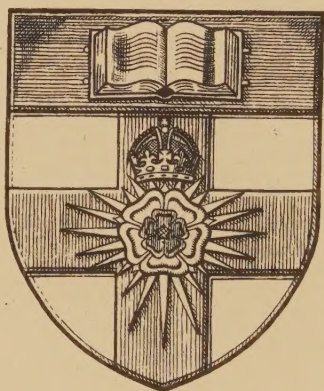


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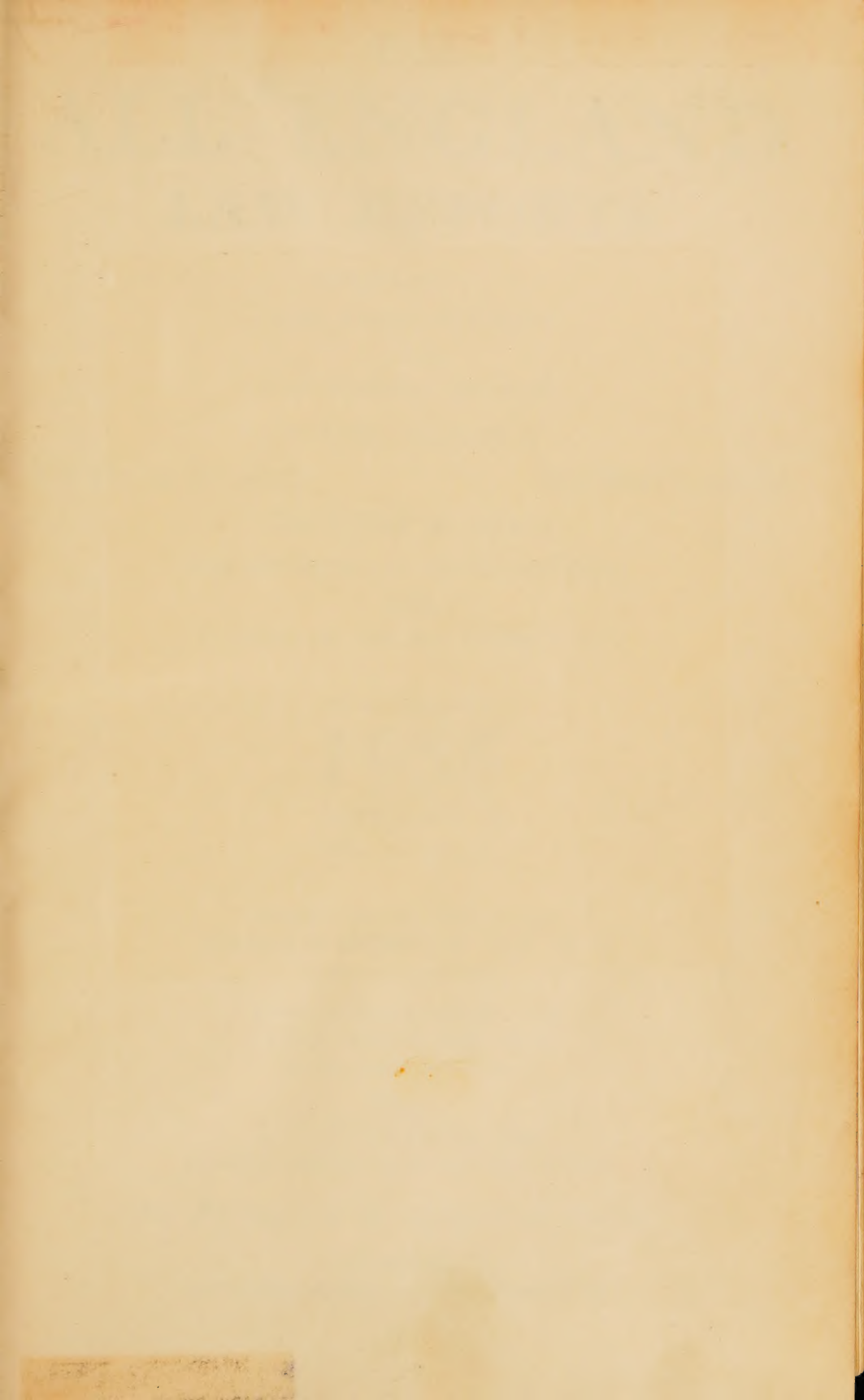
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HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

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ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

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CORRIGENDA

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- p. 507. *DRUMMOND v. BRITISH BUILDING CLEANERS, LTD.* Line F.5: For "Appeal by the defendants" read "Appeal by the plaintiff".
- p. 662. *GEORGE WIMPEY & Co., LTD. v. B.O.A.C.* Counsel for the respondents: for "*L. G. Scarman*" read "*Wilfrid Bourne*".

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- p. 75. Re *RUSSIAN COMMERCIAL AND INDUSTRIAL BANK*. Line F.2, and p. 80, line H.4: after "liquidation" read "concerning the distribution of assets among the creditors" the dissolution, etc., as printed.
- p. 201. *CHELSEA ESTATES INVESTMENT TRUST Co., LTD. v. MARCHE*. Solicitors: after "*Scadding & Bodkin*" read "(for the first defendant); *Henry E. Goodrich* (for the remaining defendants)" instead of as printed.
- p. 129. *PHIPPS v. ROCHESTER CORPN.* PER CURIAM: for "licensee" read "licensor".
- p. 293. *GOVERNMENT OF INDIA v. TAYLOR*. Counsel for the appellant: read "*Sir Andrew Clark, Q.C., N. E. Mustoe, Q.C., R. R. D. Phillips* and *J. H. C. Morris* for the appellants" instead of as printed.
- p. 676. *THE MARINERO*. Lines D.3 and 5, G.5, and p. 677, lines G.2 and 3: for "Aug." read "Oct."
- p. 699. *ATID NAVIGATION Co., LTD. v. FAIRPLAY TOWAGE & SHIPPING Co., LTD.* Counsel: read "*E. V. Falk* and *I. Goldsmith* for the defendants. *Ashe Lincoln, Q.C.*, and *E. J. Cohn* for the plaintiffs", instead of as printed.
- p. 784. *PRACTICE DIRECTION*. Line G: delete from "*Infant—Marriage*" to "1925" in the following line inclusive.

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

TRUSTEES OF THE LONDON PAROCHIAL CHARITIES *v.* ATTORNEY-GENERAL AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), December 1, 1954.]

*Charity—Scheme—Jurisdiction to modify—Scheme having force of statute—
City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36), s. 34.*

A scheme for the administration of certain charities was made under the City of London Parochial Charities Act, 1883, and approved by Her Majesty in Council in 1891. By s. 34 of that Act it was provided that such a scheme should "have full operation and effect in the same manner as if it had been enacted in this Act." By art. 58 of the scheme it was provided: "The [Charity Commissioners] may from time to time by schemes made in the exercise of their ordinary jurisdiction modify the provisions of this scheme." On an application to modify the scheme,

Held: the court had no inherent jurisdiction to modify the scheme because, under s. 34 of the Act of 1883, the scheme had the effect of a statute; no jurisdiction to modify the scheme was conferred on the court by the scheme itself, because, although art. 58 of the scheme gave the Charity Commissioners power to modify it in exercise of their ordinary jurisdiction, art. 58 did not confer on the court any concurrent jurisdiction such as that which the court ordinarily had in cases to which the Charitable Trusts Act, 1860, applied; and, therefore, the court had no jurisdiction to hear the application.

Dictum of WARRINGTON, J., in *Re Berkhamsted Grammar School* ([1908] 2 Ch. at p. 43) applied.

[As to When the Court will Interfere with a Scheme Settled by the Charity Commissioners, see 4 HALSBURY'S LAWS (3rd Edn.) 316, para. 652; and for cases on the subject, see 8 DIGEST 343, 1357-1364.]

Case referred to:

- (1) *Re Berkhamsted Grammar School*, [1908] 2 Ch. 25; 77 L.J.Ch. 571; 99 L.T. 147; 72 J.P. 273; 19 Digest 589, 194.

Adjourned Summons.

The trustees of the London Parochial Charities applied to the court for the modification of the scheme known as the Central Scheme made by the Charity Commissioners for England and Wales under the City of London Parochial Charities Act, 1883, for the administration of the charitable funds vested in them under the Act. The scheme was approved by Order in Council on Feb. 23, 1891. The summons in chambers was adjourned into open court by ROXBURGH, J., on the question whether the court had jurisdiction to modify the scheme. The matter was argued and judgment was given in open court.

Geoffrey Cross, Q.C., and *G. H. Newsom* for the plaintiffs, the trustees. A

Denys B. Buckley for the first defendant, the Attorney-General.

The second defendant, the London County Council, did not appear and was not represented.

A. J. Blackett-Ord for the third defendant, the Working Men's College Corporation.

Charles Russell, Q.C., and *R. O. Wilberforce, Q.C.*, for the fourth to the twelfth defendants, representing bodies and institutions affected by the proposed modifications to the scheme. B

J. A. Plowman, Q.C., and *D. G. Scott* for the thirteenth defendant, a trustee of the Bishopsgate Foundation, which was also affected by the proposed modifications.

ROXBURGH, J.: This is an application to modify a scheme for the administration of certain charities, which was approved by Her Majesty in Council on Feb. 23, 1891, and was made under the City of London Parochial Charities Act, 1883. At the threshold of the hearing the question arises whether the court has any jurisdiction to modify that scheme, and it is on that point alone that I am now giving judgment. C

I shall call the City of London Parochial Charities Act, 1883, the Act of 1883. Section 2 of that Act provides: D

"The Charity Commissioners for England and Wales (hereinafter called the commissioners) shall be commissioners under this Act and have the following powers for the purposes thereof . . ."

I call attention to that provision because it shows that the Charity Commissioners, in addition to their ordinary duties under what I may call the general Acts relating to charitable trusts, have special duties and powers for the purposes of this Act of 1883. The Act provides by s. 33 for the formulation of schemes by the Charity Commissioners in relation to the City of London Parochial Charities which require the approval of Her Majesty in Council. Section 34 provides: E

"No scheme shall of itself have any operation, but the same, when and as approved by Her Majesty in Council, shall . . . have full operation and effect in the same manner as if it had been enacted in this Act."

Therefore, the scheme is given statutory validity. Section 36 provides: F

"The Order in Council approving a scheme shall be conclusive evidence that such scheme was within the scope of and made in conformity with this Act, and the validity of such scheme and order shall not be questioned in any legal proceedings whatever." G

Therefore, I am not concerned here with any question of *ultra vires*. That is not unimportant because there might well have been some argument as to whether one particular provision in this scheme was *ultra vires* or not, but for that provision which makes it quite plain that any such point cannot be taken. H

Article 57 of the scheme provides:

"Any question as to the construction of this scheme, or as to the regularity or validity of any acts or proceedings done or taken or about to be done or taken under this scheme, shall be determined conclusively by the commissioners, upon such applications made to them for the purpose as they think sufficient." I

Pausing there, that is a reference to the Charity Commissioners. I am not concerned today with the question whether the functions which are under the scheme assigned to the Charity Commissioners ought or ought not now to be exercised by the Minister of Education. I want to make that quite plain. I shall continue to refer to the Charity Commissioners, but that is without prejudice to the question whether now the functions ought or ought not to be exercised by the

A Minister of Education. I make that reservation because I understand that there is some doubt on that point and it has not been argued before me.

Article 57 creates a difficulty. If on other grounds I had felt that I had jurisdiction, I should have had to reach a final conclusion on the meaning of art. 57, but as I think there are sufficient grounds to be found elsewhere on which to base my judgment that I have no jurisdiction, I desire to leave open the question of what art. 57 means. If I look at it as a mere matter of grammar, it appears to me to lay on the commissioners an imperative duty to determine any of the questions embraced in art. 57, and to provide that when they have determined them their determination is conclusive. I realise, however, that such a construction might give rise to far-reaching difficulties, and therefore I wish to say that I also think it possible that any court that was really faced with construing art. 57 might find a way of giving to those words a construction which I do not think they *prima facie* bear. This at least may be said: that on no view are they inconsistent with the decision which I am about to reach.

The next article, art. 58, is:

“The commissioners may from time to time by schemes made in the exercise of their ordinary jurisdiction modify the provisions of this scheme.”

D Before I turn to the Charitable Trusts Act, 1860, in order to discover what is meant by the words, “in the exercise of their ordinary jurisdiction”, I will summarise the position up to this point, for of this I think that there is no doubt. The scheme has the effect of a statute, and, therefore, the court has no inherent jurisdiction to modify it. Any power to modify it must be found in the scheme itself, though I agree that it is possible that power to modify might be implied from words in the statute itself if the words properly lead to an implication of that character. It is clearly decided by WARRINGTON, J., in *Re Berkhamsted Grammar School* (1). The Act there in question was not the same, but it had sufficient similarity to make the words which WARRINGTON, J., used about the scheme there under consideration applicable to the scheme now under consideration by me—not all the words that he used, but those that I am going to quote. He said ([1908] 2 Ch. at p. 43):

“It is said, and said with truth, that by virtue of the operation of s. 45 of the Act of 1869, the scheme of 1877 is as much an Act of Parliament as if it had been enacted by that Act. Then it is said, and said also with truth, that the Board of Education [as successors in this regard to the functions of the Charity Commissioners] have no greater powers than those which the court had always exercised prior to the original Charitable Trusts Act, 1853, and that the powers exercised by the court did not extend to enable it to alter the provisions of a statute.”

G The Act of 1869, to which WARRINGTON, J., refers is the Endowed Schools Act, 1869, which for present purposes may be treated as indistinguishable from the Act of 1883. The scheme of 1877 cannot be distinguished from the scheme now before me. As I have said, in my view those words are directly applicable here. Later, WARRINGTON, J., says (*ibid.*, at p. 44):

“It is exactly the same as if the scheme of 1877 had been originally a statute and that statute had provided that the board [as successors to the Charity Commissioners] may from time to time frame schemes altering this scheme.”

I Therefore, first and foremost, I have to decide whether art. 58 confers any jurisdiction on the court to alter this scheme. Admittedly, it does not expressly do so, but it is argued that it does so by implication.

In order to explain the argument, I must now refer to the general powers of the Charity Commissioners, which are to be found for this purpose in s. 2 and other sections of the Charitable Trusts Act, 1860. Section 2 provides:

“The Board of Charity Commissioners for England and Wales, subject

to the restrictions and rights of appeal hereinafter provided, shall have power from time to time, upon the application [of certain persons] to make such effectual orders as may now be made by any judge of the Court of Chancery sitting at chambers . . . for the appointment or removal of trustees of any charity . . . or for the establishment of any scheme for the administration of any such charity."

Section 3 provides:

"The said Board, previously to making any order under the jurisdiction vested in them by this Act, shall notify to the trustees or administrators (if any) of the charity to be affected thereby their intention of exercising such jurisdiction . . ."

In my view, that is one of the restrictions referred to in s. 2. Section 4 is:

"The said Board shall not make any order, under the jurisdiction vested in them by this Act, with respect to any charity of which the gross annual income . . . shall amount to £50 or upwards, except upon the application . . ."

of certain persons. That is another of the restrictions referred to in s. 2.

Section 5 provides:

"The said Board also shall not exercise the jurisdiction hereby vested in them in any case which, by reason of its contentious character, or of any special questions of law or of fact which it may involve, or for other reasons, they may consider more fit to be adjudicated on by any of the judicial courts."

As regards the charitable trusts to which the Charitable Trusts Act, 1860, normally applies, the court has concurrent jurisdiction, and I certainly do not think it possible to construe s. 5 as authorising the Board to confer on the court jurisdiction which it does not otherwise possess. There is no difficulty about the scheme of the general Act. The difficulty is about the special scheme with which I am today concerned. The court normally has concurrent jurisdiction, and this merely means that the Charity Commissioners need not exercise their jurisdiction in a case within the scope of s. 5. If they do not, then the court has jurisdiction because all the time it has concurrent jurisdiction; but when one comes to apply that sort of legislation to a case in which the court has not concurrent jurisdiction—and this is admittedly such a case—then, as so often happens with referential legislation, the sort of difficulty arises which has arisen in the present case.

The argument runs in this way, and it was very ably put before me by Mr. Cross, counsel for the plaintiffs. He said "Look at the words 'in the exercise of their ordinary jurisdiction'. That phrase must import the whole system of administration of charities envisaged by s. 2 to s. 5 inclusive of the Act of 1860." Those sections envisage a concurrent jurisdiction of the court. Therefore art. 58 must also envisage a concurrent jurisdiction of the court, and therefore the court, taking an extremely heavy penful of ink, must expand art. 58 as follows: "The commissioners from time to time by schemes made in the exercise of their ordinary jurisdiction, or the court, if, under s. 5 of the Act of 1860, the commissioners do not desire to exercise their jurisdiction, may modify the provisions of this scheme." The principle of *falsa demonstratio* cannot, however, be applied to the construction of a statute, though effect must be given to the language of the statute if it is reasonably plain.

In my judgment, there is really no ambiguity about art. 58. It says quite definitely that the modifications are to be by schemes made by the commissioners. That appears to me to exclude schemes made by the court. As I say, there is no concurrent jurisdiction. Therefore, I have to extract from these words something conferring jurisdiction on the court. How can I get that out of words which say that the schemes are to be made by the commissioners? It is the very negation of what the words say. The argument is that if I take that view I am giving no

- A meaning to the words "in the exercise of their ordinary jurisdiction". I cannot take that view. Two alternative explanations can be offered for those words. I think in a way they are cumulative. I think there are probably two readings. One is that the contrast is between the special jurisdiction conferred on the commissioners ad hoc for the purposes of the Act of 1883, which was of limited duration, and the ordinary jurisdiction conferred on them by the Act of 1860,
- B which is of unlimited duration. Again, the words "in the exercise of their ordinary jurisdiction" may be a restriction on the enabling power conferred by art. 58. If those words were struck out, I suppose that the commissioners would be able to make their own rules of procedure with a view to the modification of the provisions of the scheme, whereas art. 58 seems to me plainly to incorporate the restrictions, if and so far as they are relevant, imposed by s. 3 and s. 4 of the
- C Act of 1860.

It is said: how ridiculous it must be if the commissioners can disclaim jurisdiction under s. 5 of the Act of 1860, and leave the court powerless. But, in my judgment, the commissioners have no power to disclaim jurisdiction under s. 5 of the Act of 1860, because I can see no reason for importing s. 5 of the Act of 1860 into art. 58. The scheme, as I have already said, has statutory force and it

D seems to me that when the scheme says that "The commissioners may . . . in the exercise of their ordinary jurisdiction modify the provisions of this scheme", that does necessarily imply that the commissioners should consider whether they ought to modify the provisions of the scheme. In other words, it seems to me that by implication a statutory duty is cast on them to consider whether or not this particular scheme ought to be modified.

- E Therefore, in the result, I am of opinion that by virtue of the fact that this is a scheme having the force of a statute, no jurisdiction exists in this court to modify it.

Order accordingly.

Solicitors: *J. W. French* (for the plaintiffs); *Treasury Solicitor*; *Coward, Chance & Co.* (for the third defendant); *Bartlett & Gluckstein* (for the remaining defendants other than the second and thirteenth defendants); *Ernest G. Scott & Co.* (for the thirteenth defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

JONES v. STAVELEY IRON & CHEMICAL CO., LTD.

[COURT OF APPEAL (Denning, Hodson and Romer, L.J.J.), November 18, December 8, 1954.]

Master and Servant—Liability of master—Negligence of fellow servant—Standard of care—Contributory negligence—Standard of care.

The standard of care owed by an employer to his workmen in his factory for the purpose of determining his liability to them for negligence is higher than the standard to be applied in determining whether there has been contributory negligence on the part of one of the workmen.

The plaintiff, who was employed by the defendants as a core-maker, was at work in their foundry on the lifting of a load in an iron pan by an overhead crane. Attached to the crane was a main hook from which hung four chains with hooks at the ends. The men on the floor, of whom the plaintiff was one, hooked the chains on to the pan. It was their duty to see that the main hook was centred over the load. The crane-driver, who was also employed by the defendants, should have paused, but did not pause, when beginning the lift to see that the load was centred and hanging vertically. The load swung out and the plaintiff was injured. The plaintiff sued the defendants for damages for negligence.

Held: on the facts (a) the crane was negligently handled by the crane-driver and (b) the plaintiff was at fault in not having centred the main hook over the load as should have been done by the men on the floor; the defendants were responsible for the negligence of the crane-driver as if it were their own act, but the standard of care owed by a workman in a foundry was less than that owed by his employers and in the present case the plaintiff's fault was an error of judgment not amounting to contributory negligence; accordingly, he was entitled to recover damages without any share of the responsibility for the accident being apportioned to him.

Caswell v. Powell Duffryn Associated Collieries, Ltd. ([1939] 3 All E.R. 722) applied.

Appeal allowed.

[As to the Degree of Negligence amounting to Contributory Negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 680, para. 964; and as to the Effect of Contributory Negligence between Master and Servant, see 22 HALSBURY'S LAWS (2nd Edn.) 190, para. 319.]

Cases referred to:

- (1) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (2) *Jones v. Manchester Corpn.*, [1952] 2 All E.R. 125; [1952] 2 Q.B. 852; 116 J.P. 412; 3rd Digest Supp.
- (3) *Broom v. Morgan*, [1953] 1 All E.R. 849; [1953] 1 Q.B. 597; 3rd Digest Supp.
- (4) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.
- (5) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds*, H.L., [1936] A.C. 206; 36 Digest (Repl.) 173, 929.
- (6) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, 812.
- (7) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 1937 S.C. (H.L.) 46; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

A **Appeal** by the plaintiff from a judgment of SELLERS, J., at Derby Assizes, dated June 18, 1954.

The plaintiff was an experienced core-maker employed by the defendants, iron foundry, and part of his duty was to move heavy cores from one part of the foundry to another. The cores were carried on a pan some six feet by four feet and 1½ feet deep, resting on a bogey which was manhandled along a railway line running parallel to another railway line on which stood wagons on to which the cores were loaded with the aid of a crane. The distance between the side of the wagon and the pan was three feet nine inches. The cabin of the travelling crane was midway between the two railway lines so that the crane-driver was above but not directly above the centre of the pan.

C On June 4, 1951, the plaintiff with the assistance of another man, attached a four-hook sling, which was suspended from the crane, to the four corners of the pan. It was their duty to assist the crane-driver, Mrs. Burton, to drop the sling as nearly as possible in the centre of the pan but, as the plaintiff himself was at the side, his centring could be only approximate.

The crane-driver hauled away without first taking the strain to see if all four chains attaching the hooks to the sling were equally taut. In consequence of the sling not being central the pan swung towards the plaintiff and his arm was trapped between the pan and the wagon and was injured. In an action for damages for personal injuries the plaintiff alleged that his injury was the result of the negligence of the defendants, their servants or agents. The judge found that the plaintiff had not been guilty of contributory negligence in failing to adjust the position of the sling, and that the crane-driver in failing to pause so that the sling might be adjusted had not been guilty of negligence. Accordingly, he dismissed the action and gave judgment for the defendants.

F. W. Beney, Q.C., and D. J. Turner-Samuels for the plaintiff.

Marven Everett, Q.C., and A. E. James for the defendants.

Cur. adv. vult.

F Dec. 8. The following judgments were read.

DENNING, L.J., stated the facts and continued: On the judge's findings, there were two mistakes which led up to this accident: the first mistake was that, at the time when the chains were hooked on, the hook of the crane was not truly centred over the load. That was more a matter for the men below than for the crane-driver. The practice, as proved in evidence, is that the crane-driver brings the hook into a tentative position as near centre as she can, but she cannot see as well as the men below, so if it is out of centre, they signal to her to bring it into centre. The manager of the foundry said that "the person on the floor is the only person who can give proper adjustment". In this case the plaintiff, the injured man, did not give the proper adjustment. That was his mistake. The second mistake was that, when the crane-driver started to hoist the load, she did not pause in the usual way to take the weight and tighten the chains. She hoisted the load from the trolley straight up without a pause. A consulting engineer spoke as to the usual procedure. He said [in evidence]:

"The common practice is to just take the slack out of the chain first and see that everything is balanced before continuing the hoist."

I In this case if the crane-driver had paused, either she or the men below would have seen that it was not truly centred and would have corrected it. As she did not pause, however, no one had an opportunity to correct the faulty centring, and the load swung out more than usual. In this case the crane-driver did not pause to take the weight. That was her mistake.

The problem in this case is to assess the quality of those two mistakes. The judge put them on the same level and said that neither of them amounted to negligence. The question is whether he was right. So far as the injured man's

mistake is concerned, I agree with the judge that it did not amount to contributory negligence. Ever since *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (1) ([1939] 3 All E.R. 740) the courts have made allowances in favour of an injured workman. Even if he has been thoughtless or inadvertent or has made an error of judgment, he is often not made to bear any share of the responsibility. The reason is, no doubt, historical. Until 1945 a workman who proved that his employer was guilty of a serious fault was nevertheless liable to be defeated altogether if he was in any degree at fault himself. It was not open to the court at that time to apportion the responsibility. The workman failed altogether. In order to overcome this injustice, the House of Lords in *Caswell's* case (1) relaxed the standard of care required of workmen in a factory. The thoughtlessness or inadvertence of a workman was not necessarily to be regarded as contributory negligence such as to defeat his claim. He was often allowed to be thoughtless or inadvertent without it telling against him. Since 1945 this standard has repeatedly been applied to injured workmen just as it was before. Applying it in this case, I think that the plaintiff was at most guilty of an error of judgment which was in the circumstances an excusable error. He thought that the hook was truly centred whereas it was not. I do not think that he should be found guilty of contributory negligence. But what about the mistake made by the crane-driver? The judge seems to have thought that "what is sauce for the goose is sauce for the gander". The same standard of care should be applied to the crane-driver as to the injured man. She should be excused for thoughtlessness or inadvertence just as he is. This raises a very nice problem. Before the Law Reform (Personal Injuries) Act, 1948, the employer would have been protected by the doctrine of common employment, but since 1948 he is not so protected. The doctrine has been abolished. If, however, the law were now to begin to make allowances for the mistakes of fellow workmen (such as the crane-driver here) on the same lines it excuses the injured workman, we should soon have the doctrine of common employment back again in a new dress. That cannot be right.

So far as the crane-driver's mistake is concerned, I do not think that it is to be judged by the same standard as that of the injured man. The difference lies in this: negligence is founded on a breach of duty, whereas contributory negligence is not. The employer is made liable, not so much for the crane-driver's fault, but rather for his own fault committed through her. He puts her in charge of a great machine which can cause much damage if it is not properly handled. He must see that reasonable care is used in the handling of it so that it does not cause damage. No matter whom he employs to handle it, he must ensure that a proper standard of care is obtained. He acts by his servant; and his servant's acts are for this purpose to be considered as his acts. Qui facit per alium facit per se. He cannot escape by the plea that his servant was thoughtless or inadvertent or made an error of judgment. If he takes the benefit of a machine like this, he must accept the burden of seeing that it is properly handled. It is for this reason that the employer's responsibility for injury may be ranked greater than that of the servant who actually made the mistake (see *Jones v. Manchester Corpn.* (2)) and he remains responsible even though the servant may for some reason be immune (see *Broom v. Morgan* (3)). A good illustration, as counsel for the plaintiff pointed out, is *Stapley v. Gypsum Mines, Ltd.* (4) where the widow of the dead man Stapley succeeded against his employer, although she would no doubt have failed against his fellow workman Dale, because of their joint agreement.

My conclusion is, therefore, that the law expects a higher standard of care from employers than it does from injured workmen: and this is so, no matter whether the employers are acting by superior servants or by fellow servants. This state of the law should not, however, be carried to extremes in either direction. The standard expected of employers should not be put so high as

A to make them insurers: and the standard expected of an injured workman should not be put so low as to exempt him from responsibility for his own carelessness. Each should bear his proper share of responsibility. Approaching this case in this way, it seems to me the crane was not handled with reasonable care and the employers are answerable for it. Counsel for the defendants admitted as much but argued that no damage could have been anticipated to flow from the mistake. I do not agree. I should have thought that a reasonable person could foresee that, if the crane-driver did not take the strain and get the load properly balanced before hoisting it, some damage might be done to somebody. The employers are therefore responsible, but the injured man is not, because his mistake did not amount to contributory negligence. In my opinion this appeal should be allowed and judgment entered for the plaintiff for damages to be assessed.

HODSON, L.J., stated the facts and continued: If the normal practice of lifting a load by crane in a sling had been followed the accident would not have happened. It is clear that to haul away without applying the normal precaution of taking the strain first may lead to an accident. The defendants' manager's evidence was quite specific on this point. In cross-examination he said:

“The usual practice is to take the weight and tighten the chains. Q.—The usual procedure is to take the weight, tighten the chains and then wait for a signal? A.—Yes, unless the crane driver sees that the load is safe and central . . . I think if the crane driver was over the job and tightened the chains and took the weight it would be all right, she would proceed to do her job.”

A consulting engineer called on behalf of the plaintiff gave evidence to the same effect and pointed out that a crane-driver can see at once when tightening the chains whether one sags or not and can thus tell whether the lift is central. It is true that the centring of the sling in the first place is a combined operation but this is only approximate and the final responsibility for centring the sling accurately is with the crane-driver who hauls away the load.

The learned judge was not impressed by the plaintiff's evidence and thought that he was unwilling to accept his responsibility, as the man on the ground, to get the drop of the sling on the proper alignment. However, he did not find him guilty of negligence, applying to him the doctrine first enunciated by LAWRENCE, J., in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (5) and later approved by the House of Lords in *Caswell's* case (1). LAWRENCE, J. had said ([1934] 2 K.B. at p. 140):

“ . . . in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.”

SELLERS, J. found that there had been an error of judgment on the part of the plaintiff not amounting to negligence. I agree with this finding, but in addition he did say that the plaintiff was more at fault than anyone else. With all respect to the learned judge, I cannot agree with that conclusion. The plaintiff could not get exact alignment from his position at the side of the bogey and had to rely ultimately on the crane-driver taking the strain to check the alignment before hauling away. Since the wagon was close to the pan a slight lateral error would be enough to cause a dangerous swing which the plaintiff could do nothing to correct. In my opinion, fault must be attributed to the crane-driver and the question then arises whether this amounts to negligence.

The learned judge found that the crane-driver was at fault in acting as she did but treated her fault as an error of judgment not amounting to negligence on the part of a workman within the doctrine enunciated above. I am of opinion that

this fault ought not to be so regarded. A departure from the normal safe practice of taking the strain when raising heavy loads by crane in a sling is obviously dangerous when anyone is near the load. In my view, in the circumstances of this case, the failure of the crane-driver to take the precaution was an act of negligence which caused the injury to the plaintiff and for this the employer is as liable as if he himself had been sitting in the crane cabin and working the crane. I cannot agree that the act or omission of the employers' servant ought, as the learned judge thought, to be looked at exactly in the same way as the act or omission of the plaintiff.

The doctrine approved in *Caswell's* case (1) applies to workmen who are injured in the course of their employment and who might otherwise be debarred from recovering in whole or in part by reason of their contributory negligence. LAWRENCE, J., was speaking only of contributory negligence (*Flower v. Ebbw Vale Co.* (5)). In *Caswell's* case (1) LORD WRIGHT used this language ([1939] 3 All E.R. at p. 739):

"What is all important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing *at the cost perhaps of some inattention to his own safety.*"

I emphasise the last eleven words of the sentence I have read. If one applies the doctrine to employers and their servants through whose hands they act, one must end the sentence by substituting the words "at the cost of some inattention to the safety of employees". This to my mind would be inconsistent with the law as laid down in *Smith v. Baker & Sons* (6), and in *Wilsons & Clyde Coal Co., Ltd. v. English* (7) which sets out in clear terms the duty of an employer to take reasonable care for his servant's safety. This duty is personal to him, a failure to perform which constitutes personal negligence even though he acts through the hands of another. The position of an injured plaintiff who is accused of contributory negligence is different in that he is not similarly in breach of a duty to his employer when, as LORD WRIGHT said, he is pre-occupied in what he is doing at the cost of his own safety. I do not intend to be taken as saying that every error made by every employer by himself or through his servants which causes injury must necessarily be negligent. This is a question of fact to be decided in each case. I cannot, however, accept that the doctrine which I have been discussing can be extended beyond the field of contributory negligence and applied to the servants of the employer when they stand in the master's shoes in the same way as when they are injured in performing work in his service. I agree, therefore, that the appeal should be allowed and judgment entered for the plaintiff for damages to be assessed.

ROMER, L.J.: In my opinion two things emerge quite plainly from the evidence which was given in this case. The first is that the crane-driver, Mrs. Burton, was in dereliction of her duty in hoisting the crane straight up without pausing to tighten the chains of the pan, and the second is that this omission on her part resulted in injury to the plaintiff. There is no dispute as to the latter of these points and not much, I think, as to the former. Apart from the plaintiff himself, three witnesses, namely, Mr. Binns, Mr. Goode and Mr. Howard (who is the manager of the defendants' foundry) all testified that it is the common practice for a crane driver to take the strain of a pan, so as to ensure that the grab is central, before hoisting the pan off the ground. Mr. Howard said "The usual procedure is to take the weight and tighten the chains"; and Mrs. Burton, in her own evidence, admitted that this was so.

Inasmuch as Mrs. Burton, on the occasion of the accident, forgot about this customary precaution and therefore failed to take it, with the consequence that

A injury was caused to the plaintiff, it would seem *prima facie* that she was guilty of an act of negligence for which her employers are answerable in law. I rather gather from one passage in his judgment that the learned judge was in fact inclined to impute negligence to Mrs. Burton but exonerated her on the footing, as I understand it, that her omission would have been held to amount to no more than an error of judgment according to the reasoning which the courts have applied

B since *Caswell's* case (1) in determining issues of contributory negligence. The question here, however, is not as to Mrs. Burton's rights but as to her employers' liability. As to this, it is well settled that a master is liable for the acts of his servants, if done in the course of their employment, on the principle *qui facit per alium facit per se*. If an employer employs a crane-driver to operate a crane it is the employer himself who, in the eye of the law, is operating it, though he is

C doing so through the person of the employee. From this it follows that if the crane-driver's wrongful handling of the crane results in injury to a third party it is no defence to the employer to say that the workman's act or omission would have amounted to something less than contributory negligence if it had resulted in injury to the workman himself. It is the standard of care which Mrs. Burton (as the defendants' servant) owed to the plaintiff which is material to the present

D case, not the standard of care which she owed to herself; and I am of opinion that her conduct fell short of that standard to a degree which amounted to negligence and inasmuch as, in my opinion, a resulting injury to the plaintiff was reasonably foreseeable the defendants are, in my judgment, liable.

The next question is whether the plaintiff himself was guilty of contributory negligence. It has been recognised since *Caswell's* case (1) that a workman's default which, in relation to some third party, would constitute negligence, may amount to no more than an excusable error of judgment in relation to himself. As a matter of logic this is not, perhaps, altogether easy to appreciate; and many people might think that a workman who has a wife and three or four young children dependent on him is under at least as much obligation to look after his own safety as he is to ensure that of other people. Moreover, the distinction

F between the two standards of care has lost much of its justification since the statutory removal of a workman's former disqualification to sue in respect of an injury which had been caused in part by his own negligence. However, in applying to the present case the reasoning of *Caswell's* case (1) I am of opinion that the plaintiff has not been proved guilty of contributory negligence; for the evidence does not, in my judgment,

G " . . . show that he was guilty of more than an error of judgment or heedlessness or inadvertence in regard to his own safety not amounting to contributory negligence or misconduct . . . "

(see per LORD WRIGHT in *Caswell's* case (1) [1939] 3 All E.R. at p. 736). It is true that the general practice appears to be that the men on the ground are

H expected to ensure that the hook is centralised, and to give any necessary signals to the crane driver, and that the plaintiff did not do this on the occasion in question. He swore, however, that he did not know that the crane was not central and Mr. Groves, who was co-operating on the other side of the pan, said that he did not know it either; and they were both agreed that they were prevented from seeing each other by reason of the height of the load. In these

I circumstances it is not easy to see what the plaintiff ought to have done. He might, I suppose, have summoned some other person to check that the grab was central and then have signalled to the driver, but I cannot think that his failure to do this amounted to more than a venial error of judgment, especially as he had no reason to suppose that if the crane-driver started to lift before receiving a signal she would depart from the ordinary practice of merely taking the strain. Moreover, as Mrs. Burton started to lift without receiving a signal either to bring the hook into centre or to hoist the load it may well be that the plaintiff's omission to give a signal was not an effective cause of the accident. In all the circumstances

it does not appear to me that contributory negligence has been established A
against the plaintiff. I accordingly agree with the order which my brethren have
proposed.

Appeal allowed.

Solicitors: *W. H. Thompson* (for the plaintiff); *Bell, Brodrick & Gray*, agents
for *Harold Jackson & Co.*, Sheffield (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*] B

RAJBENBACH v. MAMON.

[QUEEN'S BENCH DIVISION (Wynn-Parry, J., sitting as a judge of the Division),
December 2, 3, 6, 7, 1954.]

Rent Restriction—Possession—Tenant to receive sum of money in event of D
giving up possession on specified date—Contract enforceable by tenant.

Contract—Mutuality—Agreement by tenant to give up possession of rent-controlled
flat to landlord.

In May, 1954 it was orally agreed between the landlord and tenant of
a flat, which was subject to the Rent and Mortgage Interest Restrictions
Acts, 1920 to 1939, that the tenant would vacate the flat at the end of
1954 and that, in the event of his doing so and in consideration thereof, E
the landlord would pay £300 to the tenant. In an action by the tenant
for a declaration that, in the event of his delivering up to the landlord
vacant possession of the flat on or before Jan. 1, 1955, he would be entitled
to the payment of £300 from the landlord on Jan. 1, 1955, the landlord
pleaded that the agreement was an attempt by the parties to contract out F
of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and
was, therefore, void and unenforceable.

Held: the agreement was not against public policy nor vitiated by
the Rent Restrictions Acts, and, being composed of promise for promise,
was not unenforceable for want of mutuality, although it might not legally
be possible to eject the plaintiff from the flat at the end of 1954 owing to G
the operation of the Rent Restrictions Acts; accordingly, the tenant was
entitled to the declaration which he claimed.

Barton v. Fincham ([1921] 2 K.B. 291) distinguished.

[As to Restrictions on Landlord's Right to Possession although Tenant has
contracted to give up Possession, see 20 HALSBURY'S LAWS (2nd Edn.) 329,
para. 392.] H

Case referred to:

(1) *Barton v. Fincham*, [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495;
85 J.P. 145; 31 Digest (Repl.) 701, 7912.

Action.

The plaintiff was the tenant and the defendant was the landlord of premises
known as Flat 2, 35 Anson Road, Highgate which was subject to the Rent
and Mortgage Interest Restrictions Acts, 1920 to 1939. In an action com-
menced on Aug. 25, 1954, the plaintiff alleged in his statement of claim that
in May, 1954, it was orally agreed between the plaintiff and the defendant
that the plaintiff would vacate the flat by the end of 1954 and that in the
event of his so doing and in consideration thereof the defendant would pay
to the plaintiff the sum of £300; that the plaintiff intended to vacate the flat
by the end of 1954, as the defendant knew, and that the defendant, in a letter, I

A dated Aug. 3, 1954, from his solicitors to the plaintiff's solicitors, had denied the existence of the agreement and sought to repudiate it. The plaintiff claimed a declaration that in the event of his delivering up to the defendant vacant possession of the flat before Jan. 1, 1955, he should be entitled to payment from the defendant forthwith of the sum of £300. By his defence the defendant stated that he made no admissions as to the application of the Rent Restrictions Acts, and denied that he ever entered into any agreement with the plaintiff to pay any money to him in the event of the plaintiff vacating the premises. During the hearing of the action the plaintiff was allowed to amend the statement of claim by substituting, in the allegation in respect of the agreement between the parties, "at the end of 1954" for "by the end of 1954", and, in the claim for a declaration, "on or before Jan. 1, 1955" for "before Jan. 1, 1955", and "payment from the defendant of the sum of £300 on Jan. 1, 1955" for "payment from the defendant forthwith of the sum of £300". The defendant was then allowed to amend the defence by adding a paragraph to the effect that the alleged agreement was an attempt by the parties to contract out of the Rent Restrictions Acts, and was, therefore, void and unenforceable.

D *M. Waters* for the plaintiff, the tenant.
D. J. C. Ackner for the defendant, the landlord.

WYNN-PARRY, J.: In this action the plaintiff claims a declaration that in the event of his delivering up to the defendant vacant possession of flat No. 2, 35 Anson Road, Highgate, in the County of London, on or before Jan. 1, 1955, he shall be entitled to payment of the sum of £300 from the defendant on that day.

E [HIS LORDSHIP reviewed the evidence and continued:] It is perfectly clear that according to the plaintiff and his wife on this occasion in May, 1954, a definite arrangement was made which comes down to this: that the plaintiff agreed to move out of the flat by Dec. 31, 1954; that he would either stay in until that date, or, as a matter of necessary implication, would pay the rent down to that date; and that if he did fulfil what he agreed to do then the defendant would pay him £300, the £300 not to become payable until after Dec. 31, 1954, but to become payable immediately thereafter. That is what it comes to. It is accepted by counsel for the plaintiff that it was an agreement promise for promise and I think that is the true view. [HIS LORDSHIP referred to a question of fact and, having considered the evidence thereon and having found that the agreement alleged by the plaintiff's amended statement of claim was proved, continued:] A point of law remains which was taken by counsel for the defendant after the amendment asked for by the plaintiff was allowed. I allowed the defendant to add a paragraph to the defence to this effect:

H "The alleged agreement was an attempt by the parties to contract out of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and is therefore void and unenforceable."

I For that purpose counsel for the defendant relied on the well-known case of *Barton v. Fincham* (1). That case, as I understand it, does no more than this. It gives effect to the limitation on the jurisdiction of the court to make an order for possession which was imposed originally by s. 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,* and it does nothing more. It does not discuss the question of public policy or any of the other questions which appear to have been raised before the Divisional Court in that

* Section 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was repealed by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 18 (3), and Sch. III. Section 3 and s. 4 (1) of the Act of 1933 and Sch. I thereto were substituted for the repealed provisions by s. 17 of the Act of 1933 and Sch. II thereto.

case before it reached the Court of Appeal. The agreement in the present case is quite clearly an agreement composed of promise for promise, and the attack which was developed on that agreement is that there is want of mutuality, because it is quite clear on the authority of *Barton v. Fincham* (1) that, although the plaintiff had agreed as part of the agreement to leave the premises at the latest by Dec. 31, 1954, he could not be compelled to do so at the suit of the defendant, because the defendant could not obtain an order for possession. On the other hand there is no doubt that, if the plaintiff as he intends does go out on Dec. 31, 1954, the defendant will obtain all that he sought by the agreement which I find that he made, namely, he will get vacant possession, which, according to his own evidence, has been part of his policy as regards all flats, his object being either to let them furnished or to obtain the benefit of the Housing Repairs and Rents Act, 1954, by which, if he puts them in a good state of repair, he will be able to obtain enhanced rents on letting them. I can find no authority which suggests, and no such authority has been cited to me, that an agreement such as this is in any way against public policy, nor do I think that it is an agreement which must be treated as void and of no effect for want of mutuality. Ordinarily in a contract there would be mutuality, but many examples (if necessary) can be given where Parliament has stepped in and, to some extent, robbed a contract of some degree of mutuality without destroying it, and I think that this is one of those contracts.

To my mind, however, at any rate in the state of the authorities as they have been cited to me, I can find no reason for holding that this agreement is to any extent vitiated by the effect of the Rent Acts. It was sought to be argued that in reality there was no agreement, but that there was only a continuing offer which could be brought to an end presumably at any time by the defendant, and which, if accepted by the plaintiff by going out of possession on Dec. 31, 1954, might result in the defendant becoming liable to pay £300. All I need say on that is that the evidence is quite against it. There is clearly here an agreement containing promise for promise and on the view which I take of the authorities as they have been cited to me there is nothing to make that agreement unenforceable. In the result, I propose to make the declaration for which the plaintiff asks in its amended form and to order the defendant to pay the plaintiff's costs of the action.

Declaration accordingly.

Solicitors: *Cyril Ralton* (for the plaintiff); *Stanley Attenborough & Co.* (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

A

R. v. BULLOCK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Devlin, JJ.),
December 6, 1954.]

Criminal Law—Accessory before the fact—Direction to jury—Whether knowledge of general unlawful purpose or of particular proposed crime essential.

B

The appellant was charged on two counts of housebreaking and larceny. Two different cars had been used for two robberies and both were traced to the appellant. In each case the appellant had hired the car which was found on the scene of the robbery. The appellant's explanation was that he had hired the two cars but their use for the purposes of robbery was entirely unknown to him. At the trial the case was presented and was summed up to the jury on the basis that the appellant was concerned with the breaking and entering and that his defence was an alibi. After the jury had retired and considered their verdict the foreman of the jury asked the commissioner for, in effect, a direction on what the law applicable would be if the jury were satisfied that, although the appellant might not have been the person driving the car, he knew beforehand that it was going to be used by a thief or thieves. The commissioner answered: "Then he would be an accessory before the fact and would be liable to be punished accordingly." The appellant was convicted of being an accessory before the fact on both occasions. On appeal,

C

D

E

Held: the sufficiency of the direction to the jury must be considered against the background of fact and, as the appellant's defence had been that he had not lent the car and did not know that it was put to an unlawful use and as the jury were apparently satisfied that he had lent it and did know that an unlawful use was intended, an elaborate direction distinguishing between a general unlawful purpose and a particular unlawful purpose was not necessary; the direction was sufficient and the appeal should be dismissed.

F

R. v. Lomas (1913) (110 L.T. 239) explained.

Per CURIAM: the second part of the headnote to *R. v. Lomas* (9 Cr. App. Rep. 220) "there must be some particular crime in view" is not derived from anything which was contained in the judgment of SIR RUFUS ISAACS, C.J. (see p. 17, letter E, post).

Appeal dismissed.

G

[As to Accessories before the Fact, see 9 HALSBURY'S LAWS (2nd Edn.) 33, para. 33; and for cases on the subject, see 14 DIGEST 95, 652 et seq.]

Case referred to:

- (1) *R. v. Lomas*, (1913), 110 L.T. 239; 78 J.P. 152; 9 Cr. App. Rep. 220; 14 Digest 96, 669.

H

Appeal against conviction.

The appellant, George Thomas Bullock, was convicted at Birmingham Assizes before Commissioner SIR ERNEST GOODMAN ROBERTS, Q.C., on July 21, 1954, on two counts of being accessory before the fact to housebreaking and larceny and was sentenced to eight years' preventive detention.

I

F. H. Lawton for the appellant.
J. A. Grieves for the Crown.

DEVLIN, J., delivered the judgment of the court. This case is concerned with two breakings and enterings. One took place between Nov. 23 and Nov. 26, 1953, in a house belonging to the Duke of Somerset, which was broken into and from which a quantity of property was stolen; and the second took place between Jan. 14 and Jan. 17, 1954, in a house in Leicester which belonged to Lord Cromwell where a quantity of property was also stolen.

It is beyond dispute that two cars were used for the purposes of these robberies and in each case, although they were different cars, the cars have been traced to the appellant. In each case the appellant had hired the car which was found on the scene of the robbery. His explanation was that he had, in fact, hired these two cars on these two occasions but their use for the purposes of robbery was entirely unknown to him. He said he could only suggest that from the place where the car had been parked at night it had been taken away and used for the robbery and brought back without his being any the wiser. In one case the car had done quite a considerable mileage and, as he had already stated that he had never used it outside London, he found some difficulty in giving an adequate explanation of the mileage. In those circumstances there was abundant evidence to suggest that he had some connection with both the crimes. It was too much to ask the jury to believe that on two separate occasions separated by a couple of months and with two separate cars, the car in each case had been used without his knowledge.

Another man named Beyer was charged with the crime of January, 1954, and has been convicted and is not appealing, but in the case of the earlier crime the appellant was charged alone.

The summing-up and, indeed, the way in which the case was presented at the trial and the way it was summed up to the jury was on the basis that the appellant was concerned with the breaking and entering and that he had produced an alibi to show that on neither of these occasions could he have been away from London. There was, however, an alternative possibility which apparently suggested itself to the jury during their deliberations that it was conceivable that the alibi might have been true but the two sets of facts could be reconciled by saying that although he did not go himself, he lent his car for the purpose on each occasion; and accordingly, after they had been out about three-quarters of an hour, the jury came back and the foreman of the jury put this question:

“What is the law regarding a person who has knowledge of the fact that his car is being used for an unlawful purpose?”

(The commissioner): “That is rather difficult, I do not understand the question.”

(The foreman of the jury): “May I continue? We are of the opinion, but we have not finally decided, that Bullock may have driven the car to Misterton Hall. We cannot reach a unanimous decision on that point and the other members of the jury”—

Then the commissioner intervened and said:

“Is it this you want to know: if you are not satisfied that he was there, whether to his knowledge the car was being driven by a thief or thieves?”

(The foreman of the jury): “Yes”.

Then the commissioner said:

“Although he may not have been the person driving the car, he knew beforehand that it was going to be used for that purpose?”

(The foreman of the jury): “Yes”.

(The commissioner): “Then he would be an accessory before the fact and would be liable to be punished accordingly.”

That direction has been criticised on the ground that, in the circumstances of this case, it was not adequate and, in particular, that the jury ought to have been told that, unless the appellant knew that his car was being used for this particular crime and did something by way of encouragement, there was not enough to constitute being an accessory before the fact in law. It is no doubt true that, if the

A prosecution case had been more directed towards the alternative, it is probable that the summing-up would have dealt with it more elaborately than it did. The learned commissioner was dealing with the question which was put to him after he had concluded his summing-up but the only point we have to determine is whether he dealt with it sufficiently clearly and gave the jury an adequate direction for the purposes of this case. We think that he plainly did.

B/ The case that has been cited and relied on by counsel for the appellant is the case of *R. v. Lomas* (1). That case has this headnote (9 Cr. App. Rep. 220):

“Mere knowledge that the principal intends to commit crime does not constitute an accessory before the fact: there must be some particular crime in view.”

C As far as the first part of that headnote goes it is unexceptionable, that is,

“Mere knowledge that the principal intends to commit crime does not constitute an accessory before the fact”;

mere knowledge is not of itself enough, there must be something further. But, in the circumstances of this case, once it was plain that the accused had hired the car and had control of it, if he knew that it was being used he must also have permitted it to be used; he must formally or informally have lent it for that purpose, and that is certainly enough. The case of *Lomas* (1) is on this point quite different. On this point the appellant in *Lomas* (1) had a jemmy which belonged to the burglar, a man named King, to whom he handed back King's own jemmy. The appellant was not in a position to withhold the jemmy or permit King to use the jemmy. In this case where the appellant had control of the car, the position is quite different.

E The second part of the headnote “there must be some particular crime in view” is not derived from anything which was contained in the judgment of SIR RUFUS ISAACS, C.J., which was a very short one. The conclusion which is stated there is (110 L.T. at p. 240):

F “It is enough for us to say that the facts as found by the jury are not sufficient to make out the offence charged.”

The reference to a particular crime in view comes from the rider or something in the nature of a rider which the jury attached to their verdict. The jury found the accused guilty and (*ibid.*)

G “that he had a certain knowledge that the jemmy was wanted for an illegal purpose; that he handed the jemmy to King with the knowledge that it was wanted for a burglary. He did not know that it was wanted for this particular burglary.”

H But there is nothing in the judgment to show that that point was taken by the court as being the decisive point and the case could have been decided equally well on the ground that the accused had no control over the jemmy. It is no doubt true that if an accused merely suspects that if he lends something it may be used for a general criminal purpose, it may not be enough to make him an accessory before the fact; it is not necessary for the purposes of this case that we should express a view one way or another on that point. If an accused lends a man a revolver believing that it may be used to commit a crime of violence I but with nothing specific in mind, it may not be enough, but this is not a case of that sort. This is a case in which a man had hired a car and, having hired it, he was plainly not going to put it at the disposal of anybody who wanted to borrow it; it must have been borrowed, if borrowed at all, for a specific purpose. If the appellant's case had been: “Yes, I did lend the car to Beyer. I had not an idea what he wanted it for and I lent it to him without knowing that he was going to commit any particular crime,” then it might be that a more careful direction than the one given ought to have been given. But one must consider the direction given in this case with the background of the admitted facts. It

was a case where the appellant was saying that he had never lent the car to anybody and he did not use it or know that it was being used for any unlawful purpose. Once the jury were satisfied, as they apparently were, that he did know that it was being used for an unlawful purpose, there was no need to give an elaborate direction whether the unlawful purpose was merely a general purpose or the intent to commit one or other of these crimes. In our judgment, the direction was, in the circumstances, quite adequate and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Sampson & Co.* (for the appellant); *B. F. Chapman*, Leicester (for the Crown).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re REYNOLDS (deceased). PEARKES v. REYNOLDS.

[COURT OF APPEAL (Denning and Morris, L.J.J.), December 3, 1954.]

Probate—Pleading—Defence that testatrix of unsound mind—Particulars—R.S.C., Ord. 19, r. 25A.

In a probate action it was pleaded that the deceased testatrix was not of sound mind, memory and understanding. The defence set out the substance of the case and included substantial particulars. The plaintiff applied for extensive further particulars.

Held: R.S.C., Ord. 19, r. 25A required the substance of the case, but not all details of it, to be stated; the defendant had already given a sufficient general statement of facts, and further particulars would not be ordered.

Lord Salisbury v. Nugent (1883) (9 P.D. 23) followed.

Appeal allowed.

[Editorial Note.] The present decision may usefully be considered with that in *Re Earl of Shrewsbury* ([1922] P. 112). SIR HENRY DUKE, P., in *Re Earl of Shrewsbury* ([1922] P. at p. 120) stated that the practice with regard to particulars of the substance of the case under R.S.C., Ord. 19, r. 25A, was that which COTTON, L.J., in *Lord Salisbury v. Nugent* (1883) (9 P.D. 23), had said would be most conducive to a just administration of the law. The views of COTTON, L.J., are relied on by DENNING, L.J., in the present case. The practice under the rule in relation to a plea of undue influence, being the plea before the court in *Re Earl of Shrewsbury*, was stated by the registrars to be ([1922] P. at p. 120)—“To make orders for further and better substance of the case [of undue influence], but not for particulars [of undue influence] except as to names of persons”.

As to Pleading the Substance of a Case, see 14 HALSBURY'S LAWS (2nd Edn.) 223, para. 377; and for cases on the subject, see 23 DIGEST 129, 1276-1280.]

Case referred to:

- (1) *Salisbury (Lord) v. Nugent*, (1883), 9 P.D. 23; 53 L.J.P. 23; 50 L.T. 160; 23 Digest 129, 1277.

Interlocutory Appeal.

The defendant appealed against an order of DAVIES, J., in chambers, dated Nov. 2, 1954, whereby he ordered the defendant to give further particulars of

A his allegation that the deceased was not of sound mind, memory and understanding at the dates of making her three wills. The facts appear in the judgment of DENNING, L.J.

A. H. Ormerod for the defendant.

A. Richard Ellis for the plaintiff.

B DENNING, L.J.: Mrs. Reynolds, the deceased, died in July, 1953. She made three wills, one in February, 1949, another in March, 1951, and another in April, 1952. Her executor, the plaintiff, who was her solicitor, is putting these forward for probate. Her husband, and since his death his executor, the defendant, contends that at the material dates she was not of sound mind, memory, or understanding.

C At one time it was not the practice in the Probate Division to order particulars of an allegation of unsoundness of mind. There were reasons which appeared good to the judges of that time. LINDLEY, L.J., said in *Lord Salisbury v. Nugent* (1) (9 P.D. at p. 26):

" . . . the case may depend on a multitude of circumstances of which it is impossible to give particulars."

D FRY, L.J., said (*ibid.*):

" . . . to adopt any other form of order would lead to great prolixity and to expensive contests as to the sufficiency of the particulars."

In 1901, however, Ord. 19, r. 25A was added to the Rules of the Supreme Court and that rule now provides:

E "In probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely: and further where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial . . ."

F That rule, of course, altered the practice; it introduced what COTTON, L.J., thought to be the proper method. In the case to which I have already referred he said (9 P.D. at pp. 25, 26):

"If we were dealing with a new practice I should say that it was reasonable to require from the defendant a general statement of the facts on which he means to rely."

G In this case the defendant set out in the original particulars nearly a page of the substance of the case, saying that

"The deceased had for many years been of unstable temperament, and for several years prior to her death had been addicted to excessive consumption of alcohol which caused a continuous process of mental deterioration . . ."

H I need not read more. Particulars were then requested of

"The date from which it is alleged that the deceased became of unstable temperament, stating how the alleged instability manifested itself and giving any specific incidents relied upon, with dates and places."

In answer to that application the defendant gave a further two and a half pages of particulars showing how the deceased was of unstable temperament.

I I will read one or two examples:

"The deceased was in the habit of flying into unreasonable rages. The deceased was in the habit of swearing violently in public. On many occasions, the dates of which the defendant cannot now specify, the deceased in public restaurants kissed the waiters . . . On many occasions, the dates of which the defendant cannot now specify, the deceased flew into a temper with the guests whom she was entertaining at her house, 32 Grove End Road, and sent for the police to 'sling them out'."

There are a number of general allegations of that kind together with some of specific occasions such as an incident in 1946 when it is alleged that she insisted on going for a drive without enough petrol, that the petrol ran out and that she hit her husband over the head with an umbrella. A

Now the plaintiff asks for still more particulars. There is a whole series of requests for particulars which have been ordered by the registrar and by the judge. The first request is for particulars B

“Of the unreasonable rages alleged, setting out any facts or specific incidents relied on, with dates or approximate dates.”

Then follow requests for particulars—

“Of the deceased’s swearing in public . . . setting out dates and places . . . Identifying the occasions on which it is alleged that the deceased kissed the waiters in public restaurants”, C

and so on. In short, there is a series of further applications demanding further particulars needing further investigation.

The question is whether R.S.C., Ord. 19, r. 25A, requires particularity to such an extent. In my judgment, it does not. COTTON, L.J., referred (see 9 P.D. at p. 26) to a “general statement of facts”, not to a highly detailed and particularised statement. R.S.C., Ord. 19, r. 25A requires the “substance of the case” to be stated, not all the details. I think that the substance of the case has already been sufficiently stated and we should not order these further particulars. Applications of this kind make litigation much too expensive and cause too many delays. In my judgment the order which has been made goes beyond that which the rule warrants, and I do not think any further order should be made on the defendant but that the case should be brought to trial. E I would, therefore, allow this appeal and vary the order which has been made, leaving only one item which counsel for the defendant conceded that he ought to answer. I am encouraged in taking this view by the fact that the learned judge gave leave to appeal. He must himself have hesitated whether particulars ought to be given. It seems to me that his doubts were well founded, and I F would allow the appeal accordingly.

MORRIS, L.J.: I entirely agree.

Appeal allowed.

Solicitors: *Arnold, Fooks, Chadwick & Co.* (for the defendant); *Pettiver & Pearkes* (for the plaintiff).

[Reported by PHILIPPA PRICE, *Barrister-at-Law.*]

A

R. v. FRY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Devlin, JJ.),
December 17, 1954.]

*Criminal Law — Sentence — Conditional discharge — Breach of condition —
Sentence of Borstal training for first offence—Need for nominal sentence in
respect of breach of condition.*

B

In April, 1954, the applicant was convicted of larceny and was conditionally discharged. In October, 1954, he was convicted of office-breaking and larceny and attempted store-breaking and sentenced to Borstal training. On application for leave to appeal against this sentence,

C

Held: although normally it was not desirable to impose nominal sentences of one day's imprisonment, yet in the present case such a nominal sentence ought to have been imposed in respect of the breach of condition in order that it might rank as a conviction but, as the application was for leave to appeal only from the sentence of Borstal training, the court did not propose to interfere and the application must be refused.

D

Application for leave to appeal against sentence.

The applicant, George Thomas Fry, was convicted at Essex Quarter Sessions on Oct. 17, 1954, of office-breaking and larceny and attempted store-breaking and was sentenced to Borstal training. In April, 1954, he had been convicted of larceny by a court of summary jurisdiction and conditionally discharged.

The applicant did not appear and was not represented.

E

DEVLIN, J., delivered the judgment of the court. This is an application for leave to appeal from a sentence imposed by the Essex Quarter Sessions in respect of office-breaking and larceny and attempted store-breaking for which the applicant was given a sentence of Borstal training. The court thinks that that sentence is perfectly proper and does not propose to interfere with it, but

F

there was another matter which was before the quarter sessions. Earlier, on Apr. 21 of this year, the applicant had been found guilty by a court of summary jurisdiction of larceny and had been conditionally discharged. Therefore, the matter for which he was before the quarter sessions was not only the fresh offence he had committed but also the breach of the conditional discharge, which, of course, meant that he could be sentenced for the offence

G

for which he had been conditionally discharged. However, the quarter sessions took the view that, since they were passing a Borstal sentence for the substantive offence before them, it would not be proper that they should pass any sentence in respect of the offence for which he had been conditionally discharged. They were quite right in thinking that they could not pass a substantial sentence of imprisonment because that would have been inconsistent with the Borstal sentence,

H

but it was suggested to them that they should pass a nominal sentence of one day's imprisonment. They decided, however, not to do so. In that respect, this court thinks that they were wrong. Normally it is not desirable to impose nominal sentences of one day's imprisonment but in this particular case it is the only way of getting round the difficulty which would otherwise occur. If no sentence at all is passed in respect of the offence for which the applicant was

I

conditionally discharged, it does not rank as a conviction, and the result of it not ranking as a conviction is that, if hereafter the applicant were to commit further offences and questions were to arise on which it was necessary to prove previous convictions, such as questions of sentence to corrective training and so forth, this offence for which he ought now to be sentenced since he has broken his conditional discharge would not rank for that purpose. The court does not feel that it can now interfere with the matter by imposing one day's imprisonment because the only sentence the applicant has appealed from is the sentence of Borstal training and the powers of this court are, therefore, restricted to dealing

with that; but the court desires to draw attention to this matter so that, in future, it should be noted that this is one of the rare cases in which a nominal sentence should be imposed.

Application refused.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

JOSHUA v. REGINAM.

[PRIVY COUNCIL (Lord Oaksey, Lord Keith of Avonholm and Mr. L. M. D. de Silva), November 3, 4, 8, 9, December 7, 1954.]

Criminal Law—Trial—Direction to jury—Public mischief—Speech—Direction to convict prisoner if he uttered the words complained of.

Criminal Law—Indictment—Charges of making seditious speech and of effecting a public mischief contrary to common law in respect of same speech—Undesirability of charging both offences.

The appellant was indicted on three counts, the first and third charging sedition based on public speeches made by him, and the second charging a public mischief contrary to common law, the particulars of the offence being that he "did by means of certain false statements in a public speech . . . agitate and excite certain section of the public against the police, to the prejudice and expense of the community". The jury failed to agree on the first count, and he was acquitted on the third count. On the second count, no evidence was given that any section of the public were agitated or excited by his speech. In his charge to the jury, the trial judge directed them that they must, as a matter of law, find the appellant guilty of the offence of effecting a public mischief if they found that he spoke the words complained of. The appellant was found guilty on the second count and discharged conditionally. On appeal to the Privy Council,

Held: (i) it was a general principle of British law that, on a trial by jury, it was for the judge to direct the jury on the law and, in so far as he thought necessary, on the facts, but that the jury, whilst they must take the law from the judge, were the sole judges whether on the facts the accused was guilty; this principle extended to the crime of public mischief, and, therefore, it was a misdirection to tell the jury as a matter of law that they must convict the appellant if they found that he had spoken the words alleged.

Observations of LORD ALVERSTONE, C.J., in *R. v. Brailsford* ([1905] 2 K.B. at pp. 746, 747) considered.

(ii) it was highly undesirable that the offences of sedition and of effecting a public mischief at common law (assuming that such a crime existed apart from conspiracy) should be charged in respect of the same speech.

(iii) on the indictment as framed there was no evidence to go to the jury, and, accordingly, the appeal must be allowed and the conviction quashed. Appeal allowed.

[As to Misdirection of Jury as to Law, see 9 HALSBURY'S LAWS (2nd Edn.) 275, para. 402; and for cases on the subject, see 14 DIGEST 530, 531, 6006-6018.]

As to Joinder of Offences, see 9 HALSBURY'S LAWS (2nd Edn.) 137, para. 179; and for cases on the subject, see 14 DIGEST 226-231, 2111-2174.]

Cases referred to:

(1) *R. v. Young*, (1944), 30 Cr. App. Rep. 57; 2nd Digest Supp.

(2) *R. v. Daniell*, (1704), 6 Mod. Rep. 99, 182 (87 E.R. 856, 937); Holt K.B. 346 (90 E.R. 1091); 2 Ld. Raym. 1116 (92 E.R. 239); 14 Digest 208, 1898.

(3) *R. v. Wheatly*, (1761), 2 Burr. 1125; 97 E.R. 746; 14 Digest 207, 1889.

(4) *R. v. Newland*, [1953] 2 All E.R. 1067; [1954] 1 Q.B. 158; 117 J.P. 573; 3rd Digest Supp.

- A (5) *Kerr v. Hill*, 1936 S.C. (J.) 71; Digest Supp.
 (6) *R. v. Brailsford*, [1905] 2 K.B. 730; 75 L.J.K.B. 64; 93 L.T. 401; 69 J.P. 370; 15 Digest 978, 10,940.
 (7) *R. v. West*, *R. v. Northcott*, *R. v. Weitzman*, *R. v. White*, [1948] 1 All E.R. 718; [1948] 1 K.B. 709; [1948] L.J.R. 1377; 112 J.P. 222; 2nd Digest Supp.
- B (8) *R. v. Beeby*, (1911), 6 Cr. App. Rep. 138; 14 Digest 533, 6041.
 (9) *R. v. Frampton*, (1917), 12 Cr. App. Rep. 202; 14 Digest 529, 5961.

Appeal by special leave from a judgment of the Court of Appeal for the Windward Islands and Leeward Islands (St. Vincent Circuit), dated July 7, 1953, dismissing an appeal from a conviction by the Supreme Court of the Windward Islands and Leeward Islands, dated Jan. 16, 1953, of effecting a public mischief. The facts appear in the judgment.

R. Millner for the appellant.

J. G. Le Quesne for the respondent.

LORD OAKSEY : This is an appeal from a judgment, dated July 7, 1953, of the Court of Appeal for the Windward Islands and Leeward Islands (JACKSON, C.J., DATE and MANNING, JJ.), dismissing an appeal from a conviction and judgment, dated Jan. 16, 1953, of the Supreme Court of the Windward Islands and Leeward Islands (COOLS-LARTIGUE, J., and a jury), whereby the appellant was convicted of effecting a public mischief and was discharged conditionally on entering into a recognizance to be of good behaviour and to appear for sentence when called on at any time within two years.

The appellant was indicted on three counts, the first and third charging sedition and the second charging a public mischief. On the first count the jury failed to agree, and were discharged from returning a verdict; on the third count the appellant was acquitted. The second count read as follows:

"Statement of Offence. Effecting a public mischief, contrary to the common law. Particulars of Offence.

"Ebenezer Theodore Joshua on Nov. 26, 1952, at Kingstown in the Colony of Saint Vincent, did by means of certain false statements in a public speech to the effect that the police were scheming politically and storing up a veritable arsenal at headquarters to shoot down the people when they decide to fight for their rights, agitate and excite certain section of the public against the police, to the prejudice and expense of the community."

The common law of England relating to criminal matters prevails in St. Vincent.

The following evidence relevant to the second count was given for the respondent. In a speech made by the appellant in the Market Square at Kingstown on Nov. 26, 1952, and in other speeches made by the appellant on Nov. 12 and 20, 1952, he had said, inter alia:

"For this reason, the policemen are storing up a veritable arsenal in the headquarters. They are storing up this arsenal to shoot you down when you decide to fight for your rights. I have on many occasions pointed out the seriousness of making the people of this island bitter against one another and it is again happening in our midst. That is why they are storing up this arsenal and with that, Charles, Slater and all the rest are joining in the plot. They have a veritable arsenal to shoot you down like dogs . . . I am asking about all these number of wrongs going on in our midst; the police taking political sides, heaping up a large arsenal to shoot you and destroy you; the councillors whom you elected not caring for you and things of that nature."

Evidence was also given that there was no truth in the allegation that the police were storing up arms. Arms were kept primarily for the protection of the colony,

because the police were liable to be called out for full military service. The appellant neither gave evidence nor made a statement, and called no witnesses. His counsel submitted that comment about the conduct of a public officer could not be said to tend to create public mischief. The learned judge rejected this submission. A

In his charge to the jury, the learned judge, after dealing with the facts, directed the jury as follows: B

"The authorities also clearly establish that it is for the jury to find whether the accused committed the acts alleged against him. In this case whether he said these words! It is for the judge to rule whether those acts, if proved, do or do not constitute the effecting of a public mischief. Holding as I do that the words complained of, in the context in which they are found, can only be construed as an attempt to bring the police into disrepute and to cause a certain section of the community to suspect, disrespect and, in all probability, to hate the police. I direct you, as a matter of law, that if you find he did utter the words complained of, he is guilty of the offence of effecting a public mischief." C

The jury returned a verdict of guilty on the second count by eight to one. D

The appellant appealed to the Court of Appeal for the Windward Islands and Leeward Islands. His notice of appeal, dated Jan. 24, 1953, raised the following points of law: (i) that the indictment was bad for various reasons; (ii) that the learned judge had misdirected the jury about the relevance to the first and third counts of evidence supporting the second count; (iii) that the evidence supporting the second count did not constitute the offence of public mischief; (iv) that the verdict on the second count was unreasonable in view of the verdict on the first and third counts. E

The judgment of the Court of Appeal was delivered on July 7, 1953. Having set out the indictment and described the course of the trial, the learned judges held that no complaint could be based on the suggestion that the words which formed the subject of the second count were also part of the words which formed the subject of the first count. In fact, the two counts were founded on different parts of the one speech, and COOLS-LARTIGUE, J., had specifically and clearly directed the jury as to the particulars on the second count. The learned judges quoted the statement of LORD CALDECOTE, C.J., in *R. v. Young* (1) (30 Cr. App. Rep. at p. 60), that F

"offences which tend to the prejudice or which cause expense to the public justify charges under the common law of misdemeanour of causing a public mischief." G

They quoted COOLS-LARTIGUE, J.'s direction that the appellant, if he uttered the words alleged, was guilty of effecting a public mischief, and said it was settled law that the question whether an act might tend to the public mischief was for the judge, and was not an issue of fact on which evidence might be given. It did not matter that there had been no evidence of expense to the community, because the offence could be constituted either by prejudice or by expense to the public. The words "and expense" in the second count were surplusage. The direction of the learned judge was right. Accordingly, the appeal was dismissed. H

The following questions have been argued before their Lordships' Board: first, whether, apart from cases of conspiracy, there is any common law offence of effecting a public mischief; secondly, whether the judge's direction was right that the jury must as a matter of law find the appellant guilty if they found that he spoke the words charged; thirdly, whether the two offences of sedition and effecting a public mischief can be charged in respect of one speech, and fourthly, whether the appellant could be found guilty on an indictment charging that he did by false statements agitate and excite certain sections of the public when no evidence was given that any section of the public were agitated or excited by the appellant's speech. I

- A** The first question is one of general importance on which there are conflicting views by judges of great eminence (e.g., *R. v. Daniell* (2) (6 Mod. Rep. at p. 100) per HOLT, C.J., *R. v. Wheatly* (3) (2 Burr. at pp. 1127, 1128), per LORD MANSFIELD, C.J., *R. v. Newland* (4) ([1953] 2 All E.R. at p. 1071), per LORD GODDARD, C.J., and *Kerr v. Hill* (5) (1936 S.C. (J.) at p. 75) per the Lord Justice-General (LORD NORMAND)) and, as it is not necessary to the decision of the present appeal,
- B** their Lordships do not propose to deal with it.

- On the second question, their Lordships are of opinion that it was for the judge to direct the jury as to the elements of the crime of effecting a public mischief (assuming that such a crime exists) and to direct them on the facts if he thought there was evidence to go to the jury, and it was for the jury to find whether the appellant was guilty on those facts. It was a misdirection to tell the jury as a
- C** matter of law that they must convict the appellant if they found he had spoken the words alleged. To do so was, in their Lordships' opinion, to usurp the function of the jury. It is true that there are some observations of LORD ALVERSTONE, C.J., in the case of *R. v. Brailsford* (6) ([1905] 2 K.B. at pp. 746, 747) which seem to suggest that the question whether the crime of public mischief had been committed is for the judge, but there are other passages in the same judgment
- D** which make it clear that the court there recognised that there are cases in which the jury must find whether the prisoner is guilty on the facts proved. It is a general principle of British law that, on a trial by jury, it is for the judge to direct the jury on the law and, in so far as he thinks necessary, on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts. (See *R. v. West* (7), *R. v. Beeby* (8), *R. v. Frampton* (9).)

- E** On the third question, their Lordships think it is highly undesirable that a prisoner should be tried on counts that he made a seditious speech and also that he effected a public mischief by making the said speech, yet that is what happened in the present case, with the result that the jury found the appellant not guilty of sedition but guilty of effecting a public mischief by making a speech the mischief of which was its allegedly seditious nature.

- F** On the fourth question, their Lordships are of opinion that on the indictment as framed there was no evidence to go to the jury.

- For these reasons their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and the conviction quashed. There will be no order as to costs as there are in their Lordships' view no such circumstances as to justify a departure from the ordinary rule in criminal cases.

- G** *Appeal allowed.*
Solicitors: *Garber, Vowles & Co.* (for the appellant); *Charles Russell & Co.* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re COATES (deceased). RAMSDEN AND OTHERS v. COATES AND OTHERS. A

[CHANCERY DIVISION (Roxburgh, J.), December 2, 3, 1954.]

Power of Appointment—Uncertainty—Collateral power—Executors directed to pay to "such friend or friends" as were nominated by widow—Validity.

A testator by his will provided that "If my wife feels that I have forgotten any friend I direct my executors to pay to such friend or friends as are nominated by my wife a sum not exceeding £25 per friend with a maximum aggregate payment of £250 so that such friends may buy a small memento of our friendship". In the margin the testator wrote that he had forgotten certain persons, whose names he gave, and added "but my wife will put that right". The testator's wife survived him. B

Held: a friend who could benefit under the power must be a friend of a considerable degree of intimacy at the testator's death and thus the widow would know, or the court could determine, whether any particular friend was an object of the power; accordingly, the power was not void for uncertainty, because it was a collateral power not a power coupled with a duty and it was not essential to the validity of such a power that when exercising it in favour of one person the donee of the power should know how many other persons there might be who were objects of the power. C

Re Gestetner ([1953] 1 All E.R. 1150) applied. D

[As to the Validity of wide General Powers of Appointment, see 25 HALSBURY'S LAWS (2nd Edn.) 511, para. 926, note (b).] E

Cases referred to:

- (1) *Gower v. Mainwaring*, (1750), 2 Ves. Sen. 87; 28 E.R. 57; 37 Digest 526, 1166.
- (2) *Re Caplin's Will*, (1865), 2 Drew & Sm. 527; 34 L.J.Ch. 578; 12 L.T. 526; 62 E.R. 720; 37 Digest 528, 1193.
- (3) *Re Gestetner*, [1953] 1 All E.R. 1150; [1953] Ch. 672; 3rd Digest Supp. F
- (4) *Re Ogden*, [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.
- (5) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- (6) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp. G

Adjourned Summons. G

The executors of the will of Frederick Piercey Coates, deceased, applied to the court by originating summons to determine, among other questions, whether, on the true construction of the will of the testator, they were bound or entitled under cl. 8 thereof to make payments to such friends of the testator as his wife nominated in accordance with cl. 8 of his will. H

The testator made his will on June 4, 1953. After appointing executors and directing them to get in his estate and discharge his debts, he gave them powers as to the investment of moneys coming into their hands. By cl. 3 he bequeathed a legacy of £1,000 and his personal effects to his wife (the first defendant), by cl. 4 he bequeathed a number of pecuniary legacies, amounting in the aggregate to £2,425, and by cl. 5 he made a specific bequest. By cl. 6 he left the residue of his estate to his executors on certain trusts for the benefit of his wife, his three brothers and their respective wives, a niece and two god-children (all of whom were defendants to the summons). By cl. 8, he declared that, if his wife felt that he had forgotten any friend, his executors were to pay to such friend or friends as were nominated by his wife a sum not exceeding £25 per friend with a maximum aggregate payment of £250. The testator died on Aug. 21, 1953, his will was proved by the plaintiffs on Dec. 29, 1953, and his estate was amply sufficient for, among other purposes, those of cl. 8 of his will. I

A *R. Gwyn Rees* for the plaintiffs, the trustees.

G. H. Newsom for the first defendant, the widow.

J. A. Brightman for the second, third, fourth, fifth, sixth and seventh defendants, the testator's brothers and sisters-in-law.

Robert S. Lazarus for the eighth defendant, a niece, and the ninth and tenth defendants, godchildren.

B

ROXBURGH, J.: This point surpasses in interest the sum of money involved. The testator, who was not an expert in legal matters but had a very clear head, made the following provision in cl. 8 of his will:

C

"If my wife feels that I have forgotten any friend I direct my executors to pay to such friend or friends as are nominated by my wife a sum not exceeding £25 per friend with a maximum aggregate payment of £250 so that such friends may buy a small memento of our friendship."

Then, in the margin of the will by the side of the clause are words which have been admitted to probate, and, therefore, form part of the will. The testator says "I have forgotten", and I am sure that there the emphasis is on the "have",—

D

"... Richard Hurton and C. G. Chapple Mark Francis and Miss Jennings but my wife will put that right."

I decline to be intimidated by threats as to where this decision of mine might lead. I am not deciding whether or not a power to appoint in favour of a testator's friends without qualification would be valid. I do not intend to express any view on that point because I regard it as immaterial for the purposes of the present case. This enables me to discard two ancient cases, the conclusions in which certainly appear to have defeated the intentions of the testator, whether or not they are otherwise sound. I refer to *Gower v. Mainwaring* (1), where the trust was to give the residue of A.'s estate

E

F

"among his friends and relations where [the trustees] should see most necessity, and as they should think most just"

and was construed as a trust in favour of relations simpliciter. There is a similar, and, I think, perhaps more difficult, decision in *Re Caplin's Will* (2), where a testator bequeathed a fund to his wife for life, and after her death to be paid to such and so many of the relations or friends of the wife as she should by will appoint, and it was held that "relations or friends" must be construed relations. As I have said, I feel able to by-pass those decisions because the words with which I am concerned are quite different. This is not a case of a condition subsequent, and I find no necessity to introduce into this subject the difficult doctrine of conceptions having an a priori certainty.

G

H

I

I accept to the full as my guide the judgment of *HARMAN, J.*, in *Re Gestetner* (3). In the first place, I accept the distinction which he so clearly draws between a power coupled with a duty and a power collateral. There is, of course, no doubt that the present is a power collateral, and the distinction, in my view, is of particular importance in this case because, if the power had been one which the trustees had to exercise, that is to say, had been a power coupled with a duty, and if it had been the law that, if the trustees declined to exercise the power, the court would have to exercise it for them either by saying that equality was equity or by some other refinement of doctrine, then I should have no hesitation in holding that the power was bad because it would be quite impossible to draw up a complete list of every person who might come within the description contained in this clause, and I think it would be necessary to be able to do that if this were a trust coupled with a duty. The fact, however, is that this is a power collateral, and, if the wife died before the testator, nobody could have exercised the power. I think that that is a circumstance of some importance in considering whether there is sufficient certainty here.

The very point which arose in *Re Gestetner* (3) and was decided by HARMAN, J., arises here, though I do not mean that his decision covers the present case—it does not. The point common to both cases, however, is neatly stated in these words of the judge ([1953] 1 All E.R. at p. 1153):

“It was said on behalf of the Crown and also by counsel representing infants interested in default of appointment, that the power of selection given to the trustees, being a power coupled with a duty . . .”

—that was the contention which HARMAN, J., rejected—

“ . . . is bad because it is impossible, as it admittedly is, to know the limits of the area of selection—that is to say, although the trustees can at any moment tell whether John Doe or Richard Roe is a person within the power, they cannot tell how many more people there may be within it. It is said that a power of this sort, if it be not limited to ascertainable objects, is bad because the trustee cannot perform his duty of considering the merits and demerits of the objects unless he knows who they are.”

I think that that is the precise point which arises here. If this were a power coupled with a duty it would be bad, because in proceeding to exercise the selection the wife could not possibly know who fell within the exact limits of the class, that is to say, how many more people there might be within the class in addition to those whom she wished to select. HARMAN, J., has, however, plainly decided, as again I accept to the full, that in the case of a power collateral that requirement is not necessary.

It is said, however, that in the present case the donee of the power could not at any moment tell whether John Doe or Richard Roe was a person within the power. That was admitted in *Re Gestetner* (3), and that is why it does not cover the present case. This question of uncertainty is a vexed question. Language draws a series of mental pictures in the mind of the person hearing the words spoken. Those pictures are sometimes fairly well defined, and sometimes blurred in outline, but they are never very precise. Language is a medium which disdains mathematical rules. I, for my part, accept as my guide what LORD TOMLIN [sitting as an additional judge of the Chancery Division] said in *Re Ogden* (4), which was cited by HARMAN, J., in *Re Gestetner* (3). LORD TOMLIN said ([1933] Ch. at p. 682):

“The question is one of degree in each case, whether, having regard to the language of the will, and the circumstances of the case, there is such uncertainty as to justify the court in coming to the conclusion that the gift is bad.”

That appears to me to be all that can possibly be said on the subject of uncertainty.

What I have to consider is whether there is such a degree of uncertainty about the word “friend” in the context in which I find it and in the circumstances of the case as would justify me in coming to the conclusion that the gift was bad. Friendship, of course, is a phrase particularly blurred in outline, but its context, and the circumstances of the case, may well fill in what would otherwise be vague. A circumstance to which I have particular regard is the power of appointment vested in the testator's widow. In my judgment, it is quite plain that this gift contemplates a degree of intimacy sufficiently close to make its detection quite easy. It is to be observed that the opening words (which may not have any imperative force, but which, none the less, are not to be ignored in construing the gift) are: “If my wife feels that I have forgotten any friend”. Therefore, it must be somebody who was realised by the wife to be a friend at the moment of the testator's death. That is emphasised by the

A fact that in the margin of the will the testator, as it were, picks up his own words

"I have forgotten Richard Hurton and C. G. Chapple Mark Francis and Miss Jennings but my wife will put that right."

B I am sure that the emphasis in the "I have forgotten" is on the word "have"; and in the words which follow the testator gives again to his wife a plain clue as to the sort of friends whom he had in mind. Then he directs that his wife may nominate such friends. It is to be noted that it is not any friends, but is the friends that his wife feels that he has forgotten. What may she nominate them? Not a fortune but "a sum not exceeding £25 per friend." That in itself indicates that the purpose here is sentimental, not financial.

C Again, to show that his purpose is sentimental, he provides that there shall be "a maximum aggregate payment of £250." That is the limit of the widow's power of appointment. Then, to close any possible gap, he says "so that such friends may buy a small memento of our friendship". Quite obviously that indicates to my mind that the testator was thinking of friends whom he would wish to remember him and who, he thinks, would wish him to remember them. In those circumstances it appears to me that friends of a considerable degree of intimacy are only to be included in this gift.

I admit at once that, if I were dealing with such problems as arose in *Sifton v. Sifton* (5), or *Clayton v. Ramsden* (6), or other cases of defeasance on a condition, what I have said would be fatal because I cannot a priori define the limit of the degree of intimacy required. I have often wondered whether it is ever possible to do that in connection with any set of words, but to say that is, perhaps, heresy. At any rate, it is quite plain, in my view, on the judgment of HARMAN, J., in *Re Gestetner* (3), that it is not necessary for me to do that in this case. All I have to say is that the widow must be able to tell at any moment whether John Doe or Richard Roe is a person within the power, or I may add, as I do not think HARMAN, J., would mind my adding, that, if she applied

E to the court to know whether John Doe or Richard Roe was a person within the power, the court, on reading the evidence, would be able to say whether the person was or was not within the power. For my own part, I cannot conceive that the court would have any difficulty in this case in answering such a question if the trustees, in excess of caution, thought it necessary to come to the court and ask the court to determine that question.

G It has to be borne in mind that the widow has to exercise the power and if she is already dead it cannot be exercised by anybody. Therefore, ex hypothesi, she is in a position to put before the court precisely why she says that the recipient of the bounty is within the will and she is the one person who would have paramount knowledge of the situation. Ex hypothesi, she must be alive to give the evidence because otherwise she could not exercise the power. What has her evidence got to be and how high has it got to be? First, she would

H have to swear that she felt that the testator had forgotten that particular friend, because otherwise the power does not arise. She would then have to explain why she thought that such a friend ought to have a memento and why she thought that that friend would like to have a memento. I should think that, by the time she had done that, the court would have no possible doubt whatever whether the person was within the category or not. Accordingly,

I in my judgment, this power is valid, and can be exercised by the testator's widow.

Order accordingly.

Solicitors: Church, Adams, Tatham & Co., agents for Day & Yewdall, Leeds (for all parties other than the tenth defendant); Theodore Goddard & Co. (for the tenth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

CHANCERY DIVISION. PRACTICE DIRECTIONS.

Practice—Chancery proceedings—Affidavits—Office copies—Ex parte applications without summons—Mortgages—Orders nisi for foreclosure or redemption. Mortgage—Foreclosure—Redemption—Orders nisi—Notice of intention to redeem—Place of redemption.

The judges of the Chancery Division have directed that the following Practice Directions shall be substituted for those issued under date Nov. 3, 1954 [reported [1954] 3 All E.R. 364].

1. EX PARTE APPLICATIONS. Where, by any rule or practice, Orders or Directions may be sought in chambers ex parte supported by affidavit, it shall not be necessary to issue a summons for such purpose unless required by the rule under which the application is made or the judge shall otherwise direct.

EXAMPLES.

- (1) Garnishee order nisi.
- (2) Change of parties upon devolution of interest.
- (3) Appointment of next friend or guardian-ad-litem of an infant or person under disability in the stead of such a person who has died.
- (4) Substituted service of writ and other process.

2. OFFICE COPIES OF AFFIDAVITS. Unless the court or a judge in any particular instance shall otherwise direct, it shall not be necessary to bespeak for the use of the court or judge office copies of affidavits intended to be filed in connection with interlocutory or procedural matters as distinct from affidavits forming part of the evidence in a suit or dealing with the merits of the case; as to which latter the existing practice shall continue.

EXAMPLES where office copies will NOT usually be required:—

- (1) Of fitness to act as receiver, manager, next friend or guardian-ad-litem or guardian of an infant.
- (2) Verifying the security of a surety or a receiver's, manager's or guardian's account.
- (3) Proving service of process (including notices to prove a claim or the allowance thereof).
- (4) In support of applications under Ord. 7, r. 4; Ord. 14; Ord. 18, r. 2; Ord. 31, r. 19A (3) and Ord. 57, etc.

NOTE. A more extensive list can be inspected in the Masters' Summons Rooms.

3. REDEMPTION AND FORECLOSURE OF MORTGAGED PROPERTY.

(1) In order to make it unnecessary to go to the expense of preparing deeds, powers of attorney and form of receipt to hand over in case a mortgagor should attend to redeem at the time and place appointed by the master's certificate for redemption; all orders for foreclosure or redemption unless the court otherwise directs will provide (1) that the mortgagor shall give seven days' notice of his intention to attend and redeem and (2) if no such notice is given but the mortgagor in fact attends at the appointed time and place then at the option of the mortgagee the time for redemption shall be extended for one week. This will give the mortgagee's solicitor time to prepare the necessary documents.

(2) The master's certificate pursuant to an order nisi (or the order itself if thereby a certificate is avoided) shall nominate as the place of redemption the office of the mortgagee's solicitors if it be within five miles of the Royal Courts of Justice, Strand, or such other place as may be agreed between the parties and recorded in the order or certificate. In all other cases the place of redemption shall be recorded as Room 138 of the Royal Courts of Justice, Strand, W.C.2.

M. G. WILLMOTT,

Chief Master.

December 21, 1954.

Re KOLCZYNSKI AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Devlin, JJ.),
November 29, December 13, 1954.]

*Extradition—Political offence—Prisoners accused of extradition crimes—
Evidence on behalf of prisoners that offences were of political character—
Duty of magistrate—Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1), s. 9.*

While a Polish fishing trawler was at sea in September, 1954, the applicants, who were seven members of the crew, noticed that they were under political supervision. Fearing that they would be severely punished on account of their political opinions if they returned to Poland, they took charge of the trawler, putting the master and some members of the crew under restraint and slightly wounding the political officer, and steered the vessel to the nearest English port. On arrival they went ashore and asked for political asylum. The Polish government having asked for their extradition, the applicants were brought before the chief metropolitan magistrate under the Extradition Act, 1870, the main offence alleged against them being revolt against the master of the ship on the high seas, which was an offence listed in sched. I to the Act of 1870, and in the schedule to the treaty between the United Kingdom and Poland, signed on Jan. 11, 1932. At the hearing before the magistrate, the applicants claimed that their offence was of a political character, and evidence was given on their behalf that an attempt by a Pole to leave Poland was regarded in that country as an act of treason and was severely punished. The magistrate, having found that the acts done by the applicants were done solely with the object of leaving their country, made a committal order in respect of each of the applicants and left to the High Court the question whether the offences were of a political character. On applications by the applicants for writs of habeas corpus,

Held: it was shown on the evidence that (per CASSELS, J.) the applicants, if extradited, would be punished as for an offence of a political character, or that (per LORD GODDARD, C.J.) the offence for which the extradition of the applicants was requested, though on the face of the requisition an extradition crime, had in the present case a political character; accordingly (DEVLIN, J., concurring) the applicants were excepted from surrender to the Polish state by virtue of s. 3 (1) of the Extradition Act, 1870, and writs of habeas corpus should be issued.

Per LORD GODDARD, C.J.: under s. 3 (1) of the Act of 1870 it is the duty of the magistrate to determine on the whole of the evidence whether the offence is of a political character and whether it is an extraditable crime; he cannot determine this finally as against the prisoner because the prisoner can question his decision by applying for habeas corpus (see p. 37, letter I, p. 38, letter A, post).

Per CASSELS, J.: to interpret the Act of 1870 as showing that it was not for the magistrate to decide whether the requisition for the surrender of the fugitive criminal has in fact been made with a view to punishing him for an offence of a political character is to ignore the words "if he prove to the satisfaction of the police magistrate . . ." in s. 3 (1) (see p. 35, letter B, post).

Dictum of HAWKINS, J., in *Re Castioni* ([1891] 1 Q.B. at p. 166) not followed.

[As to the Evidence Admissible in Extradition Proceedings, see 14 HALSBURY'S LAWS (2nd Edn.) 533, paras. 1007, 1008; and for cases on the subject, see 24 DIGEST 882, 92-97.

As to Extradition and Political Offences, see 14 HALSBURY'S LAWS (2nd Edn.) 538, para. 1024; and for cases on the subject, see 24 DIGEST 873, 874, 36, 37.]

Cases referred to:

- (1) *Re Castioni*, [1891] 1 Q.B. 149; 60 L.J.M.C. 22; 64 L.T. 344; 55 J.P. 328; 24 Digest 873, 36.
- (2) *Re Arton (No. 1)*, [1896] 1 Q.B. 108; 65 L.J.M.C. 23; 73 L.T. 687; 24 Digest 875, 42.
- (3) *R. v. Holloway Prison (Governor)*, *Re Siletti*, (1902), 71 L.J.K.B. 935; 87 L.T. 332; 67 J.P. 67; 24 Digest 886, 129.
- (4) *Ex p. Huguet*, (1873), 29 L.T. 41; 24 Digest 886, 126.
- (5) *R. v. Maurer*, (1883), 10 Q.B.D. 513; sub nom. *Re Maurer*, 52 L.J.M.C. 104; 24 Digest 886, 127.
- (6) *Re Arton (No. 2)*, [1896] 1 Q.B. 509; 65 L.J.M.C. 50; 74 L.T. 249; 60 J.P. 132; 24 Digest 871, 21.

Motion for writs of habeas corpus.

The applicants were seven Polish sailors, Zygmunt Koleczynski, Feliks Skrzydlewski, Jan Radziszewski, Stanislaw Reczko, Edmund Jeleniewski, Marcelli Sawicki and Kaziwierz Paszkiewicz, who were formerly members of the crew of the Polish fishing trawler *Puszczyk*. On Sept. 22, 1954, the applicants landed at Whitby from the trawler and asked for political asylum. They were detained under the Aliens Order, 1953. On Sept. 25, 1954, warrants for their provisional arrest were issued by the Polish authorities in Warsaw, charging them with crimes under the Polish criminal code. The Polish government having requested their surrender for certain named extradition offences, pursuant to a treaty between the United Kingdom and Poland, signed on Jan. 11, 1932, the applicants appeared before the chief metropolitan magistrate at Bow Street Magistrate's Court on Nov. 3, 10, 16 and 23, 1954, pursuant to orders from the Secretary of State, under the Extradition Act, 1870. The offences with which they were charged were false imprisonment, unlawful wounding and revolt against the master of the ship on the high seas. The magistrate found that there was a *prima facie* case that all the applicants were guilty of revolt on the high seas and that Koleczynski was guilty of unlawful wounding; that all the acts done by the applicants were done solely with the object of leaving their country; and that an attempt by a Pole to leave his country was now regarded in Poland as an act of treason. Being of the opinion that the question whether the offences were of a political character should be determined by the High Court, the magistrate committed the applicants to prison to await a further order.

On Nov. 25, 1954, counsel on behalf of the applicants applied *ex parte* for writs of habeas corpus. Leave to move on Nov. 29, 1954, was granted and it was directed that notice be given to the Governor of Brixton Prison and to the Director of Public Prosecutions. On Nov. 29, 1954, the court, after hearing argument, directed the writs to issue in the case of each of the applicants, but ordered their release to be conditional on the Home Secretary granting them leave to stay in this country because they had illegally entered the country and were lawfully detained under the Aliens Order, 1953. On Dec. 13, 1954, the court gave their reserved judgment on the motion.

Sir Hartley Shawcross, Q.C., and *W. Glanville Brown* for the Polish sailors.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and *Maxwell Turner* appeared as *amici curiae*.

Cur. adv. vult.

Dec. 13. LORD GODDARD, C.J. : I will ask CASSELS, J., to read the first judgment.

CASSELS, J., read the following judgment: The court has already directed the writs of habeas corpus to issue in each of these seven cases. That meant that the applicants were entitled to release, and they have been released, from custody in these extradition proceedings. They have also been given permission by the Secretary of State to stay in this country.

- A** In September, 1954, the applicants were members of the crew of a small trawler fishing in the North Sea as part of a Polish fishing fleet. On this trawler the captain was in charge of the navigation only. A political commissar and a party secretary, who was nominally an engineman, were really in control of the crew. They exercised supervision over the crew's political leanings, and noted their conversations, doubtless for future action, though at the most material
- B** times the commissar had gone aboard another of the trawlers in the fleet, namely, the mother ship. One of the applicants, by name Kolczynski, a fisherman, had a brother serving in one of the other trawlers in the fleet. News that that brother had escaped to England came over the trawler's wireless, and from that moment this man Kolczynski on board this trawler was kept under special observation. Another fisherman, Radylezenski, was told by the political
- C** secretary to get rid of a picture of the Virgin Mary which he had over his bunk. His refusal led to a dispute. When the applicants were in conversation with each other it was observed that the political secretary was listening in and afterwards that he was making a note. All this caused the applicants to arrive at the conclusion that if they remained on the trawler until they reached Poland again they would be dealt with according to the constitution of the Polish
- D** People's Republic and the severity of the Polish law would be applied to them. They, therefore, decided to take charge of the trawler and steer her to an English port. To accomplish this, and in furtherance of this project, they barred the door of the water-closet where the captain had gone for refuge (it was said without much resistance) and they directed an assistant engineman to work the engines, and they put the other members of the crew under restraint. The political
- E** secretary showed fight when awakened in his cabin, but was overpowered, being slightly cut on the hand by a fisherman's knife in the hands of Kolczynski. When the trawler reached Whitby, the applicants marched off and asked for political asylum. They were imprisoned.

The Polish government applied for the extradition of each of the applicants on offences alleged against each: use of force, depriving his superiors and other

F members of the crew of their freedom, wounding one member of the crew (in fact the political secretary), damaging the trawler's wireless installation, preventing the captain of the trawler from directing her, thus exposing the Polish vessel to the danger of calamity at sea and the entire crew to loss of life. This application of the Polish government came before the learned chief magistrate at Bow Street Police Court on Nov. 3, 10, 16 and 23, 1954. On Nov. 24 the learned

G chief magistrate, having considered evidence taken in Poland, the evidence of the applicants, evidence of the British Ambassador to Poland from 1945 to 1947 and of a press attaché during the same period, and evidence of a member of the staff of the British Embassy in 1951 to 1952, came to the conclusion that the only object which the applicants had in mind was to leave their country in which they suffered an intolerable sense of frustration and repression and to seek a fresh life somewhere else, and that they achieved their object with the smallest amount

H of injury to persons and property, and he left the declaration of the law to this court through the applicants' application for writs of habeas corpus.

The following points seem to emerge from the evidence taken at Bow Street. Between 1945 and 1947 Poland became a police state ruled by terrorism. The communist party became the only party in the state with complete control

I with the help of the security police. Anyone opposed to the communist régime is arrested and some disappear. Relatives, too, are arrested. It is an offence to leave the country. Ninety per cent. of the population is opposed to the communist régime. Political agents spy on other people and make reports. The activities of the secret police penetrate into all walks of life. England is not regarded as a friendly country; on the contrary it is looked on as an enemy country. To go to a Western country without permission is treason. If a Pole were outside Poland and heard that his brother had fled to the West he

would be very unwise to return to Poland. If he returned to Poland he would be punished. A

By the Extradition Act, 1870, s. 3 (1), it is declared that

"A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character." B

The treaty between this country and Poland makes a similar provision. According to art. 79 (2), in chapter 7, entitled "Citizens' Rights and Duties", of the Constitution of the Polish People's Republic, voted by the legislature on July 22, 1952, C

"Treason of the Country: spying, weakening of the armed forces, going over to the enemy—being the greatest crime, will be punished with all the severity of the law."

Treason is an offence of a political character, and is not included in the offences mentioned either in Sch. I to the Act of 1870 or in the treaty, but, in both these, assaults and revolt or conspiracy to revolt on board a ship are included. D

During their imprisonment letters from relatives have been handed to all the applicants. Some of the applicants say that they are not genuine letters, that the language used is not the language of the writers, and one of them says that a letter from his brother must have been dictated by a member of the security force. One brother's letter uses the phrase, "I condemn with scorn your action of having sold yourself to the American imperialists" and refers to "repaying education and advantages with treason." A family letter talks of the "influence of the imperialistic propaganda". A brother writes, "You have betrayed your brothers and your own country." Another brother writes, "You have left your sisters and brothers in the country and followed the capitalists". A cousin writes, E

"You are a traitor to the country and a traitor you will remain until your death. You have abandoned and betrayed your country. You have escaped to our enemies." F

There is an indication in the letters that some of the relatives of these men had been removed from their homes in the early days of October, for some of the letters are dated prior to the taking of the evidence of the captain and other witnesses in Poland on Oct. 8 after the trawler had arrived back. G

It is submitted on behalf of the applicants that if they should be extradited they may well only be tried for the offences for which their extradition is requested, but they will be punished as for an offence of a political character, and that offence is treason in going over to the capitalistic enemies. Everything in the case points that way and for that reason I agree that the writs of habeas corpus should issue. H

As to the meaning of the phrase "an offence of a political character", definitions were considered in *Re Castioni* (1). John Stuart Mill's definition,

"Any offence committed in the course of or furthering of civil war, insurrection, or political commotion", I

was rejected as too narrow, and the definition by STEPHEN, J., in his HISTORY OF THE CRIMINAL LAW OF ENGLAND, vol. 2, p. 71,

"... fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances"

was preferred. HAWKINS, J., who cited this passage with approval ([1891] 1 Q.B. at p. 166), also expressed the view (*ibid.*, at p. 163) that it was not for the magistrate to decide whether the requisition for the surrender of the fugitive

- A criminal has in fact been made with a view to try or punish him for an offence of a political character, but that under s. 9 of the Act of 1870 all he had to do was to hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England, and merely to receive evidence which might be tendered to show that the crime of which the prisoner is accused is an offence of a political character and not an extradition crime. To interpret that Act in such a way seems to me to ignore the words of s. 3 (1): "if he prove to the satisfaction of the police magistrate . . ." In this case the learned chief magistrate has left the decision to this court, being the court before whom the applicants are brought on habeas corpus.

- The words "offence of a political character" must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1890 when *Castioni's* case (1) was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave.
- D In this case, the members of the crew of a small trawler engaged in fishing were under political supervision. The applicants revolted by the only means open to them. They committed an offence of a political character and if they were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime. Thus they have brought themselves within s. 3 (1) and made good their claim to have the restrictions referred to observed.

- LORD GODDARD, C.J., read the following judgment: I need not recapitulate the facts which have already been dealt with in the judgment just delivered by CASSELS, J. The questions that arise under s. 3 (1) of the Extradition Act, 1870, are: (i) whether the offence for which extradition is sought is an offence of a political character, or (ii) have the applicants proved to the satisfaction of this court before whom they are brought on habeas corpus that the requisition has, in fact, been made with a view to trying and punishing them for an offence of a political character.

- This section is somewhat obscure, especially when it is remembered that by sub-s. (2) a criminal is not to be surrendered to a foreign state unless provision is made by the law of that state or by an arrangement, which must mean by treaty, that he shall not be tried by the foreign state for any offence committed prior to his surrender other than that for which the surrender is granted. This arrangement has been made by a treaty signed on Jan. 11, 1932, between His late Majesty King George V and the President of the Republic of Poland and will be found in the Poland (Extradition) Order in Council, 1934 (S.R. & O. 1934 No. 209). The court must not assume that the foreign state will not observe the terms of the treaty: see *Re Arton (No. 1)* (2). The second limb of the section cannot, therefore, in my opinion, mean that the court may say that, if extradition is sought for crime "A" we believe that, if the prisoner is surrendered, he will be tried or punished for crime "B". None of the offences in Sch. I to the Act are *prima facie* political. The precise meaning of this difficult section has not yet been made the subject of judicial decision and text-writers have found it difficult of explanation, but in my opinion the meaning is this. If, in proving the facts necessary to obtain extradition, the evidence adduced in support shows that the offence has a political character, the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that, in fact, the offence is of a political character. Let me try to illustrate this by taking a charge of murder. The evidence adduced by the requisitioning state shows that the killing was committed in the course of a rebellion. This at once shows the offence to be

political; but if the evidence merely shows that the prisoner killed another person by shooting him on a certain day, evidence may be given, and under s. 9 the magistrate is bound to receive it, to show that the shooting took place in the course of a rebellion. Then if either the magistrate or the High Court on habeas corpus or the Secretary of State is satisfied by that evidence that the offence is of a political character, surrender is to be refused. In other words the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer.

The present case, in my opinion, comes within the second limb. *Prima facie*, the evidence in support of the requisition merely shows a revolt by two or more of the persons charged on board a ship on the high seas against the authority of the master, and this is a scheduled offence. The evidence, the truth of which the magistrate accepted, showed that the applicants while at sea found that a political officer was overhearing and recording their conversations and keeping observation on them for the purpose of preparing a case against them on account of their political opinions, presumably in order that they might be punished for holding or, at least, expressing them. A resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for a political offence and in my opinion, therefore, the offence had a political character. I would emphasise that, although the requisitioning Power is diplomatically represented in this country, no attempt was made to controvert or displace the evidence of the applicants or of the witnesses called on their behalf. The Polish government were not represented before the magistrate or this court and cannot, therefore, complain if the court accepts the evidence given on this matter by or on behalf of the applicants.

The learned chief magistrate, while accepting the evidence, thought that, as the only decision as to what constituted a political offence was that to be found in *Re Castioni* (1), he was bound to commit and to leave it to this court to say whether that decision was conclusive or whether the words "of a political character" could be extended to the facts which he found. I desire to say that in my opinion, in the circumstances of this case, the course which he took was entirely proper. It is clear from his careful judgment that, had he thought it open to him, he would have held the offence to be political. Now the court in *Castioni's* case (1) were careful to say that they were not giving an exhaustive definition of the words "of a political character". They applied a formula taken from STEPHEN'S HISTORY OF THE CRIMINAL LAW, vol. 2, p. 71, as sufficient for the facts of that case, and, no doubt, when that work was written, about 1882, no better definition could be given. No doubt, the conception of what is commonly called nowadays a "police state" was not unknown in the middle years of the nineteenth century. One need only recall the vigour of Mr. Gladstone's language and some of Lord Palmerston's dispatches as to the state of affairs prevailing in Naples, then a part of the Kingdom of the Two Sicilies, under the despotic rule of a monarch usually referred to as King Bomba. All that, however, had passed by the time SIR JAMES FITZJAMES STEPHEN wrote, though, no doubt, political police were still very active in Czarist Russia. The evidence as to the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.

This is enough to dispose of the case, but we have been pressed by the Attorney-General to consider the opinion of HAWKINS, J., in *Re Castioni* (1), where he appears to hold ([1891] 1 Q.B. at p. 163) that the magistrate cannot decide the question whether or not the offence is political although he concedes that it is open to this court to do so on a motion for a habeas corpus. *Castioni's* case (1) was in some respects adversely criticised in *R. v. Holloway Prison (Governor)*,

A *Re Siletti* (3). The court, BIGHAM, J., and DARLING, J., were both of opinion that the observations in *Castioni's* case (1) that the court could revise the decision of the magistrate on the evidence were obiter, and inconsistent with the decisions in *Ex p. Huguet* (4), *R. v. Maurer* (5), and *Re Arton* (No. 2) (6). In the latter case LORD RUSSELL OF KILLOWEN, C.J., said ([1896] 1 Q.B. at p. 518):

"We are not a Court of Appeal on questions of fact from [the magistrate].

B We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit."

In *Siletti's* case (3) BIGHAM, J., said (71 L.J.K.B. at p. 937):

"... the only question that this court can entertain is the question of jurisdiction. Applying the observation to this particular Act, the accused may say that the crime with which he was charged was not a crime within the meaning of the Act—that is to say, that it did not come within the class of offences contemplated, or that it was an offence of a political character, and therefore was outside the Act altogether."

D This appears to me to lay down the true rule; the effect of s. 3 (1) is to prevent a crime of a political character coming within the purview of the Act. If, then, the crime is of that character, the magistrate has no jurisdiction to commit. If the magistrate wrongly gives himself jurisdiction by holding that a crime is not of a political character when it is, this court can and must interfere, and both *Re Castioni* (1) and *Re Siletti* (3) affirm this. Moreover, apart from authority this is what, in my opinion, the statute provides. Clearly the second limb of s. 3 (1) contemplates a decision of the magistrate on the subject; the first limb, as I have said above, deals with an offence which the evidence called to support extradition shows is political. The second limb contemplates a charge which on its face appears to be one of those set out in Sch. I to the Act, but which on examination of the evidence tendered is shown to be really of a political character. The magistrate must give a decision on this matter and his decision is open to review on habeas corpus. In support of this view I would refer to the statutory form of the warrant of committal in Sch. II to the Act. It recites

F "and forasmuch as no sufficient cause has been shown to me why he should not be surrendered . . ." If the magistrate can decide that there is no sufficient cause for refusing to surrender the prisoner, it must follow that he can also find that there is. Section 9 requires the magistrate to hear the case in the same manner and with the same jurisdiction and powers as if the prisoner was before him charged with an indictable offence and to receive any evidence which may be tendered to show that the crime of which the prisoner is accused is of a political character and not an extradition crime. HAWKINS, J., in *Castioni's* case (1) seems to have thought that this required the magistrate merely to take the evidence of witnesses for the defence so that it could be considered either by this court or by the Secretary of State, and he referred ([1891] 1 Q.B. at p. 163) to Russell Gurney's Act (30 & 31 Vict. c. 35). With all respect to the opinion of one who was a great authority on criminal law, the provision in that Act to which he was referring was, I think, intended to fill a gap in the Indictable Offences Act, 1848. The latter Act did not appear expressly to contemplate taking the depositions of and binding over witnesses for the defence, and this was remedied by s. 3 of Russell Gurney's Act (the Criminal Law Amendment Act, 1867)*. However that may have been, the position is now clarified by s. 12 (8) of the Criminal I Justice Act, 1925, which provides that, before determining whether or not to commit for trial, any statement by the accused and any evidence given by him or his witnesses must be taken into consideration. Accordingly, I am of opinion that it is the duty of the magistrate to determine on the whole of the evidence whether or not the offence is of a political character, and also whether it is an extraditable crime. He cannot determine this finally against the prisoner

* Section 3 of the Criminal Law Amendment Act, 1867, was repealed by the Criminal Justice Act, 1925, s. 49 (4), and Sch. III.

because the latter can question the decision on habeas corpus. This does not mean that this court will review the magistrate's findings of fact, but they will and must consider the result of those findings. A

DEVLIN, J. : I agree.

Writs of habeas corpus issued.

Solicitors: *Chancellor, Jaxa & Partners* (for the applicants); *Director of Public Prosecutions.* B
[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. CHELSEA JUVENILE COURT JUSTICES (Re an infant).

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Devlin, JJ.), C
December 13, 1954.]

Adoption—Adoption order—Amendment—Correction of particulars—Jurisdiction—Adoption Act, 1950 (14 Geo. 6 c. 26), s. 21 (1).

In 1946 the adopter became acquainted with the child then in the care and custody of the London County Council. In 1949 the child was boarded out with the adopter in the latter's home. On June 20, 1951, the juvenile court made an adoption order authorising the adopter to adopt the child. D
In the order the child was described as a foundling and it was stated that the court was satisfied that the child was identical with a child registered in the register of births on July 16, 1942, and that the probable date of the child's birth appeared to be Aug. 1, 1938. The adopter, having reason to believe that these particulars were incorrect, applied under the Adoption Act, 1950, E
s. 21 (1), to have the errors corrected. The justices refused to hear the application on the ground that they had no jurisdiction so to do. On a motion for mandamus,

Held: section 21 (1) of the Adoption Act, 1950, gave the court power in the widest terms to correct any error and was not a mere slip rule; accordingly, if the justices came to the conclusion that an error had been F
committed, they had jurisdiction to correct it, and an order for mandamus should issue.

[For the Adoption Act, 1950, s. 21 (1) (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 483.]

Motion for mandamus.

The adoptive mother of a child applied by motion for an order of mandamus directed to the justices for the County of London and the metropolitan police courts district, sitting as the Chelsea Juvenile Court, requiring them to exercise the jurisdiction conferred on them by the Adoption Act, 1950, s. 21, and to hear and determine the application of the adopter of a child, for an order amending the particulars contained in an adoption order. On June 20, 1951, the Chelsea Juvenile Court made an order whereby the adopter was authorised to adopt an infant then named H. In the adoption order the infant was described as a foundling and it was stated that it had been proved to the satisfaction of the court that he, the infant, was identical with a child (who, it appeared from the relevant birth certificate, had been found at a railway station on Sept. 21, 1938) in respect of whom an entry numbered . . . was made on July 16, 1942, in the register of births for the registration district of P. and that the probable date of the infant's birth appeared to be Aug. 1, 1938. The adopter became acquainted with the child in June, 1946, when he was in the care and custody of the London County Council. He was boarded out with her on June 18, 1949, since when he had been in her custody. On evidence which the adopter tendered to the justices it appeared to her that the probable date of the birth of the child was not as stated in the order, but was a date about the beginning of 1941. On Sept. 29, 1954, the adopter applied to the justices that in the particulars G
H
I

A of the adoption order the words "a foundling" and the recital of the child's identity be deleted, and that the probable date of the child's birth, Jan. 1, 1941, be substituted for Aug. 1, 1938. On the direction of the justices the London County Council was represented at the hearing. The justices, without hearing the applicant's witnesses, refused to amend the particulars contained in the said order, on the ground that they had no jurisdiction so to do.

B *H. E. Francis* for the adopter.
F. H. Lawton for the justices.
Paul Wrightson for the London County Council.

LORD GODDARD, C.J., stated the facts and continued: Section 21 (1) of the Adoption Act, 1950, is as follows:

C "The court by which an adoption order has been made under this Act or the Adoption of Children Act, 1926, or the Adoption of Children (Scotland) Act, 1930, may, on the application of the adopter or of the adopted person, amend the order by the correction of any error in the particulars contained therein; . . ."

D That is in the widest possible terms. It has been suggested to us that that is only what is called a slip rule, but those words are not appropriate to a slip rule at all. A slip rule applies where the court makes an order and by a slip the order drawn up does not represent what the court has said. That is the true function of a slip rule. Power is obviously being given in this sub-section to correct particulars which in the case of children from unknown parentage may easily be wrongly inserted in an order. Sub-section (2) says:

E "Where the adoption order was made before Jan. 1, 1950, the power of the court under the foregoing sub-section shall include power to amend the order—(a) by the insertion of the country of the adopted person's birth; (b) (where the order does not specify a precise date as the date of the adopted person's birth) by the insertion of the date which appears to the court to be the date or probable date of his birth."

F We have not explored fully the position before Jan. 1, 1950, but if the court is expressly given power to make that alteration, it seems to me that it is because there may have been some doubt about the power to do that under the old Act, and it is recognised in this sub-section that orders made since then can be amended. There is no doubt, in our opinion, that the justices have power to amend the order, although it may be, if they do amend the order with regard to the date of birth, they may have to make some consequential amendments. There may be some confusion as to the particulars regarding the child, but there is no confusion as to the identity of the child who was adopted. There may be some confusion as to the birth of the adopted child or where the child came from, but the child adopted was the child that the adopter had in her custody and whom the justices could, and no doubt did, see.

H In my opinion, the justices were wrong in refusing jurisdiction. We are not attempting in the least to dictate how they are to decide the matter when it comes before them. No doubt there will be strong evidence on the one side and on the other, and it will be for the justices to come to a conclusion when they have heard the evidence as to the particulars. If they come to the conclusion that there was no error, then of course they will refuse the amendment. Therefore, in my opinion, the order for mandamus must go.

I CASSELS, J.: I agree.

DEVLIN, J.: I also agree.

Application granted.

Solicitors: *T. D. Jones & Co.* (for the adopter); *Samuel Coleman* (for the justices); *J. G. Barr* (for the London County Council).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re VANBERGEN (a bankrupt). *Ex parte* THE TRUSTEE
OF THE PROPERTY OF THE BANKRUPT *v.* VANBERGEN
(married woman).

[COURT OF APPEAL (Jenkins and Hodson, L.JJ., and Vaisey, J.), December 6, 7, 1954.]

Bankruptcy—Proof—Rejection—Extension of time for appealing—Whether application ex parte or on notice—Jurisdiction of registrar in bankruptcy—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 102 (1) (2) (f), s. 109 (4), s. 147 (1)—Bankruptcy Rules, 1952 (S.I. 1952 No. 2113), r. 8 (1) (g) (2), r. 9, r. 31, r. 32 (1) (2), r. 389.

A trustee in bankruptcy rejected a creditor's proof. The time for appealing against the rejection having elapsed, the creditor applied *ex parte* to the registrar for an extension of time, which was granted. The affidavit in support of this application gave no particulars and amounted to no more than a statement that the creditor was not ready within the permitted time. The trustee applied to set aside the order extending time for appealing.

Held: the order extending the time within which to appeal against the rejection of the proof ought not to have been made *ex parte* after the time for appealing had expired, but the application for extending time should have been made by motion on notice (*Re Lawrence* (1876), 4 Ch.D. 139, approved); moreover, in the present case, even if the application had been regularly made, good cause for extending the time had not been shown.

Per CURIAM: it would probably be more convenient and more suitable if the judge who was going to hear an appeal from an order rejecting a proof should also deal with any question as to the extension of time within which to . . . lodge an appeal . . . but . . . it seems that, according to the long-standing practice in bankruptcy, the registrars have consistently dealt with these matters . . . [we] wish to say nothing . . . to alter or cast doubt on a well-settled practice . . . but the judges . . . might consider whether the practice may not advantageously be altered by a suitable direction (see p. 44, letters D, E and F, p. 45, letter H, post).

Per JENKINS, L.J.: if an order extending time for appealing against rejection of a proof in bankruptcy has been made *ex parte*, it may be open to the registrar, on an application to set aside the order, to hear the motion *de novo* in the presence of both parties and if satisfied on the merits that time should be extended to make a new order or to allow the *ex parte* order to stand (see p. 43, letter B, post).

Appeal allowed.

[As to Powers of Registrars in Bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 591, para. 1185; as to Extension of Time for Appeal, see *ibid.*, 585, para. 1174; and for cases on the subject, see 4 DIGEST 530, 531, 4855-4866 and DIGEST (Practice) 805, 3682-3698.

For the Bankruptcy Act, 1914, s. 102 (1) (2) (f), s. 109 (4), and s. 147 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 415, 420, 432.

For the Bankruptcy Rules, 1952, rr. 8, 9, 31, 32, 389, see 3 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 159, 160, 164, 243.]

Case referred to:

(1) *Re Lawrence*, (1876), 4 Ch.D. 139; 46 L.J.Ch. 119; Digest (Practice) 805, 3682.

Appeal by the trustee in bankruptcy of a debtor, Charles Vivian Vanbergen, against an order of Mr. Registrar CUNLIFFE, dated Oct. 26, 1954, dismissing the trustee's application to set aside an order of the registrar dated July 20, 1954, extending the time within which the debtor's wife, claiming to be a creditor, might appeal against the trustee's rejection of her proof of a debt of £20,245.

A The trustee contended that the order extending the time ought not to have been made on an ex parte application made after the time for appealing had expired, that the determination of the application was not within the jurisdiction of the registrar but should have been dealt with by the judge in bankruptcy in court, and that on the merits no good cause was shown for an extension of time.

B *Muir Hunter* for the appellant trustee in bankruptcy.
I. H. Jacob for the respondent creditor.

JENKINS, L.J.: This is an appeal by the trustee in bankruptcy of a debtor, Charles Vivian Vanbergen, from an order of Mr. Registrar CUNLIFFE dated Oct. 26, 1954, dismissing an application by the trustee to set aside an order made by the same registrar on July 20, 1954, on an ex parte application by a person claiming to be a creditor entitled to prove in the bankruptcy, namely, Mrs. Ethel Anne Vanbergen, the wife of the debtor, extending the time within which the creditor might appeal from the trustee's rejection of her proof of debt in respect of a sum of £20,245.

D The creditor put in her proof for £20,245, and the trustee rejected that proof and gave notice of rejection on June 21, 1954. The time for appealing from the rejection is twenty-one days, and the last day of the permitted time was therefore July 12, 1954. On July 19, 1954, one week after the time had expired, the creditor applied ex parte to the registrar for extension of time, and on July 20 the registrar made the order extending the time to fourteen days from the date of the order, i.e., until Aug. 3, 1954. Having obtained that extension on her ex parte application, the creditor gave notice of appeal, but that notice contained no reference to the order, of which the trustee had not otherwise been apprised, so that it appeared, on the face of it, to be irregular. Nevertheless, it appears that the trustee made an application for particulars of the matters stated in the affidavit in support of the creditor's notice of motion of appeal. Counsel for the trustee told us that that was done merely in order that the trustee might be ready if this notice, on the face of it appearing to be irregular, was upheld as a good notice. There were subsequent applications, but they were expressed, or one of them, an application for discovery, was expressed, to be made without prejudice to the trustee's right to contend that the notice was bad. One of the submissions made by counsel for the creditor was that any irregularity in the notice must be taken as having been waived by the trustee.

G I think there is no substance in that submission. By notice of motion dated Oct. 22, 1954, the trustee applied to the registrar to have the ex parte order of July 20, 1954, set aside. The motion was dismissed with costs by order of the learned registrar dated Oct. 26, 1954, and the present appeal ensued. I understand that the creditor's appeal has been before the court on one or two occasions, but has been adjourned pending the issue of the present appeal, on which the validity of the creditor's notice of appeal must depend.

H Counsel for the trustee takes three points. First, he says that the order extending the time for the creditor's appeal ought not to have been made ex parte and therefore should be set aside. Secondly, he says that, on the true construction of the Bankruptcy Act, 1914, and of the rules made thereunder, now the Bankruptcy Rules, 1952, an application for the extension of time for appealing from a rejection of proof is a matter not within the jurisdiction of the registrar, but one which should be dealt with by the judge in bankruptcy in court. Thirdly, he says that, on the merits, no good cause (to use the language of the rule) was here shown for an extension of time.

Rule 261 of the Bankruptcy Rules, 1952, provides:

"No application to reverse or vary the decision of an Official Receiver or trustee rejecting a proof shall be entertained after the expiration of twenty-one days from the date of the decision."

That is subject to s. 109 (4) of the Act, which provides:

"Where by this Act, or by general rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose."

Rule 389 provides:

"The court may, for good cause shown, extend or abridge the time appointed by these rules or fixed by an order of the court for doing any act or taking any steps in any proceedings."

It thus appears that the strict provision of r. 261, that no application to reverse or vary a decision rejecting a proof shall be entertained after the expiration of twenty-one days, is relaxed to the extent of allowing the court, for good cause shown, to extend the time and, as appears by s. 109 (4), to extend it as well after as before the time limited by the rule has expired.

It is next necessary to consider whether an application for the extension of time can properly be made *ex parte* after the time for appealing from a rejection of a proof has expired, as in the present case. The relevant rules are as follows:

"31. Except where these rules otherwise provide, every application to the court shall, unless the court otherwise directs, be made by motion supported by affidavit.

"32. (1) Where any party other than the applicant is affected by the motion, no order shall be made except with the consent of that party, or upon proof that notice of the motion and a copy of the affidavits in support thereof have been duly served upon him: Provided that where the court is satisfied that serious mischief may result from delay caused by proceeding in the ordinary way, it may make an order *ex parte* upon such terms as to costs and otherwise, and subject to such undertaking, if any, as the court thinks just. (2) Any party affected by an order made *ex parte* may move to set it aside."

Having regard to those provisions, I am satisfied that the order extending time in this case ought not to have been made *ex parte* and accordingly that the registrar ought, if he had strictly adhered to the proper practice, to have set it aside. The expiry of the time limited by r. 261 for appealing from the rejection of the proof had the effect of conclusively determining that the creditor was not entitled to share in the assets of the bankrupt and that was a benefit or advantage conferred on the trustee as representing the general body of creditors, inasmuch as, by the rejection of the proof, the fund available for distribution amongst the effectively proving creditors was increased. Accordingly, it is clear that the trustee, in his representative capacity, was a person who would be prejudiced by an extension of the time for appealing against such rejection, for an order extending it would have the effect (so to speak) of depriving him of a vested interest. Therefore, it seems to me plain on principle and on the rules that the application ought to have been made by motion on notice, as contemplated by r. 32. That is in accordance with the practice in regard to appeals to this court, for I understand it to be well settled that an *ex parte* application for the extension of time will not be entertained after the time for appealing has expired. That appears from *Re Lawrence* (1).

I have said that, in my view, strict adherence to the rules demanded that the registrar should set aside the order of July 20, 1954, on the trustee's application. I should, I think, qualify that statement by referring to s. 147 of the Act, sub-s. (1) of which provides:

"No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been

- A caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court."

On that principle, it might be open to the registrar in a case of this sort, while holding that the order ought not to have been made *ex parte* and should on an application by the party aggrieved to set aside the order, be set aside, nevertheless to proceed to hear the matter *de novo* in the presence of both parties, and either to make a fresh order extending the time or, for convenience, to allow the order made *ex parte* to stand, if satisfied that this would have been the result if he had heard both parties on the original occasion. In my view, however, the learned registrar cannot, by reference to his note, be taken to have disposed of the matter in that way. There was some difference of recollection between counsel as to what exactly happened before him, but I think the position which he took in the matter is reasonably plain from this passage in his note. He made a note to the effect that counsel for the trustee wanted to know if he was entitled to be heard on the merits. Then follows this passage:

- "(Self): It does not seem to me to be necessary. I have decided on an application conforming with the practice of this court of upwards of sixty years, i.e., *ex parte* to the registrar—that a good *prima facie* case has been made for extending the time for Mrs. Vanbergen appealing against the trustee's rejection of her proof. I see no good reason for altering that decision—after all, I am not allowing Mrs. Vanbergen's appeal; I am only exercising my discretion as to whether in the circumstances she shall be allowed an extension of time for bringing that appeal."

- E To my mind that passage from his note makes it reasonably plain that the learned registrar was adhering to the view, on which he had previously acted, that the regular procedure was that an *ex parte* application after time expired for extension of the time for appeal from rejection of proof was an application which could properly be entertained, and, having, as he thought, made a regular and valid order on such an *ex parte* application, he saw no good reason for altering it. In my view, the learned registrar was in error in dealing with the matter in that way, and the result must therefore be, in accordance with what in my judgment is the strict and proper procedure, that the order of July 20, 1954, extending the time *ex parte* must be set aside. That does not involve entertaining here, by a side-wind, an appeal out of time from the order of July 20, 1954. The appeal is from the order of Oct. 26, 1954, refusing to set aside the order of July 20, 1954; and, in my view, the order which ought to have been made on Oct. 26, 1954, was an order setting aside the order of July 20, 1954; if the appeal is allowed, that will follow as a necessary consequence.

- That is sufficient to dispose of this case. But, since the matter has been discussed before us, I think it right to say something about the jurisdiction of the registrar. The relevant provisions are in s. 102 of the Act, which provides:

- H "(1) The registrars in bankruptcy of the High Court, and the registrars of county courts having jurisdiction in bankruptcy, shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the court. (2) Subject to general rules limiting the powers conferred by this section, a registrar shall have power—(a) To hear bankruptcy petitions . . . (b) To hold the public examination of debtors . . . (f) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers."

I The Bankruptcy Rules, 1952, provide:

"4. (1) 'The court' includes a registrar when exercising the powers of the court . . .

" 8. (1) The following matters shall be heard and determined in open court . . . (g) Appeals against the rejection of a proof, or applications to expunge or reduce a proof, where the amount in dispute exceeds £200 . . . (2) Any other matter or application may be heard and determined in chambers."

Rule 9, headed " Jurisdiction of registrars " provides:

" The registrar may, under the general or special directions of the judge, hear and determine any matter or application referred to in s. 102 (2) of the Act."

Thus, by the joint effect of s. 102 (2) and r. 8 and r. 9, the registrar has jurisdiction to hear and determine the matters mentioned in s. 102, including matters proper to be dealt with in chambers, but there is no express reference to the particular matter here in question, namely, applications for the extension of time within which to appeal from the rejection of a proof. On the other hand, the actual appeal from rejection of a proof is one of the matters which, according to the rules, are to be heard in open court. If I followed correctly the argument of counsel for the trustee, he says that by implication that means that an application to extend the time for appealing should be dealt with in the same way, inasmuch as the effect of r. 8 (1) (g) is to make the appeal itself a matter for the judge. That submission seems to me to be not without substance, and, so far as I am able to judge, it would probably be more convenient and more suitable if the judge who was going to hear an appeal from an order rejecting a proof should also deal with any question as to the extension of time within which to perfect and lodge an appeal of that kind. But I cannot find any sufficiently clear indication in the rules to enable me to hold that, as matters stand at present, applications for the extension of time are not proper to be dealt with by the registrars in bankruptcy. It seems that, according to the long-standing practice in bankruptcy, the registrars have consistently dealt with these matters. I believe instances of their having dealt with them can be found extending over as long as sixty years. Accordingly, I wish to say nothing in this case to alter or cast doubt on a well-settled practice, but it might conceivably be worth consideration by the judges of the Chancery Division exercising the bankruptcy jurisdiction whether the practice in this respect might not advantageously be altered by a suitable direction, so that applications to extend the time for these appeals should be dealt with by the judge in bankruptcy, as are the appeals themselves.

There remains the third matter, whether good cause was here shown for an extension of time, if the extension of time had been applied for in a regular manner. In view of the conclusion I have reached on the first submission of counsel for the trustee, this also is a point with which, for the purposes of our decision, it is, strictly speaking, unnecessary for me to deal, but I feel obliged to say that the affidavit in support of the ex parte application for extension of time seems to have fallen far short of showing any good cause at all for an extension of time. It was sworn by one Dawson, a managing clerk, and he says :

" (1) My firm act for Ethel Anne Vanbergen who claims to be a creditor in the bankruptcy for the sum of £20,245. A proof of debt of this amount was lodged with the trustee who has given notice of rejection of the same dated June 21, 1954. (2) The said Ethel Anne Vanbergen is the wife of the above-named debtor who is now serving a term of imprisonment. The claim of the said Ethel Anne Vanbergen is in respect of various loans and other sums payable to her by the above-named debtor over a period of approximately seven years and the total amount is made up of numerous payments. (3) In the circumstances, my firm were not able to obtain full instructions to enable the proceedings to apply to reverse the trustee's decision to be commenced within the time limited. The said debtor had

- A been seriously ill in prison hospital and owing to this illness it was some time before he could be seen to obtain certain information which was required so that details of the claim could be given. (4) It is respectfully requested that in the circumstances the time for applying to reverse the trustee's decision in rejecting the proof of debt of the said Ethel Anne Vanbergen may be extended for fourteen days."
- B That affidavit, as I have said, is made, not by the creditor herself, but by a managing clerk. It gives no details; it condescends to no particulars. Although the creditor was able to lodge a proof, presumably a bona fide proof, for £20,245, it is here said in quite general terms that the information necessary for the purposes of lodging the appeal had not yet been obtained. There are no dates and no details whatsoever. To my mind, the affidavit comes to no more than a mere
- C statement that the creditor is not ready, with a submission that because the creditor is not ready the time ought to be extended. It is also not without significance that, in order to make out her claim, this creditor apparently found it necessary to consult her husband, the debtor. I find it difficult to see for what purpose that should be necessary, if there is a bona fide claim.
- D For these reasons I am of opinion that the trustee's appeal should here succeed on the first of the three grounds with which I have dealt, and I would make an order accordingly, the effect of which will be to set aside the order of July 20, 1954, by allowing the appeal from the registrar's refusal to set it aside by the order of Oct. 26, 1954.

E **HODSON, L.J.:** I entirely agree with the judgment of my Lord. On the question of jurisdiction, it appears from r. 8 that certain matters are to be heard and determined in open court. Those matters include, under r. 8 (1) (g):

"Appeals against the rejection of a proof, or applications to expunge or reduce a proof, where the amount in dispute exceeds £200."

That heading covers this case. Then, r. 8 (2) provides:

F "Any other matter or application may be heard and determined in chambers."

Under s. 102 (2) (f) of the Act, the registrars in bankruptcy of the High Court have power

"To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers."

- G On the face of it, therefore, it appears as if an application for an extension of time can, by the combined effect of s. 102 (2) (f) and r. 8 (2), be made to a registrar in bankruptcy. But I agree with my Lord that there is force in the argument of counsel for the trustee that, the judge alone having jurisdiction to hear and determine the appeal against rejection of proof, that would naturally carry with
- H it the duty of dealing with applications for extension of time, and I would like to support the suggestion that has been made that, in future, notwithstanding the long practice which has existed in the past, the learned judges of the Chancery Division might consider the making of a direction to the end that they should themselves deal with applications for extension of time in these matters. It seems to me an exceedingly important matter, because, as was pointed out to us
- I in argument, after the time for appeal against rejection of proof has expired, the trustee in bankruptcy, on behalf of the general body of creditors, has acquired a vested right to the estate of the bankrupt which cannot be disturbed, as the rules show, without good cause.

I cannot forbear to add that it passes my understanding how the observations contained in the affidavit of Mr. Dawson could be regarded as good cause. I do not propose to add anything further to my Lord's criticisms of that affidavit which, in my opinion, are thoroughly well founded. I agree that the appeal should be allowed and that the order which has been proposed should be made.

VAISEY, J.: I agree and I have nothing to add.

Appeal allowed.

Solicitors: *Ward, Bowie & Co.* (for the appellant trustee); *S. Rutter & Co.* (for the respondent creditor).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

KUENIGL v. DONNERSMARCK AND OTHERS.

[QUEEN'S BENCH DIVISION (McNair, J.), October 26, 27, 28, 29, November 1, 2, 3, 4, 5, December 3, 1954.]

Enemy—Company registered in England acquiring enemy character—Whether remaining subject to English law concerning trading with the enemy.

Trading with the Enemy—English company having enemy character—Validity of acts performed on behalf of company in Germany during the war of 1939-45—Executory contract—Intercourse with enemy involved—Severance of contractual provisions.

Enemy character, when acquired by an English limited company, is not a substitute for the company's original character but is something added to it (see p. 52, letter B, post).

The H. Co., Ltd. was incorporated and registered in England but was controlled by persons in Austria and had its main assets in Silesia. In 1929, legal proceedings in the Austrian courts were compromised on terms that A should pay to K certain moneys by instalments over fifteen years and that the company should guarantee A's obligation. In 1939 (by which time Austria had been incorporated in the German Reich), a further agreement was made between the parties to the agreement of 1929 under which the company became the principal debtor, A (who was at all material times resident in enemy territory) being discharged from his obligation. The agreement of 1939 further provided for (i) outstanding questions between the parties to be resolved in the German courts, (ii) the payment by the company of fees to the German receiver in bankruptcy, and (iii) the payment of moneys to K's creditors in Germany. On the outbreak of war with Germany the company acquired enemy character. In March, 1940, a new agreement to an effect similar to the agreement of 1939 was agreed on behalf of the H. Co., Ltd. within German territory.

Held: (i) a company incorporated under English law and registered in England which acquires enemy character on the principles laid down in *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.* ([1916] 2 A.C. 307), does not cease to be, in English law, an English company subject to English law; and, therefore, it remains subject to the common law prohibition against trading with the enemy (*V/O Sovfracht v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* [1943] 1 All E.R. 76, considered), and also remains subject to the penalties imposed by legislation on trading with the enemy to the same extent as any other English company residing in Great Britain.

(ii) thus the agreement of 1939 was abrogated on the outbreak of war with Germany in 1939, because it was of an executory character and (a) it involved intercourse with persons in Germany or benefit to such persons and provided means of communication with them, (b) it was impossible to sever from the agreement those provisions which offended, for there was no authority that for this purpose severance could ever take place, and furthermore the offending provisions were not supported by separate consideration, but were inextricably interwoven with the remaining provisions, and (c), on the facts, the agreement of 1939 did not merely provide a method of discharging that of 1929 (which, since K's part would have been wholly executed, would not have been abrogated on the outbreak of war,

A but merely suspended), and in any event involved intercourse across the line of war.

Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag ([1946] 1 All E.R. 36) distinguished.

(iii) as the authority of the directors or agents in Germany of the H. Co., Ltd. was determined automatically on the outbreak of war in 1939 the agreement of 1940 was not to be taken as an agreement of the H. Co., Ltd.

B [As to a Company having Enemy Character, see 6 HALSBURY'S LAWS (3rd Edn.) 113, para. 235; and for cases on the subject, see 2 DIGEST 145, 146, 194-199.]

Cases referred to:

- C (1) *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 2 Digest 145, 195.
- (2) *Soefracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] 1 All E.R. 76; [1943] A.C. 203; 112 L.J.K.B. 32; 168 L.T. 323; 2nd Digest Supp.
- (3) *Elders & Fyffes, Ltd. v. Hamburg Amerikanische Packetfahrt Act.*, (1917), 34 T.L.R. 4, 275; 2 Digest 176, 407.
- D (4) *The Unitas*, [1948] 1 All E.R. 421; [1948] P. 205; *affd.* P.C. sub nom. *Lever Brothers & Unilever N.V. v. H.M. Procurator General, The Unitas*, [1950] 2 All E.R. 219; [1950] A.C. 536; 2nd Digest Supp.
- (5) *Swedish Central Ry. Co., Ltd. v. Thompson*, [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest 28, 144.
- E (6) *Egyptian Delta Land & Investment Co., Ltd. v. Todd*, [1929] A.C. 1; 98 L.J.K.B. 1; 140 L.T. 50; sub nom. *Todd v. Egyptian Delta Land & Investment Co., Ltd.* 14 Tax Cas. 119; Digest Supp.
- (7) *Gasque v. Inland Revenue Comrs.*, [1940] 2 K.B. 80; 109 L.J.K.B. 769; 23 Tax Cas. 210; 2nd Digest Supp.
- (8) *Bergner Engel Brewing Co. v. Dreyfus*, (1898), 70 American State Reports 251.
- F (9) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 2 Digest 144, 189.
- (10) *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; 87 L.J.K.B. 531; 118 L.T. 181; 12 Digest (Repl.) 447, 3380.
- (11) *Putsman v. Taylor*, [1927] 1 K.B. 637; 96 L.J.K.B. 315; 136 L.T. 285; *affd.* C.A., [1927] 1 K.B. 741; 96 L.J.K.B. 726; 137 L.T. 291; 12 Digest (Repl.) 325, 2514.
- G (12) *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36; [1946] A.C. 219; 115 L.J.Ch. 58; 174 L.T. 49; 12 Digest (Repl.) 436, 3334.

Trial of preliminary issues.

H The plaintiff brought this action against the first defendants for moneys due under an agreement and against the second defendant for moneys due under a written guarantee. In 1920 the plaintiff, Count Philip Kuenigl, an Austrian national resident in Hungary, married Thea, Countess Kinsky, the granddaughter of Count Arthur Henckel, the head of the Austrian Von Donnersmarck family. In 1921 Count Arthur died, and his son, the first defendant, Count Alfons Henckel, became the universal heir of his estate. Count Arthur's two daughters (one of whom was the mother of Thea) became beneficiaries under his will and also claimed to be entitled as against the universal heir to claim their legitimate shares in the estate as inheritors. Included in this estate were valuable mines at Beuthen in Upper Silesia, and in 1921, in view of the then political situation, the Von Donnersmarck family caused the defendant company, the Henckel Von Donnersmarck Beuthen Estates, Ltd., to be incorporated in England, to which the mines in Upper Silesia were transferred. In 1923 the plaintiff took over by assignment certain claims against the first defendant, and he then brought proceedings in respect of these claims in the provincial court of

Klagenfurt in Austria. These proceedings resulted in a compromise agreement (hereinafter referred to as "the 1924 agreement"), by which the first defendant agreed to pay the plaintiff 3,100,000 gold marks by two instalments of 100,000 gold marks and the balance by further instalments of gold marks over the period July, 1924, to July, 1934. In 1928, default in the payment of instalments having been made, the plaintiff commenced proceedings in the court of Breslau and the court of Klagenfurt to recover the instalments in arrears. These proceedings in turn resulted in a further compromise agreement (hereinafter referred to as "the 1929 agreement"), by which the actions were withdrawn on terms that the first defendant should pay the plaintiff 1,300,000 gold marks by yearly payments of 124,000 gold marks payable in quarterly instalments for fifteen years and that the defendant company, inter alia, should guarantee the first defendant's obligation. No payments under this agreement were made after Jan. 1, 1932. In March, 1932, the defendants brought proceedings against the plaintiff to obtain, inter alia, a declaration that the agreements of 1924 and 1929, in so far as they provided for payment in gold marks, were void. These proceedings were terminated in the plaintiff's favour in 1936 by a decree of the German Supreme Court. In November, 1932, the plaintiff commenced proceedings in England against the defendant company as guarantors, but this action remained dormant while the German proceedings were being carried on. In 1934 the defendant company, having purchased certain claims by third parties against the plaintiff, commenced bankruptcy proceedings against him in the provincial court of Klagenfurt, but after the decision of the German Supreme Court in 1936, an agreement was concluded in 1939 (hereinafter referred to as "the 1939 agreement"), by which time Austria had been incorporated in the German Reich. This agreement was described as a part settlement of the plaintiff's claim based on the 1924 and 1929 agreements. By it, inter alia, the defendant company's guarantee was extinguished and they became the principal debtor, the first defendant personally being discharged. Scheduled to the agreement was a statement of accounts as at Jan. 2, 1939, the total of the instalments outstanding being 864,079 gold marks. Against this were set fourteen claims by third parties against the plaintiff which had been purchased by the defendant company, but, as the plaintiff disputed the amount of these claims, provision was made for vesting them in the defendant company so that certain "reserved questions" set out in the agreement relating to these claims might be determined between the parties in one legal action. For this purpose it was agreed that the provincial court of Beuthen should have jurisdiction for such legal proceedings. In June, 1939, the relevant exchange control office notified its agreement with the compromise but stipulated that, if payment was to be made to foreigners (which would include the plaintiff then resident in Hungary), a special permit would be required, and, further, a special permit would be required for the payment of the plaintiff's legal costs in London. Owing, among other things, to the outbreak of the war, it became expedient to modify the 1939 agreement, and, accordingly, in March, 1940, a new agreement (hereinafter referred to as "the 1940 agreement") was entered into between the parties which followed broadly the same lines as the 1939 agreement. However, up to the time in 1945 when Beuthen was overrun by the Russian forces, the "reserved questions" had not been determined by the court of Beuthen, though proceedings for that purpose had been instituted. It was agreed that the provincial court of Beuthen throughout 1939 and 1940 was a court forming part of the German judicial system, but that since 1945 when Beuthen was occupied by Russian forces and later when it came under Polish administration, any court at Beuthen had formed part of the Polish and not the German judicial system. Accordingly, it was admitted that the clause in the agreement relating to the determination of the "reserved questions" by the provincial court of Beuthen had become impossible of performance. The plaintiff claimed, inter alia, that he was entitled

A to claim against the first defendant as principal debtor, or, alternatively, against the defendant company as guarantors, the principal and interest due under the 1929 agreement, on the footing that the 1939 and 1940 agreements were to be wholly disregarded as being of no legal effect in English law.

On Mar. 9, 1953, the master ordered that the following preliminary points be tried: 1. (a) was there an agreement concluded between the plaintiff and the first defendant and the defendant company in May, 1939? If yes, (b) was that agreement of full force and effect between the parties? If yes, (c) must the rights (if any) of the plaintiff against either or both defendants be determined in accordance with that agreement? If yes, (d) had the plaintiff the right to have the reserved questions determined in the present action? And (e) did that agreement, on its true consideration, afford a defence to either or both defendants against the plaintiff's claims in the present action, excluding claims which arose on the reserved questions if the answer to (d) was affirmative? 2. If the answer to question 1 (e) was negative, then: (a) was there a compromise agreement concluded between the plaintiff and the first defendant and the defendant company in March, 1940? If yes, (b) was that agreement unlawful by reason of English law relating to trading with the enemy? If not, (c) must the rights (if any) of the plaintiff against either or both defendants be determined in accordance with that agreement? If yes, (d) had the plaintiff the right to have the reserved questions determined in the present action? And (e) did that agreement on its true construction afford a defence to either or both defendants against the plaintiff's claim in the present action, excluding claims arising on the reserved questions if the answer to (d) was affirmative? At the hearing, a third question was added by consent which is not dealt with in this report.

Leonard Caplan, Q.C., and M. Littman for the plaintiff.

B. J. M. MacKenna, Q.C., and J. E. S. Fawcett for the defendants.

Cur. adv. vult.

F Dec. 3. McNAIR, J., read the following judgment in which he stated the facts, answered question 1 (a) in the affirmative and question 1 (b) in the negative and (from which it followed that the answer to question 1 (e) would also, in effect, be negative) continued on question 2 (a): On behalf of the plaintiff it was submitted that, on the outbreak of war between Great Britain and Germany on Sept. 3, 1939, the 1939 agreement (even if contrary to his contention it ever came into effect) was abrogated, as it was of an executory character and (i) involved either intercourse with persons in Germany or benefit to such persons, or (ii) provided means of communication with such persons. It was further submitted that the 1940 agreement could not be regarded in English law as being the agreement of the defendant company so as to bind them, nor could any payments made either under the 1939 agreement, if there were any, or the 1940 agreement by any persons purporting to act on behalf of the defendant company, be taken in English law to be payments by the company, since on or by reason of the outbreak of war all persons in Germany who before the outbreak of war were directors of or agents of the defendant company ceased to have any authority to act for the company. In addition, it was submitted that the 1940 agreement, if ever made, was abrogated on the same grounds as were advanced for the abrogation of the 1939 agreement.

I To these submissions, the broad answers made by the defendants may be summarised as follows: (a) On the facts of this case, the defendant company, though incorporated and registered in England, is to be treated as a person in Germany and not in England, with the result that no intercourse, benefit or communication took place or was required to take place across the line of war and the authority of the defendant company's directors and agents was not terminated. (b) If (contrary to their submission under (a)) the defendant company is to be treated as a natural person resident in England, then, on the



true construction of the 1939 agreement, (i) there were no terms which necessitated intercourse with, benefit to, or communication with, persons in Germany, and (ii) if there were any such terms, the terms in question were not essential to the validity of the agreement and could be severed, leaving the remainder unaffected. It was further argued that if, on the hypothesis stated, the agency of the defendant company's directors and agents was terminated, the defendant company ratified the 1940 agreement (which they were entitled to do since its terms or its essential terms like the 1939 agreement did not involve prohibited intercourse, benefit or communication) and adopted the payments made thereunder. I am conscious that in that summary I may not have given full effect to the detailed arguments which were presented to me, but that, in outline, is how I understand the contentions.

I propose first to deal with the contention that the defendant company is to be treated as a person resident in Germany and not in England. The facts as to the incorporation and pre-war activities of the company may be summarised as follows: (i) The company was incorporated on Dec. 2, 1921, with an authorised capital of £500,000 divided into 500,000 shares of £1 each. At all material times the registered office of the company was in London. The primary purpose of its incorporation (though not so stated amongst the statutory objects) was to take over the valuable mines owned by the Henckel Von Donnersmarck family situated at Beuthen in Upper Silesia, the fate of which was thought to be uncertain pending the holding of a plebiscite on the status of the Silesian triangle under the peace treaties. (ii) During the period from 1926 to 1931 the company carried out large transactions in the United Kingdom principally for financing its coal interests, and advances were obtained through various banking houses in London; but the exchange restrictions following on the financial crisis of 1931 made it impossible for the company to repay these advances to their British creditors. These outstanding advances as at Jan. 9, 1947, were stated by the company to amount to £239,847. (iii) For some years before and up to the outbreak of war, out of the eleven directors eight were resident in Germany, two in Great Britain and one in Belgium. (iv) At the outbreak of war, out of the 490,500 issued shares 2,502 shares were held by the two English directors, one by the Belgian director, 75,000 by Branch Nominees, Ltd., on behalf of an English bank and the remainder were held by or on behalf of the German directors. (v) At the outbreak of war and for some years before, no business of the company had been transacted in England. The whole management and control of the company was, and had been, exercised from Germany. The seal of the company was kept in Germany and all board meetings were held there and the business of the company was transacted in Germany by the German directors without reference to the English directors. (vi) At the outbreak of war, the assets of the company in England consisted of a bank balance of £15 with the National Provincial Bank, 66,800 shares (the value of which was not proved) in the Southern European Metal Corporation, Ltd., an English registered company, a bank balance of £294 with the Westminster Bank on which the bank claimed a lien, and 8,495 shares of Hugohutte Chemical Corporation, Ltd., out of 8,500 issued shares, this being a company formed by the Henckel family for the purpose of holding other interests in Germany. On these facts I find that the defendant company was, in the eyes of English law, a company having enemy character on the principles laid down in *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.* (1).

On this state of facts and finding, it was argued by counsel on behalf of the defendants that, for the purposes of the common law prohibition against trading with the enemy, the company must be treated as being in Germany and not in England. In support of this argument reliance was primarily placed on two passages in the opinions of VISCOUNT SIMON and LORD WRIGHT in *V/O Sovfracht*

A v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* (2). VIS-COUNT SIMON, L.C., laid down the following propositions ([1943] 1 All E.R. at p. 79):

B “(i) The test of ‘enemy character’ is fundamentally the same . . . whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law. (ii) The test is an objective test, turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled: it is not a question of nationality or of patriotic sentiment.”

LORD WRIGHT is reported as having said (*ibid.*, at p. 84):

C “Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English law is not nationality, but domicile in the sense of settled residence or, in the cases of traders, commercial domicile . . . However, the right to sue or prosecute an action in court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense.”

D In parenthesis, I should observe that, in this passage, LORD WRIGHT is clearly (as was LORD SIMON expressly) dealing with the position at common law, since by the Trading with the Enemy Act, 1939, s. 2 (1) (d), “enemy” is expressly defined to mean (*inter alia*)

E “any body of persons constituted or incorporated in, or under the laws of, a state at war with His Majesty.”

F In my judgment, it is clear that LORD SIMON and LORD WRIGHT in these passages, so far as they deal with the law as to trading with the enemy, are propounding the test to be applied in determining whether such a company is a person with whom a person subject to English law may without offence trade. They are merely re-stating in their own words the third proposition propounded in the opinion of LORD PARKER OF WADDINGTON in the *Daimler* case (1) in the following passage ([1916] 2 A.C. at p. 345):

G “(3) Such a company [i.e., a company incorporated in the United Kingdom] may, however, assume an enemy character. This will be the case if its agents or persons in de facto control of its affairs, whether authorised or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.”

H I emphasise the last sentence.

I Neither of these passages in LORD SIMON’s or LORD WRIGHT’s speeches is dealing with the question which I have to deal with, viz., whether an English company found to have enemy character by reason of enemy control ceases to be in the eye of the English law an English company and subject to the prohibition which English law imposes on persons subject to that law. On this question, there is, so far as I know, no direct authority, but such authority as there is in my judgment strongly suggests a negative answer. In *Elders & Fyffes, Ltd. v. Hamburg Amerikanische Packetfahrt Act.* (3), BRAY, J., made the following comment on LORD PARKER’s opinion to which I have just referred, viz., that (34 T.L.R. at p. 4)

“ . . . LORD PARKER only decided that by certain conduct an English company might become an enemy company. He did not say that it would thereby cease to be an English company.”

With this judgment SWINFEN EADY, L.J. (*ibid.*, 275) expressed his entire agreement, though his judgment proceeded on different findings of fact from those adopted by BRAY, J. In *The Unitas* (4), LORD MERRIMAN, P. ([1948] 1 All E.R. at p. 432), declined to apply the principle of the *Daimler* case (1) in reverse in favour of a claimant in prize so as to convert a German registered company into an allied company by reason of its control from Holland. A

Further, I am aware of nothing in LORD PARKER's formulation of the *Daimler* test (1), or in any later application of that test, which involves the conclusion that the acquisition of enemy character by a corporation implies the loss of the national character of that corporation. Enemy character is not substituted for the original character, but is something added to it. An English company which has acquired enemy character continues to owe its very existence to English law (under which it was incorporated) and remains subject to all its obligations towards the Crown under the Companies Acts as an English company. It would, in my judgment, be absurd that the acquisition of enemy character should release it from the obligations attaching to an English company and enable it to do lawfully things which an English company not possessing enemy character was lawfully unable to do. B C

I can derive little, if any, assistance in the solution of the problem which I have to solve from cases dealing with the residence of English companies for the purpose of income tax, such as *Swedish Central Ry. Co., Ltd. v. Thompson* (5), and *Egyptian Delta Land & Investment Co., Ltd. v. Todd* (6). But the decision of MACNAGHTEN, J., in *Gasque v. Inland Revenue Comrs.* (7) supports the conclusion that the domicile of a limited company (which is of particular relevance here) is the place of its registration and that this domicile clings to it throughout its existence. This, apparently, is also the position under American law: *Bergner Engel Brewing Co. v. Dreyfus* (8) (a decision of HOLMES, J.), referred to in the judgment of MACNAGHTEN, J., *supra*. See, too, DICEY'S *CONFLICT OF LAWS* (6th Edn.), Part 1, r. 18: D E

"The domicile of a corporation is the country in which it is registered. If it is not required in law to be registered, its domicile is in the country by the law of which it is incorporated." F

I think it is also clear that, in so far as nationality can by analogy be applied to a juristic person, its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality (see *Janson v. Driefontein Consolidated Mines, Ltd.* (9) [1902] A.C. at p. 505 per LORD LINDLEY; *Gasque v. Inland Revenue Comrs.* (7); 9 HALSBURY'S *LAWS* (3rd Edn.) 19, para. 30). G

In my judgment, it would be contrary to principle and to public policy as embodied in the trading with the enemy law to hold that a company incorporated under the laws of this country and registered here, and so having both an English domicile and British nationality, can cease to be in the eye of English law an English company subject to English law by reason of the fact of enemy control. Enemy control may operate to the prejudice of an English company by conferring on it enemy character but cannot confer benefit on it exonerating it from the operation of English law. Could it be said that this English registered company could lawfully by English law, merely because it had acquired enemy character by means of enemy control, have, during the war, entered into contractual relations to supply a German armament firm with coal from its Beuthen mines, or that it could, after the war, ask the English courts to give effect to such a contract? Plainly not. H I

It follows from the conclusion stated above, first, that, as a company can only act through directors or other agents, the authority of the defendant company's directors and other agents in enemy territory was automatically determined on the outbreak of war (see the *Daimler* case (1) [1916] 2 A.C. at p. 325 per LORD ATKINSON, at p. 330 per LORD SHAW and at p. 336 per LORD PARKER).

- A From this it results that in English law (i) no act purported to have been performed in Germany on behalf of the company can be taken to be the act of the company, and (ii) no agreement made by persons in Germany purporting to act on behalf of the company can be taken to be the agreement of the company. Without doubt, therefore, the 1940 agreement is not to be taken as the agreement of the company.
- B It remains for consideration what effect, if any, the conclusion stated above has on the fate of the 1939 agreement. It is conceded, or if not conceded is, in my judgment, clear in principle, that, in so far as the 1939 agreement was executory on the outbreak of war, it would be abrogated at least if its performance necessarily involved intercourse or communication across the line of war or benefit to the enemy. To state the proposition in this form is probably to state it too
- C favourably for the defendants, since in *Ertel Bieber & Co. v. Rio Tinto Co.* (10), LORD DUNEDIN ([1918] A.C. at p. 274) states the proposition in the following terms:

"From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law."

- E I am, however, for present purposes only, prepared to apply the narrower proposition.

- Did, then, the performance of the 1939 agreement (assuming contrary to my earlier findings that it ever came into effect) necessarily involve intercourse or communication across the line of war or benefit to the enemy? It was an essential part of the agreement that litigation to resolve the reserved questions should be prosecuted between the defendant company and the plaintiff in the German courts. It was clearly impossible to perform this part of the contract without intercourse, for the company could take no part in such litigation except through its agents, and agency necessarily involves intercourse. Furthermore, (i) cl. 1 of the agreement expressly provides for payment by the defendant company of certain fees to the German receiver in bankruptcy; (ii) the implementation of the agreement would have resulted in the discharge of Count Alfons, a person at all material times resident in enemy territory; and (iii) the payment by the defendant company's erstwhile agents in Germany of 160,000 reichsmarks would diminish the resources of the English company, quite apart from the fact that it was clearly contemplated that, if not the whole, at least a large part of the 160,000 reichsmarks would be paid to the plaintiff's creditors in Germany. There was necessarily, then, both benefit to the enemy and detriment to the resources of the King's subjects, as well as intercourse and means of communication.

- As to the argument advanced that it is possible to sever from the 1939 agreement those provisions which offend from those which are innocent, two answers may properly be made. First, that there is no authority for the proposition that, for the purpose of the matter under consideration, severance can ever take place and no ground of public policy which requires such severance. The decisions relating to severability of covenants in restraint of trade, such as *Putsman v. Taylor* (11), seem to me to have no application at all in the present context. Secondly, that severance can only take place, if at all, if the part which it is sought to sever stands by itself supported by separate consideration. This is not the case here. The offending provisions to which I have referred are not supported by separate consideration, but are inextricably interwoven with the other promises in the agreement.

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A more refined argument was, however, presented by counsel for the defendants on the basis of the decision in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (12). This proceeded on the following lines: (i) if no agreement had been entered into in 1939, the obligations of the defendant company as guarantors towards the plaintiff under the 1929 agreement would not, on the outbreak of war, have been abrogated but would merely have been suspended, since on that assumption the plaintiff would have wholly executed his part and payment of money by instalments alone remained to be performed by Count Alfons under the guarantee of the defendant company; (ii) the 1939 agreement provided merely a method of discharge of the existing obligation to pay money by instalments, and if it had become effective before the outbreak of war it similarly would have been suspended and not abrogated; and (iii) it makes no difference that the 1939 agreement only became effective after the outbreak of war.

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I have found great difficulty in finding in the *Schering* decision (12) (which, as LORD PORTER says ([1946] 1 All E.R. at p. 53) was a very special decision) any support for these propositions or any analogy with the present case. One essential difference is that the obligation under consideration in the *Schering* case (12) involved no intercourse across the line of war, whereas the resolution of the reserved questions by litigation in the German courts between the English company and the plaintiff would (as has already been noted) necessarily involve intercourse between the English company and their legal advisers acting on their behalf in that litigation. Furthermore, in my judgment, the analysis set out in the three propositions referred to above is not accurate. The 1939 agreement did not merely provide a method of discharging an accrued right; if implemented it would (i) have created a new obligation to pay not gold marks but reichsmarks, (ii) have substituted the defendant company for Count Alfons as principal debtor, and (iii) have discharged Count Alfons.

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Up to this point in my judgment I have considered only the impact of the common law rules as to trading with the enemy. But seeing that the effect of the Trading with the Enemy Act, 1939, was also argued before me, it is right that I should shortly state my conclusions on this aspect of the matter. Having reached the conclusion that the defendant company, though acquiring enemy character, retained English domicile and nationality and did not cease to be in the eye of English law an English company subject to English law, it is clear that it remained subject to all the prohibitions imposed by s. 1 of that Act to the same extent as a British subject residing in Great Britain. But even if its position is to be equated to that of a British subject voluntarily resident in Germany, I am by no means satisfied that it would be freed from the prohibitions imposed by the Trading with the Enemy Act. Many of the old decisions dating from a more liberal age, which suggest that British subjects in enemy territory enjoy a measure of freedom of action in their dealings with the enemy, are of doubtful authority today.

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As to the contention that, after the end of the war, the defendant company ratified the 1940 agreement and adopted the payments made thereunder, the short answer, in my judgment, is that no one can ratify an agreement or adopt an act which could not lawfully have been made or done at the time when the agreement was purported to be made or the act to be done on behalf of the person ratifying.

Accordingly, my answers to the issues directed to be tried by the master's order are as follows: 1 (a) Yes; 1 (b) No; 1 (c) was by agreement between counsel withdrawn. My answer to 1 (b) being in the negative, 1 (d) and 1 (e) do not arise; but it was admitted that, in view of the disappearance of the Beuthen court, the plaintiff is entitled to have the disputed questions determined in the present action; 2 (a) No; 2 (b) Yes; 2 (c) by agreement was withdrawn; and 2 (d) and (e) must be answered as in 1 (d) and (e) above.

- A [His LORDSHIP dealt with question 3, and held that the plaintiff was not debarred by the matters raised on the preliminary issues from continuing his proceedings against the defendants.]

Solicitors: *Crawley & de Reya* (for the plaintiff); *Slaughter & May* (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

B

WARD v. LEWIS AND OTHERS. •

[COURT OF APPEAL (Denning and Morris, L.JJ.), December 3, 1954.]

Pleading—Amendment—Conspiracy to slander—No nexus between alleged slander and special damage.

C

Conspiracy—To commit tort—Merger in tort when committed.

The plaintiff, an osteopath, by his statement of claim alleged slander against four defendants and that as a result he had suffered damage. In reply to a request by the defendants for particulars of the alleged damage, he said that no special damage was alleged. By para. 8 of his statement of claim he alleged further that the defendants had conspired to make and publish defamatory statements, those statements being the slanders which he had previously alleged, but he made no allegation of damage. Paragraph 8 was ordered to be struck out since it contained no allegation of damage. The plaintiff then sought to amend para. 8 by alleging special damage. The proposed amendment contained particulars of special damage. He stated that "as a result of the allegations" his practice had suffered severely, that the value thereof had approximately halved, and he named some dozen persons who no longer attended him. On an application for leave so to amend his statement of claim,

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Held: since in its amended form para. 8 would show no nexus between the alleged slanders and the special damage, the allegation of conspiracy failed and, in the circumstances, the court would not give the plaintiff leave to amend his statement of claim.

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Per DENNING, L.J.: it is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort (see p. 56, letter G, post).

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Appeal allowed.

[As to Amendment of Pleadings, see 26 HALSBURY'S LAWS (2nd Edn.) 55-57, paras. 89-92; and for cases on the subject, see DIGEST (Pleading), 95, 96, 808-822.]

Appeal.

The first and fourth defendants appealed against an order of GERRARD, J., in chambers dated Nov. 9, 1954 whereby he gave the plaintiff leave to amend his statement of claim.

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B. B. Gillis, Q.C., for the first defendant.

H. P. J. Milmo for the fourth defendant.

Colin Duncan for the plaintiff.

I

DENNING, L.J.: The plaintiff, Mr. Stephen Ward, brings an action for slander against a number of defendants. He says in his statement of claim that he is an osteopath and that he has been slandered by the defendants, who have made various defamatory statements about him. As a result of that slander he says he has suffered damage. The defendants asked for particulars of the damage, to which he replied: "No special damage is alleged". So much for the slander action. In the same pleading he alleged conspiracy. He alleged originally in para. 8 of the statement of claim as it stood that

"the defendant Lewis conspired with the defendants Taylor and Tracey

wrongfully to make and publish false and malicious oral and written statements defamatory of the plaintiff.” A

He gave particulars of overt acts, but they were simply the slanders. That first allegation of conspiracy was struck out by the master because it omitted an essential averment, viz., an allegation of damage. Faced with that paragraph being struck out, the plaintiff by his counsel—not counsel now appearing for him—sought to amend the allegation of conspiracy by alleging special damage. B
He seeks to amend it to read in this way:

“ From in or about July, 1952, until the month of November, 1952, or thereabouts, the defendant Lewis conspired with the defendants Taylor and Tracey and the defendant company by their servants or agents as alleged in para. 1 aforesaid wrongfully to make and publish false and malicious oral and written statements defamatory of the plaintiff whereby the plaintiff has suffered damage.” C

Overt acts are alleged in para. 10 to para. 16 of the statement of claim, and those again are the slanders. In the particulars of special damage he says:

“ The plaintiff alleges that as a result of the allegations herein contained the practice of the plaintiff has suffered severely and the value thereof has been approximately halved. Prior to the said allegations herein contained the practice of the plaintiff included numerous patients connected with the journalistic profession and with the newspaper business. Upon discovery the plaintiff will disclose full details of the loss of the said practice and of the particular patients who no longer attend the plaintiff.” D

Then he gives names in the particulars of some twelve or fifteen persons who he says no longer attend him. He wishes to amend the statement of claim so as to make that a charge of conspiracy. The question is whether he should be given leave to amend his statement of claim in that way. E

The important thing to notice about the new allegation is that no connection is shown between the slanders and the damage. There is no allegation that the slanders which are charged against the defendants were either authorised to be re-published by anyone or were likely to be re-published, nor that they were in fact re-published by anyone. In the slander action some such allegation would be a necessary averment, because a man who speaks a slander is not responsible for its re-publication unless he authorises it or he knows or ought to know it is likely to be re-published. But counsel for the plaintiff says that on the conspiracy allegation it is only necessary to allege conspiracy to injure or to do an unlawful act and then to allege damage without alleging the connection between the two. I cannot agree. It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort. It is sometimes sought, by charging conspiracy, to get an added advantage, for instance in proceedings for discovery, or by getting in evidence which would not be admissible in a straight action in tort, or to overcome substantive rules of law, such as here, the rules concerning re-publication of slanders. When the court sees attempts of that kind being made, it will discourage them by striking out the allegation of conspiracy on the simple ground that the conspiracy adds nothing when the tort has in fact been committed. F
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In this case, the allegation of conspiracy fails for the simple reason that there is no nexus alleged between the falling off in the practice and the slanders which are alleged. I understand that the learned judge thought this was a border-line case. I have come to the conclusion that this is on the other side of the line. Leave to amend should not be granted in regard to the proposed para. 8 and para. 16 (which contains particulars of overt acts of conspiracy) of the statement

A of claim. I suppose that the other and minor amendments are unobjectionable and I need say nothing about them. I would allow the appeal accordingly.

B MORRIS, L.J.: I agree, and there is very little which I desire to add. In the original statement of claim, the concluding paragraphs alleged that the plaintiff had suffered damage. Particulars were requested, were delivered in July, 1953, and stated categorically that no special damage was alleged. Following that, in November, 1953, para. 8 of the statement of claim was struck out. The present application is for leave to amend the statement of claim. It does not seem to me that that leave should be given unless the new plea is in adequate form. The particulars given under the desired new para. 8 seem to me simply to be stating that at one date the practice was in a certain state and that at a later date it had declined. It does not seem to me that there is any sufficient allegation in the pleading of connection between the conspiracy and the pleaded special damage. I think this is emphasised inasmuch as the particulars still stand which say that no special damage is alleged in regard to the slanders. It is, of course, quite right, as counsel for the plaintiff has pointed out, that it may not be necessary when considering the claims made in reference to the slanders themselves to allege any special damage having regard to the nature of the alleged slanders; but the fact remains that it is still said that there is no special damage from the slanders. There is no allegation that there was any likelihood or intention that the slanders would be repeated. In my judgment, in the present form of the application it would not be proper to give leave to amend.

Appeal allowed. Leave to appeal to the House of Lords refused.

E Solicitors: *Zefferdt, Heard & Morley Lawson* (for the first defendant); *Allen & Overy* (for the fourth defendant); *Summer & Co.* (for the plaintiff).

[Reported by PHILIPPA PRICE, *Barrister-at-Law.*]

Re MAKEIN (*deceased*). MAKEIN v. MAKEIN AND ANOTHER.

F [CHANCERY DIVISION (Harman, J.), November 10, 11, December 8, 1954.]

Family Provision—"Dependant"—*Illegitimate infant son*—*Inheritance (Family Provision) Act, 1938* (1 & 2 Geo. 6 c. 45), s. 1 (1).

Statute—Construction—"Dependant" *limited to legitimate dependant.*

G An illegitimate infant son is not a "dependant" within the meaning of the *Inheritance (Family Provision) Act, 1938*, s. 1 (1), and has no claim under that Act as amended by the *Intestates' Estates Act, 1952*, s. 7 and s. 8.

[For the *Inheritance (Family Provision) Act, 1938*, as amended by the *Intestates' Estates Act, 1952*, see 32 HALSBURY'S STATUTES (2nd Edn.) 139 et seq.]

Cases referred to:

- H (1) *Wilkinson v. Adam*, (1813), 1 Ves. & B. 422; 35 E.R. 163; 44 Digest 1251, 10,786.
- (2) *Hill v. Crook*, (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 44 Digest 808, 6614.
- I (3) *Woolwich Union v. Fulham Union*, [1906] 2 K.B. 240; 75 L.J.K.B. 675; 95 L.T. 337; *affd.* H.L. sub nom. *Fulham Parish v. Woolwich Union*, [1907] A.C. 255; 76 L.J.K.B. 739; 97 L.T. 117; 71 J.P. 361; 37 Digest 255, 503.
- (4) *Maund v. Mason*, (1874), L.R. 9 Q.B. 254; 43 L.J.M.C. 62; 29 L.T. 837; 37 Digest 232, 239.
- (5) *Coleman v. Birmingham Overseers*, (1881), 6 Q.B.D. 615; 50 L.J.M.C. 92; 44 L.T. 578; 45 J.P. 521; 37 Digest 232, 245.
- (6) *Humble v. Bowman*, (1877), 47 L.J.Ch. 62; 37 Digest 400, 127.
- (7) *Lamb v. Eames*, (1871), 6 Ch. App. 597; 40 L.J.Ch. 447; 25 L.T. 175; 44 Digest 889, 7461.

- (8) *Brock v. Wollams*, [1949] 1 All E.R. 715; [1949] 2 K.B. 388; 31 Digest A
(Repl.) 664, 7641.
- (9) *Pigg v. Clarke*, (1876), 3 Ch.D. 672; 45 L.J.Ch. 849; 44 Digest 887, 7435.
- (10) *Re Joslin*, [1941] 1 All E.R. 302; [1941] Ch. 200; 110 L.J.Ch. 65; 165
L.T. 171; 2nd Digest Supp.
- (11) *Braintree Union v. Rochford Union*, (1911), 81 L.J.K.B. 251; 106 L.T.
569; 76 J.P. 41; 37 Digest 256, 504. B
- (12) *West Ham Union v. St. Matthew, Bethnal Green (Churchwardens)*, [1894]
A.C. 230; 63 L.J.M.C. 97; 70 L.T. 818; 58 J.P. 493; 37 Digest 255,
499.
- (13) *Pritchard v. Bettisfield Colliery, Ltd.*, [1925] 2 K.B. 284; 95 L.J.K.B. 49;
133 L.T. 448; 18 B.W.C.C. 204; 34 Digest 413, 3357.
- (14) *Morris v. Britannic Assurance Co., Ltd.*, [1931] 2 K.B. 125; 100 L.J.K.B. C
263; 145 L.T. 45; Digest Supp.
- (15) *Re Harrington*, [1908] 2 Ch. 687; 78 L.J.Ch. 27; 99 L.T. 723; 72 J.P.
501; 3 Digest 404, 375.
- (16) *Bosch v. Perpetual Trustee Co., Ltd.*, [1938] 2 All E.R. 14; [1938] A.C. 463;
107 L.J.P.C. 53; 158 L.T. 395; Digest Supp.
- (17) *E. v. E.*, (1915), 34 N.Z.L.R. 785. D
- (18) *Pulleng v. Public Trustee*, [1922] N.Z.L.R. 1022.
- (19) *Re Pritchard*, (1940), 40 S.R.N.S.W. 443; 57 W.N. 139.

Adjourned Summons for a declaration that the plaintiff, an infant, was entitled to be considered a dependant pursuant to the provisions of s. 1 (1) (c) of the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, s. 7 and s. 8. E

The facts appear in full in the judgment.

J. F. F. Platts-Mills for the plaintiff.

G. B. H. Dillon for the defendants, the personal representatives of the deceased.
Cur. adv. vult.

Dec. 8. **HARMAN, J.**, read the following judgment: Alfred Makein (or Makin), in the matter of whose estate this summons was issued, died, as an act of probate issuing on Jan. 29, 1954, out of the Principal Probate Registry shows, on June 12, 1953, intestate, leaving a lawful widow, the first defendant, to whom and to the second defendant (who is, I am told, his lawful son) a grant of administration was made on Jan. 21, 1954, the estate being sworn at some £16,000 net. G
On June 4, 1954, this originating summons was issued, entitled "In the matter of the intestate's estate and the Inheritance (Family Provision) Act, 1938", the infant plaintiff applying by his next friend, who styled herself his mother Betty Leventhal (feme sole). According to the plaintiff's birth certificate, he was born on Feb. 13, 1946, a son of the intestate and of the next friend: he is described in the originating summons as the natural son of the intestate. H

On the first appointment before the master, it appears that the defendants put in issue the question of the plaintiff's paternity and further took the point that even if the plaintiff proves to be that which he claims in the summons, viz., the natural son of the intestate, he is nevertheless not a dependant within the Act. Accordingly, he was allowed to amend the summons by asking for a declaration that he is such a dependant, and this issue has been adjourned to me as a point of law without any Case Stated or evidence filed, apparently under R.S.C., Ord. 34, r. 2, although no order seems to have been made under that rule. This seemed to me at one time an inconvenient way of dealing with the matter, but I was prevailed on to do so and must make certain assumptions as though this were a proceeding in lieu of demurrer under Ord. 25, r. 2, which only applies to actions by writ. I assume, therefore, for the purposes of what follows, that the plaintiff may be able to prove one or more of the following facts: (i) that he is a natural son of the intestate; (ii) that he has been acknowledged as such in the intestate's I

A lifetime; and (iii) that he has been treated as one of the intestate's family, using that word in a layman's sense. I assume also that the intestate left, besides his widow, a legitimate spinster daughter, undoubtedly a dependant within the meaning of the Act.

B The intestate died after the coming into force of the Intestates' Estates Act, 1952, which considerably amended the Inheritance (Family Provision) Act, 1938, and extended it to apply to cases of intestacy. It is, under the new s. 1 (1), a condition precedent to the plaintiff's claim that the law relating to intestates' estates is not such as to make reasonable provision for his maintenance. In fact, it is admitted that the law of intestacy makes no provision, for by the law of England a natural child cannot succeed on intestacy to any part of the estate of his father, although he may under the Legitimacy Act, 1926, s. 9, succeed to his C mother's property if she have no lawful issue. The law of intestate succession was considerably altered by the same Intestates' Estates Act, 1952, which amended the Act of 1938, and the plaintiff's claim has this startling feature, that although he may have no claim as being issue or a child of the intestate under Part I of the Act of 1952, yet he may have provision made for him by the court as an infant son of the intestate under Part II of the same statute. As the two parts D spring from separate statutes, viz., the Administration of Estates Act, 1925, and the Inheritance (Family Provision) Act, 1938, it is not impossible to achieve this result, but it seems to me that to arrive at it some very cogent reasons must be adduced.

E The reason why the plaintiff cannot rank among the statutory next-of-kin of the intestate as one of his issue or children is because, in the eye of the law, these words, in the absence of some context, connote legitimate issue and legitimate children. LORD ELDON, L.C., said in *Wilkinson v. Adam* (1) (1 Ves. & B. at p. 462):

"The rule cannot be stated too broadly, that the description 'child, son, issue', every word of that species, must be taken prima facie to mean legitimate child, son, or issue."

F See also *Hill v. Crook* (2), where the headnote reads as follows (L.R. 6 H.L. 265):

G "The word 'children' used in a will prima facie means legitimate children, and no other meaning can be given to it by any conjectural application of other words found in the will and supposed to show the testator's intention; there must be clear evidence of that intention in the will itself to establish another application of the word. There may be a gift to living illegitimate children as a class, if the words used by the testator clearly show that such children were intended to be the objects of his bounty. But whether any such gift to future illegitimate children can take effect? quære? If there is a gift to 'children' as a class, the law, if there is nothing in the will clearly to show a contrary intention, will apply the gift to legitimate children only."

H In this case, in fact, illegitimate children were held on construction to be entitled to share, and LORD CAIRNS at the beginning of his speech, after saying he had looked through a long line of cases on the subject of a will dealing with children who are said to be illegitimate, said this (*ibid.*, at p. 282):

I "I have referred to those cases not with the view of finding a will exactly parallel with the present, for that, indeed, would be a hopeless task, but for the purpose of extracting any principle which appeared to be the ratio decidendi of those various cases. And what appears to me to be the principle which may fairly be extracted from the cases upon this subject is this—the term 'children' in a will prima facie means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that prima facie interpretation is departed from. One class of cases is where

it is impossible from the circumstance of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest 'to the children of my daughter Jane', Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the courts will hold that those illegitimate children are intended, and they will take under the term 'children'. Having referred to that class of cases, I may put them altogether aside; for your Lordships will observe that that class of cases can have no bearing upon the present case, because here, as was truly said, there was no reason why legitimate children might not take under the bequest in this will. The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. I might give again a familiar illustration of that class of cases by the supposition of a bequest upon which, I presume, there would be no argument. Suppose that a testator were to say in his will, 'being aware that my daughter, who is now married to her husband, had before her marriage children by the same person, who in law are illegitimate children, and it being my intention to provide for all the children of my daughter, I give funds to trustees upon trust for her for life, and after her death to divide the funds among the children of my said daughter'. I apprehend that no person reading a bequest of that kind could hesitate to say that the testator had shown upon the face of his will, by the words which he had used, his intention, in a way that could not be mistaken, to use the generic term 'children' so as to include illegitimate children along with legitimate children."

The same principle applies to statutes, as appears in the judgment of VAUGHAN WILLIAMS, L.J., in *Woolwich Union v. Fulham Union* (3) where the headnote is ([1906] 2 K.B. 240):

"An illegitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before attaining the age of sixteen acquire a settlement by residence in a parish with its mother for the period and under the circumstances mentioned in that section. The proviso to s. 1 of the Poor Removal Act, 1846, as amended by the Poor Removal Act, 1848, does not apply to illegitimate children."

VAUGHAN WILLIAMS, L.J., discussing the argument of counsel under the Poor Removal Act, 1848, said (*ibid.*, at p. 246):

"That being so, he argued that the proviso to the section did not apply in the case of an illegitimate child. He relied for the purpose of that argument upon the technical rule of law that the word 'child' or 'children' means a legitimate child or legitimate children, and that meaning must prima facie be given to the word whenever it occurs in a statute. It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

Of course, this strict meaning of the words may be enlarged and it is, I think, possible to trace, over the last century and a half, some relaxation in the strictness of proof required. LORD ELDON, L.C., said (in *Wilkinson v. Adam* (1) 1 Ves & B.

- A at p. 462) that illegitimate children could only share where it appeared by "necessary implication" that the testator intended that they should do so, but at any rate since *Hill v. Crook* (2) the question is one of construction. Again, gifts to illegitimate future-born children were at one time considered void as being contrary to good morals and public policy, but that view does not in all its strictness obtain today. In cases on the construction of wills, the word
- B "children" has often been held to have the extended meaning of descendants, but the courts have declined to admit that this latitude should be introduced into the construction of statutes. In *Maund v. Mason* (4) the court declined to extend the meaning of "children" in the statute of 43 Eliz. 1 c. 2, s. 7, to grandchildren: see the observations of BLACKBURN, J., in the report of that case (43 L.J.M.C. at p. 64). A like result was reached in *Coleman v. Birmingham Overseers* (5), a case concerned with the Married Women's Property Act, 1870.

- C Notwithstanding this, it was urged on me that the law takes a broader view in these days and that in a modern statute, at any rate, some very slight indication will be enough to induce the court to include illegitimate together with legitimate, apparently in order that the former may compete with the latter for a share in the father's bounty. The case was put quite broadly, viz., that any
- D infant son or spinster daughter who could prove himself or herself to be the natural offspring of the deceased man might claim to share in his estate as a dependant, whether acknowledged as his by him or no and whether or no brought up as a member of his family. On this view, it seems to me that a person who was by repute, although not in law, the widow of the deceased might, by parity of reasoning, have a claim under the Act, and that even though there were a lawful
- E widow. I may say at once that it seems to me that these claims are altogether too widely stated, but this does not dispose of a claim in favour of a narrower class, viz., a son or daughter of the deceased acknowledged as such or brought up together with or in the place of legitimate offspring. Can persons have a claim under an Act whose short title is the Inheritance (Family Provision) Act, who can show that they have been brought up as members of the family or are by
- F repute sons or daughters of the deceased?

Now, the word "family" has had many meanings attributed to it in law. This is illustrated by *Humble v. Bowman* (6), where a power to appoint among the family was held to extend to illegitimate offspring. The headnote was this (47 L.J.Ch. 62):

- G "Devise and bequest to testator's widow for the term of her natural life, 'and to be distributed to the testator's family at her decease as she might think proper': Held, that the power of distribution was not testamentary only, but was exercisable by deed, and that, under the word 'family', an illegitimate child whom the testator had treated and recognised as a child was included as an object of the power."

- H The learned judge, SIR CHARLES HALL, V.-C., said (*ibid.*, at p. 65):

- "No doubt illegitimate children are not included under a gift to children, but I look upon the dictum of JAMES, L.J., in *Lamb v. Eames* (7) (though not necessary for the decision in that case) as an authority that, under the description 'family' in a power of appointment, a natural child may be included. Although the word 'family' may ordinarily mean children and nothing else, it is, I think, not unreasonable that a natural child who has been treated and recognised as a child by the parent should be so included."

Similarly, one may look at cases under the Rent Restrictions Acts: see, e.g., *Brock v. Wollams* (8), where DENNING, L.J., said ([1949] 1 All E.R. at p. 718):

"... 'members of the tenant's family', within [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g)] include . . . step-children, illegitimate children, and adopted children, whether adopted in due form of law or not."

SIR GEORGE JESSEL, M.R., in *Pigg v. Clarke* (9) said (3 Ch.D. at p. 674):

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"The word 'family' has various meanings. In one sense it means the whole household, including servants, and, perhaps, lodgers. In another sense it means everybody descended from a common stock, that is to say, all blood relations; and it may, perhaps, include the husbands and wives of such persons. In the sense I have just mentioned, the family of A. includes A. himself; A. must be a member of his own family. In a third sense, the word includes children only; thus when a man speaks of his wife and family, he means his wife and children. Now, every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of 'family'? It is 'children'; that is clear upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion."

If, then, "family" prima facie means "children", and "children" prima facie means legitimate children, "family" means legitimate family unless the context indicates the contrary.

In *Re Joslin* (10), an application was made under the Act of 1938 by a widow in a case where her husband had provided by his will not for her but for his mistress and his two children by her; and FARWELL, J., said this ([1941] 1 All E.R. at p. 304):

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"In the circumstances, the testator was in a dilemma. No doubt he owed a duty to his wife, who had lived with him for many years, and who had had a child by him, and who had apparently assisted him with money from time to time, and it may be that he treated his wife badly when he left her and went to another woman. On the other hand, he was under a moral, if not a legal, obligation to make provision for his two children—who were none the less his children because they were born out of wedlock—and for the woman who had borne those two children . . . In cases under this Act, the testator has to reckon with moral as well as legal obligations, and, in a case of this sort, the testator is not only entitled, but is bound, to consider how far he is under a duty—again a moral duty—to make provision for the children whom he has brought into this world and for the woman who has borne those children. On the other hand, he has to take into consideration the duty which he owes to the woman who was his wife at his death, and who has been through many vicissitudes with him, and who has . . . assisted him all she could for many years . . . I do not think that it is an easy dilemma for a man to have to face . . ."

The learned judge assumed there that "children" in the Act meant legitimate children: he added that under the Act regard might be had to the moral claims of the illegitimate. The point was not raised, but no one doubted that illegitimate children had no direct claim under the Act.

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A number of statutes were cited to me as showing that the word "children" can include illegitimate children, and this is, of course, true, as VAUGHAN WILLIAMS, L.J., said in *Woolwich Union v. Fulham Union* (3) in the passage already cited ([1906] 2 K.B. at p. 246), where that is more consonant with the object of the statute. In Lord Campbell's Act, 1846, which is entitled "An Act for compensating the families of persons killed by accident", the word "child" in s. 2 did not include an illegitimate child. That word was defined by s. 5 as including son and daughter and grandson and grand-daughter and any step-son or step-daughter. It required an amending statute, the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2, to enlarge the word "child" to include illegitimate child. The question as to the meaning of the word "children" in the Poor Removal Acts, 1846 and 1848, seems to have caused a good deal of difficulty among judges: see *Braintree Union v. Rochford Union* (11). The

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A Act of 1846, in s. 3, uses the words " children whether legitimate or illegitimate ", and DARLING, J., considered that a reason for holding that the word " children " included illegitimate children. This reasoning does not commend itself to me. The House of Lords seems to have concluded in *West Ham Union v. St. Matthew, Bethnal Green (Churchwardens)* (12) that in these Acts the word had its wider meaning and this was no doubt because that was more consonant with the object of the statutes. In the Workmen's Compensation Act, 1925, s. 4 deals with dependants, and these are by definition to include illegitimate children : see also s. 8 and *Pritchard v. Bettisfield Colliery, Ltd.* (13). This is a good example to show that special words are needed to give the extended meaning. With the Legitimacy Act, 1926, I have already dealt. It throws no light on this point.

B The Industrial Assurance Act, 1923, provides by s. 3 for the issue of industrial insurance policies for the funeral expenses of, among others, a child. This word was held by MACKINNON, J., in *Morris v. Britannic Assurance Co., Ltd.* (14) to include illegitimate children. He said ([1931] 2 K.B. at p. 130):

D " The determination of this question depends upon the answer to another question, which is this: Does the word ' child ' in s. 8 (1) (b) of the Friendly Societies Act, 1896, and the word ' child ' in the Act of 1923, s. 3, mean a child born in wedlock, or does it also include a child that is illegitimate ? If it does include a child that is illegitimate then these policies are all of them legal. If it does not, then, subject to any question that arises on the other branch of the case at common law as to the insurable interest of parents in the funeral expenses of an illegitimate child, they would be illegal. Prima facie I agree that when in legal documents the word ' child ' is used it means a legitimate child, but no doubt a consideration of the context may require one to give it a wider meaning so as to include both legitimate and illegitimate children. The proposition to which I referred just now as to the legal construction of the word ' child ' is laid down sufficiently and succinctly by VAUGHAN WILLIAMS, L.J., in a case of a different nature: *Woolwich Union v. Fulham Union* (3) . . . In this case, as appears from s. 36 (1) of the Act of 1909, the object of these statutes is to provide for the funeral expenses to which parents and others are put on the death of children and other relatives. It seems to me that the incidence of those expenses cannot depend upon whether before the birth of the particular child the mother did or did not go through a ceremony in a church or registry office. The nature of the duty or obligation as to which she is desirous of insuring is precisely the same whether the child happens to be legitimate or illegitimate. Having therefore regard to the purpose of the legislation I think the context in these sections does require the word ' child ' to have the wider meaning, as being more consonant with the object of the statute, and includes an illegitimate child as well as a legitimate child, and that therefore these policies were legal."

H Thus the object of the statute required the broader meaning which was accordingly given to the word. This seems to be the high-water mark for an interpretation of this kind.

I If, then, I am to give the broader meaning to the words " son " and " daughter " in this Act, it must be because that extended meaning is more consonant with the object of the statute. This was the first statutory interference in England with the freedom of testamentary disposition. Before 1938 a man might by his will disinherit his whole family, whatever sense be given to that word. At first sight, it seems to me that an Act intended to cut down this freedom should not have a meaning given to the class of persons who may take advantage of it more extensive than its plain meaning warrants, because every person included among the dependants is a person having a right to question the testator's freedom to dispose of his own. Is there, then, any compelling reason for extending the class of dependants ? It is said that there is, because a man has a moral obligation

towards those he has brought into the world who, as FARWELL, J., said in *Re Joslin* (10), are none the less his children for having been born on the wrong side of the blanket. On the other hand, while a man is free to honour his moral obligations, it may be said the law is going quite far enough in compelling him to honour his legal obligations, i.e., obligations towards those to whom he is legally bound, and that to extend the obligation is no part of the duty of society or the policy of the law. *Re Harrington* (15) shows that a putative father's liability ends with his death. It was pointed out to me that legislation on these lines in English-speaking countries originated in New Zealand: see *Bosch v. Perpetual Trustee Co., Ltd.* (16) for a general description. My attention was drawn to the New Zealand statute of 1908, entitled the Family Protection Act, by s. 2 of which "family" is defined as including wife and children, and under s. 33 children are the objects of the protection. It appears that it has never been suggested that "children" in this Act meant anything but legitimate children; and I was referred to *E. v. E.* (17), where it was assumed that an illegitimate child had no claim but a moral one: see the judgment of STOUT, C.J. (34 N.Z.L.R. at pp. 794, 801, 804). This case was followed in *Pulleng v. Public Trustee* (18). Similar legislation has been passed in New South Wales: see *Re Pritchard* (19) where it was assumed that legitimacy was necessary in order to have a claim as a child under the New South Wales Act called the Testators' Family Maintenance Act, 1916. It is true apparently that the point has not been argued in either jurisdiction. Counsel for the plaintiff asked me to hold that the word "son" was a broader word than the word "child", but this I reject altogether. In my judgment, a son means merely a male child.

Is it, then, more consonant with the object of the statute to give the words "son" or "child" an extended meaning? In my judgment, it is not. I cannot think that the legislature contemplated applications by illegitimate offspring competing with the claims, whether under a will, an intestacy or under the Act, of the legitimate dependants. The task of the courts in those circumstances would be not only odious but impossible to carry out, for who could know what other dependants might enter the lists to make further claims to a share? It would indeed be visiting the sins of the fathers on the children. On the whole, then, I come to the conclusion that there is no reason for extending the words "son" or "daughter" in this Act beyond their ordinary legal meaning. On the contrary, in my judgment, there is good reason against it, and I decline to hold that an illegitimate son, whether brought up as a member of the family or no, has a claim under the statute of 1938, as amended by the Act of 1952.

Summons dismissed.

Solicitors: *Harold Miller & Co.* (for the plaintiff); *Carpenter, Wilson & Smith* (for the defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A LEA v. MOORE.

[COURT OF APPEAL (Sir Raymond Eversherd, M.R., Birkett and Romer, L.JJ.), December 13, 1954.]

County Court—Jurisdiction—Question of title to hereditament—Co-lessees—Rent over £100—Action for contribution to rent paid—Denial by defendant that land vested in him—Whether pleadings constitute memorandum conferring jurisdiction—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 40 (1) (b), s. 43, s. 51.

The plaintiff commenced proceedings against the defendant in the county court for the recovery of £75. He alleged that by an assignment of a lease the plaintiff, the defendant and a third person became the joint lessees of a property let to them at a rent of £300, that he, the plaintiff, paid the rent due and that the defendant was bound to indemnify him in respect of part of the rent so paid. The defendant's defence was non est factum and, alternatively, fraud, and he counterclaimed for damages for fraudulent misrepresentation. The defendant challenged the jurisdiction of the county court on the ground that title to land was in question. In reply to this the plaintiff contended, among other contentions, that the pleadings signed by the parties amounted to a memorandum conferring jurisdiction on the county court under s. 43 of the County Courts Act, 1934.

Held: (i) the title to the land in respect of which the rent was paid was clearly in question, because the liability with which the defendant was charged depended on the alleged circumstance that he was the proprietor of a particular landed interest and, therefore, the county court had no jurisdiction to entertain the action by virtue of the provisions of s. 40 (1) and s. 51 of the County Courts Act, 1934.

R. v. Harden (1853) (2 E. & B. 188) applied.

(ii) the pleadings did not amount to a memorandum within the meaning of s. 43 of the County Courts Act, 1934, and did not confer jurisdiction on the county court.

Appeal allowed.

[As to the Exclusion of County Court Jurisdiction where recovery of Land or Title in question, see 9 HALSBURY'S LAWS (3rd Edn.) 148, para. 292; and for cases on the subject, see 13 DIGEST 478-480, 258-300.]

For the County Courts Act, 1934, ss. 40 (1), 43, 48 (1), 51, see 5 HALSBURY'S STATUTES (2nd Edn.) 35, 38, 44, 46.]

Case referred to:

(1) *R. v. Harden*, (1853), 2 E. & B. 188; 22 L.J.Q.B. 299; 21 L.T.O.S. 102; 17 J.P. 614; 118 E.R. 739; 13 Digest 478, 281.

Appeal.

The defendant appealed against an order of His Honour JUDGE FORBES, sitting at Birmingham County Court, dated July 13, 1954.

The facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R.

The defendant appeared in person.

J. M. Milne for the plaintiff.

SIR RAYMOND EVERSHERD, M.R. : The plaintiff sought to recover a sum of £75 on the basis that the defendant was with him, the plaintiff, a co-assignee of a lease for a term of years, and under the terms of the assignment each of the assignees covenanted with the lessor to pay the rent charged, namely, £300 a year. The particulars of claim, in their first paragraph, made the essential allegation that the plaintiff, together with the defendant and another, Winders, entered into a deed of assignment of a lease of premises known as Wick House. They then stated that, as the result of certain proceedings, the

plaintiff paid a certain sum of money to the lessor, and he claimed to recover the sum of £75 plus a small sum of costs as being his, the defendant's, share of or contribution to what the plaintiff had been made to pay. The defendant, who appeared in person in the county court, put in a printed document in which he struck out the part which was related to admissions, and amplified the part devoted to the denials thus: A

"I dispute the plaintiff's claim because (i) I never signed a deed of assignment of a lease; (ii) if I did it was because of fraudulent misrepresentation on the part of the plaintiff; (iii) if I did the lease is no longer binding on me." B

He then counterclaimed for damages for fraudulent misrepresentation. The substance of the defendant's case was that what he had been asked to do, and what he thought he had done, was to sign a mere guarantee. The transaction, like the case which has arisen from it, was unusual. The premises in question were being used at the time, I gather, as a school, of which the defendant was head master. The plaintiff was chairman of a committee of parents who were responsible for the conduct of the school, and at the time of the alleged assignment the proposal was that there should be incorporated a limited company to take over the school. As not infrequently happens, the landlord was unwilling that the lease should be assigned to a limited company which might be quite unable to pay the rent; and the form the transaction took was an assignment by the then lessee to the chairman of the parents' committee (the plaintiff), the second individual, Winders, mentioned in the claim, and the head master (the defendant). I gather that at a later stage the company was formed, but it does not appear to have much prospered. The present state of affairs, we are told, is that the premises are vacant. D

The judge applied himself most fully and thoroughly to the issue of fact raised before him. The question was that the defendant said: "I was asked merely to sign a guarantee; if I did sign the document"—and eventually he admitted that he did sign a document, this or another entirely the same—"I signed it in ignorance of its true nature, having been misled into supposing that it was a mere guarantee." Judging from the judge's notes, there was obviously something to be said for that point of view. But the judge, on that question of fact, decided against the defendant, and it is right that I should say so, because the charge of fraudulent misrepresentation was a very grave charge. The judge, having heard the witnesses, acquitted the plaintiff of that serious charge. The defendant, however, undoubtedly took another point. He said: "You, the county court, have no jurisdiction whatever to go into this matter, for this is a case in which the title to land is in question, and the value of land is above the limit which alone is within the competence of the county court to debate upon." That argument rests on certain sections of the County Courts Act, 1934. Section 40 (1) of the Act, as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 19 (1) and Sch. 2, provides: E F

"A county court shall have jurisdiction to hear and determine any action founded on contract or on tort where the debt, demand or damage claimed is not more than £200, whether on balance of account or otherwise: Provided that a county court shall not, except as in this Act provided, have jurisdiction to hear and determine . . . (b) any action in which the title to any hereditament or to any toll, fair, market or franchise is in question." G I

The exceptions referred to are to be found in certain other sections. I turn first to s. 43:

"If, with respect to any action assigned for the time being to the [Queen's] Bench Division of the High Court, the parties to the action agree, by a memorandum signed by them or by their respective solicitors, that a county court specified in the memorandum shall have jurisdiction in the action,

A that court shall have jurisdiction to hear and determine the action accordingly."

It will be convenient if I deal at this stage with one point raised by counsel for the plaintiff. He said that, in effect, by the form of the pleadings including the counterclaim, the defendant had, together with the plaintiff, signed "a memorandum" so as to confer jurisdiction on the county court. I am unable to accept that submission. In my judgment, s. 43 applies only in the case of an action which in fact has been instituted and has been "assigned" to (that is, is proceeding in) the Queen's Bench Division of the High Court; and it only relates to those cases where the parties to that existing action sign a memorandum of the kind indicated. I am quite clear that not only was there no action of the relevant kind on foot, but that no memorandum, as contemplated by that section, was ever signed.

I note next in s. 48 (1):

"A county court shall have jurisdiction to hear and determine any action for the recovery of land where neither the value of the land in question nor the rent payable in respect thereof exceeds the sum of £100 by the year."

D Finally, in s. 51 it is provided that:

"A county court shall have jurisdiction to hear and determine any action in which the title to any hereditament comes in question, being an action which would otherwise be within the jurisdiction of the court—(a) . . . if neither the value nor the rent of the hereditament in respect of which the easement or licence is claimed, or on, through, over or under which the easement or licence is claimed, exceeds the sum of £100 by the year."

The question then is, having regard to the nature of these proceedings, is the title to a hereditament in question? It is not in dispute that the leasehold term, the outstanding part of the fourteen years' term, comprehended in the original lease of Apr. 9, 1947, is a hereditament within the meaning of the relevant sections. For that proposition some authorities are quoted in 9 HALSBURY'S LAWS (3rd Edn.) pp. 148, 149, and counsel for the plaintiff did not suggest the contrary. It is true that the present is not at first sight the kind of case which one would describe as being litigation about the title to land. On the other hand, I have come to the clear conclusion, with all respect to the learned county court judge, that since the whole of the plaintiff's claim depended on the essential assertion that the defendant, together with the plaintiff and one other, had vested in them a particular term of years, and since the first line of defence put in by the defendant was that he was not such an assignee of the term of years, it seems to me inevitable that the title to this land is in question. I note that s. 48 (1) and s. 51, which I have read, point to the distinction between cases relating to the recovery of land and cases where the title to the land is in question. The short note in 13 ENGLISH AND EMPIRE DIGEST (p. 478) of *R. v. Harden* (1), seems clearly to support the view that the title to land will properly be said to be in question when the liability with which the defendant is charged depends on the alleged circumstance that he is the proprietor of a particular landed interest. I, therefore, have come to the conclusion that this appeal must succeed.

The learned county court judge dealt at length with the point of non est factum and also of fraudulent misrepresentation, and decided adversely to the defendant. If that decision was right, then, of course, the title no longer was in question; but it is, I think, clear that if, on the face of the proceedings, the title was in question, then the judge could not go into the matter at all, even to the extent of determining the matter of fact, which was essentially involved in the question of the title to the land. I have already said, and my brethren have said also, that the result may be something of a Pyrrhic victory for the defendant. That is a matter which is not for us to animadvert on—save, perhaps, that I may be allowed to repeat my hope that in this very unfortunate state of affairs the

persons who now appear to be, on the face of the document at any rate, liable for a substantial sum of rent for a substantial number of years might, without prejudice to whatever their rights one against the other might be, profitably take whatever steps they can to put an end at the earliest possible moment to this recurring risk. Subject, however, to that possibly irrelevant observation, I conclude that the appeal must be allowed. A

BIRKETT, L.J. : I am of the same opinion, and on the only point which this court has to determine I agree with the judgment which has just been delivered, and I desire to add nothing. I would like to supplement what **SIR RAYMOND EVERSLED, M.R.** called the irrelevant matter at the end of the judgment. I think the defendant would be wise and prudent if he considered very carefully what **SIR RAYMOND EVERSLED, M.R.** has said, that when the present case is over his troubles are by no means over, and a wide and prudent man would take that advice and see how this unfortunate and unhappy situation could be brought to a conclusion. B

ROMER, L.J. : I agree fully with both the judgments which have just been delivered, and on the legal question which has been argued I merely desire to say that it appears to me that the view is inescapable that the present case raises a question of the title to a hereditament, because it depends on whether or not the defendant is an assignee of these premises, Wick House. If he is an assignee of the premises, then the legal interest in the premises for the term granted by the original lease of Apr. 9, 1947, became vested by the assignment jointly in the plaintiff and the defendant and Mr. Winders. If that assignment is not binding on the defendant, as he says it is not, then the legal interest in that term of years is either vested now in the plaintiff and Mr. Winders, or, if they could escape from the liability under the assignment on the ground that it was intended to be a joint assignment, and that if it is not binding on the defendant, then it is not binding on them either, then, presumably, the legal interest in the term of years remains vested in the assignor. Accordingly, the whole question concerns the legal interest in the premises, which is essentially a question of title and therefore within s. 40 (1) and s. 51 of the Act. I agree, therefore, that the appeal must succeed. C

Appeal allowed. D

Solicitors: *Hale, Ringrose & Morrow*, agents for *Glaisyer, Porter & Mason*, Birmingham (for the plaintiff). E

[Reported by **F. GUTTMAN, ESQ.**, Barrister-at-Law.] F

A R. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.
Ex parte FINCHLEY CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Devlin, J.J.),
 December 14, 15, 1954.]

Highway—Private street works—Apportionment of cost—Minister of Housing and Local Government's powers on memorial addressed by person aggrieved—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268.

The applicants carried out certain private street works under the Public Health Act, 1875, to a road adjoining vacant land belonging to the London Transport Executive, and demanded payment from them of a proportion of the expenses incurred. The London Transport Executive, being aggrieved by this decision, addressed a memorial under s. 268 of the Act to the Minister of Housing and Local Government, who allowed their appeal and ordered that no amount was payable by them. On a motion by the applicants for an order of certiorari to quash the Minister's decision,

Held: the Minister, on a memorial being addressed to him under s. 268 of the Public Health Act, 1875, had the widest possible powers to decide what was equitable under the section and there was nothing in the section which limited his powers; accordingly, the Minister's decision was within the powers given him by the section.

R. v. Local Government Board (1882) (10 Q.B.D. 309) applied.

[**Editorial Note.** The Public Health Act, 1875, s. 268 (19 HALSBURY'S STATUTES (2nd Edn.) 96) was repealed by the Public Health Act, 1936, s. 346 and Sch. 3, Pt. I, except in so far as s. 268 is material for the purposes of any of the unrepealed provisions of the Act of 1875, or of any Act directed to be construed with it.

As to Appeal by a Frontager to the Minister of Health in respect of a decision as to Recovery of Expenses for Private Street Works, see 16 HALSBURY'S LAWS (2nd Edn.) 451, para. 655; and for cases on the subject, see 26 DIGEST 538, 2369-2375.]

Cases referred to:

- (1) *R. v. Local Government Board*, (1882), 10 Q.B.D. 309; 52 L.J.M.C. 4; 48 L.T. 173; 47 J.P. 228; 26 Digest 532, 2318.
- (2) *Great Eastern Ry. Co. v. Hackney Board of Works*, (1883), 8 App. Cas. 687; 52 L.J.M.C. 105; 49 L.T. 509; 48 J.P. 52; 26 Digest 494, 2032.

Motion for certiorari.

On May 18, 1950, notices were served by the applicants on the London Transport Executive under the Public Health Act, 1875, requiring them within three months from that date to sewer, level, pave, metal, flag, channel and make good such parts of Heatherton Terrace, Squires Lane, N.3, in the borough of Finchley, as fronted, adjoined or abutted on land owned by the London Transport Executive. Heatherton Terrace was a road crossing by means of a bridge a railway line operated by the London Transport Executive. The work referred to in the notices not having been carried out within the time limited, was carried out by the applicants. On Feb. 21, 1952, the applicants' surveyor, having settled the proportionate amount incurred by the applicants in carrying out the work payable by the London Transport Executive as £86 12s. and £906 10s. 7d., gave notices of such apportionments to the London Transport Executive, and on May 22, 1952, the borough treasurer of the applicants served notices on them demanding payment of these sums. On June 10, 1952, the London Transport Executive appealed under the Public Health Act, 1875, s. 268, to the Minister of Housing and Local Government (the successor of the Local Government Board) by way of a memorial stating that they were aggrieved by the applicants' decision to demand from them the sums concerned on the grounds that the land concerned was vacant land, being merely an embankment supporting an approach

road to a bridge, could not be utilised for any other purpose, had no commercial purpose and could not be let at a rackrent. Further, the applicants ought not in equity to have demanded any proportion of the expenses of making up the road from them and, even if a proportion was payable by them, they had been charged with an undue amount. On Mar. 10, 1954, the Minister ordered that the London Transport Executive's appeal be allowed and that no amount be payable by them in respect of the land concerned. The applicants now moved for an order of certiorari to quash this decision.

G. D. Squibb for the applicants.

C. R. N. Winn for the Minister of Housing and Local Government.

H. A. P. Fisher for the London Transport Executive.

LORD GODDARD, C.J., stated the facts and continued: Section 268 of the Public Health Act, 1875, says:

"Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties . . ."

It was under that section that a memorial was presented. The London Transport Executive said they were aggrieved because they were called on to pay £900 and they were not liable in their opinion to pay £900 or, at any rate, it was not right that they should be called on to pay £900. I cannot imagine any ground on which a man is more likely to be aggrieved than if he is asked to pay money for which he does not consider that he is liable.

I cannot find in this section any restriction or limitation on the right of appeal, or anything which indicates when an appeal is made by a person who is asked to pay this money and says he does not want to, that does not enable the Minister to go in the widest way into everything put before him and come to a decision. Counsel for the applicants has maintained that the only question in the case is whether the London Transport Executive are to be considered as owners. He says that the question of whether they are or are not is a question of law which the Minister cannot decide because, apparently, he says that the local authority has no power to decide it and this appeal is only given against a decision of the local authority. That seems to me to be very subtle reasoning and I confess that I cannot follow it. It seems to me that the widest power is given to the Local Government Board (now represented by the Ministry of Housing and Local Government) to decide and say what is equitable, which I think means fair and reasonable. When the section was first read I confess that my mind went that way at once. Naturally enough, when I heard counsel's argument my mind fluctuated because his arguments are always so convincing and compelling, but when I read two or three passages from the judgment in *R. v. Local Government Board* (1) I came to the conclusion that my first impressions were right or, at any rate, had been so held to be by the Court of Appeal and their decision is binding on us. There are two passages in the judgment of **BRETT, L.J.**, which seem to me to be very important. He said in *R. v. Local Government Board* (1) (10 Q.B.D. at p. 324):

"It is assumed on the part of these appellants that the only question which the Local Government Board can inquire into, is whether the local board equitably ought to have made the owner pay the sum which has been apportioned against him, or whether they ought to make the whole expenses private improvement expenses. Now what are the words which would

- A oblige us to come to that narrow conclusion? It would be most narrow if after what I have said, there could be no appeal to the Local Government Board upon the question whether the works which are ordered to be done, ought as against an individual to have been ordered."

- B That seems to me to be clear enough. He said later on in his judgment where he was dealing with the question whether the Minister, or the Local Government Board, as it then was, could deal with a matter which had not been specifically set up in the memorial (*ibid.*, at p. 326):

- C "I should have been very sorry to say because he has not mentioned that ground or any other ground of complaint in the memorial, that therefore the Local Government Board, if they think it right or equitable, should not inquire into it, because he had not complained of it. I think they ought to have the largest powers and the largest discretion to inquire into everything, to examine every fact which may lead them to a fair conclusion as between the local authority and the individual who has presented the memorial."

- D Those seem to me to be extremely wise words and to be saying that, in the opinion of the Court of Appeal in that case in 1882, the Minister, on a memorial being presented to him under s. 268, has the widest possible powers. I can find no words in the section which limit his powers or say what he may inquire into and allow or disallow the appeal on this, that or the other ground. It seems to me that he is given a perfectly wide and general power if a person comes and says: "Here are these private street works; I have been asked to pay a sum of money and I say it is not right, fair or equitable that I should have to pay" and
- E the Minister is given power to decide that point.

- We are told, though I am not basing my decision on this ground, that, ever since *R. v. Local Government Board* (1), the Minister has regarded it as a most useful decision as to the powers given to him by the section because it enables him to decide many small cases—and when I say "small cases" I mean cases of
- F small property owners who, instead of having to go through petty sessions and then be taken to quarter sessions and then very likely to this court by means of Case Stated, can put their case before the Minister and he can be asked by the person aggrieved to intervene and say whether he is to pay or not. If the Minister says that he is to pay, the person complaining has lost any other right of appeal and he will have to pay. If, on the other hand, the Minister says that
- G he is not to pay, the local authority cannot enforce the order against him.

- There is only one other matter which I think it is necessary to mention. The Minister, in deciding in favour of the London Transport Executive, applied *Great Eastern Ry. Co. v. Hackney Board of Works* (2). I do not think the facts are quite on all fours, but the decision of the court in that case was that where one had property considered extra commercium, that is to say of no possible
- H commercial value, it is not equitable or fair that this class of charge should be made on it. The land here no doubt is rather different from what it was in the *Great Eastern Ry. Co.'s* case (2), but in both cases it is a case of something which the railway company are bound to maintain. The Minister applied the principle which was laid down there because it seemed to him that this embankment was really extra commercium. In fact, the only purpose for which it is suggested it
- I could be used is that it might be used as an advertising station. That was suggested in the *Great Eastern Ry. Co.'s* case (2), but here is a site which has been in existence since the 1860's in a growing neighbourhood which so far no one has thought to be a suitable place for advertising or anything else. So I should think that the Minister was well justified in coming to the conclusion that there was really no value to be attached to this land at all.

It is enough to say that, in my opinion, the matter appears to fall exactly within s. 268 as a fit subject for appeal, and as I can find no limitation on the Minister's powers, and as I think that *R. v. Local Government Board* (1) says that

the Minister has the widest possible powers, it follows that this application fails and must be dismissed with costs. A

CASSELS, J. : I agree that this motion fails and I would like to add one or two observations. The applicants come before this court and ask for relief on the ground that the decision of the Minister was not within his powers under s. 268 of the Public Health Act, 1875, and, further, that the decision was bad in law. The question of the jurisdiction of the Minister was raised at first, but disappeared from the argument, and everything seems now to turn on s. 268 of the Public Health Act, 1875. I think it is important that that section should be read, at any rate the first paragraph: B

“Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he [that is the person aggrieved] may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties.” C D

How useful those last words have turned out to be is indicated, I suppose, by the number of cases that have reached these courts on the discussion of the meaning of that section and by the fact that counsel for the applicants is paying his first visit to this court and, doubtless, is on his way to other courts. E

The position seems to me to be perfectly clear. The procedure as there devised is for the purposes of making a consideration by the Local Government Board (as it then was) easy to hold. The matter goes before the Minister by presentation of a memorial, not an appeal, on behalf of the person aggrieved. He is the person who is entitled to present his case. The Minister is the person who has power under s. 268 to decide it and that decision is supposed to be final and conclusive on all parties. As to the word “owner”, s. 4 of the Act says: F

“‘Owner’ means the person for the time being receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent.” G

These lands are not let at a rackrent; no money is forthcoming for their use. The sole purpose to which these lands are devoted is to hold up the road. It is then said on behalf of the applicants: “If you could find advertisers ready and willing to pay money for the purposes of putting up a hoarding on this land you would get a rackrent”, to which the London Transport Executive say: “That would blind people coming up this road to traffic on this road so that they would not be able to keep their eye on the road and, therefore, it is not available”. It never has been let. It has been there ever since it was constructed in the sixties of the last century and nobody has thought fit to pay so much as a bean for the use of the land for advertising purposes. The Minister came to the conclusion under s. 268 that it would be inequitable for the London Transport Executive to be called on to make the contribution demanded from them and, that being his decision, there seems to me to be no reason why this motion should prevail or an order of certiorari should be issued. H I

DEVLIN, J. : I agree. I would refer merely to s. 150 to point out that the local authority, once it has executed the works, has the choice of two courses. It may recover the expenses in one of two ways: it may recover them in a lump sum in a summary manner

- A "from the owners in default, according to the frontage of their respective premises",
or it may
"by order declare the expenses so incurred to be private improvement expenses."
- B The difference between the two is that in the first case the local authority may get the sum as a lump sum from the owners of the adjoining land and in the second case it may levy a rate on the occupiers of the adjoining land and thus recover the sum over a period of thirty years, which is dealt with in s. 213.
Having those two choices before them, the applicants decided that they would recover the sum from the owners of the adjoining land, that is, the London
- C Transport Executive, and the London Transport Executive, while agreeing that they are the owners in one sense, said that they were not owners within the meaning of the Act because the land was extra commercium. Into the merits of that contention it is not necessary for the purposes of the judgment which I am delivering that I should go at all; I merely mention it in order to show that it was one of the matters in dispute.
- D That was the decision of the applicants and that brought into play s. 268 of the Act which has been read, and the only question as it seems to me is whether that is a decision within the meaning of that section. If it is a decision within the meaning of that section, then that section comes into operation and the Minister has power to make such order in the matter as to him seems equitable. The opening words of the section are these:
- E "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may . . ."
- address a memorial. It has to be, therefore, a decision of the local authority in
- F any case which comes within the words I have just read. That it is a decision of the local authority is beyond dispute. That it is made in a case which comes within the words which I have just read is also not disputed. But it must be observed that, in order to make it such a case, it does not matter whether the persons on whom the sum is levied are owners or not. The case has to be one in which the local authority may exercise the choice either of levying the sum
- G from the owners or imposing a rate on the occupiers, and it is, therefore, admitted that this is such a case. Then why is it not a case within the meaning of the Act? Counsel for the applicants submits that it is not because he says it must be a decision which the Minister is empowered to give. I can find no ground for reading such words of limitation into the section. The case must be one in which the local authority is empowered to do one thing or the other and there is nothing
- H further in the section and nothing, in my judgment, which can be properly implied to mean that it is not a decision at which the local authority are empowered to arrive. It has to be an appealable decision or it would not be a matter about which anybody was aggrieved. It may be an appealable decision because the local authority have acted outside their powers, or it may be an appealable decision because they have not done something which they ought to have done under the Act, or it may be an appealable decision because it is unfair or unjust. There is nothing, in my judgment, which limits the class of appealable decisions to one or the other or which excludes the Minister, once he has properly got seisin of the case, from reviewing any bad decision given in that case, no matter on what ground it was given. The word "equitable" to which I have referred was relied on by counsel as showing that the Minister was not intended in this sort of proceedings to deal with points of law, and here he was invited to and has, in fact, determined what is, if not a pure point of law, at any rate very largely a point of law, whether the London Transport Executive were or
- I

were not owners within the meaning of this section. The word "equitable" might suggest that what was intended by the section was that the Minister should deal only with the just amount, whether the works had been properly done, whether the cost was reasonable and so forth and not that he should deal with questions of law. I do not think that by using the word "equitable" Parliament intended to allow the Minister to depart altogether from principles of law. Prima facie, principles of law are equitable and it would need much stronger words than the words which are used in the section to satisfy me that the Minister would be entitled to disregard any principles of law. But that does not mean that the word may not be appropriately used so as to signify that the Minister has powers wider than the application of principles of law might confer on him. For example if, as in this case, the local authority had chosen to make its decision to recover the sum in one particular way from the owners in a lump sum, it might be said as a matter of law that all that the Minister could do would be to say whether that decision was good or bad. The words used are plainly, as is conceded by counsel, such as to give the Minister wider powers than that. He might say: "I am not going to say whether your decision is good or bad. I have complete control of this matter and I am going to substitute for it an order that you should get the sum by levying a rate on the occupiers and not by a lump sum from the owners". That is the sort of power which the language used by the section is wide enough to give, and that is why I think the word "equitable" is used; but it does not mean that by using that word Parliament intended to exclude points of law from the purview of the Minister. I have no doubt Parliament thought it unlikely that any points of law would arise. I have no doubt if Parliament thought legal points would be likely to play a great part in inquiries of this sort, it would not have entrusted it to the Minister. Parliament, perhaps, did not foresee the complications to which questions of ownership might subsequently give rise; it probably thought it would be a simple matter to determine who was or was not the owner of any particular land. However that may be, the word "equitable" is not, in my judgment, enough to require us to say as a matter of construction that points of law are excluded from the purview of the Minister. The Minister has, therefore, dealt with the decision in a matter with which he is empowered to deal; he has given his decision on it and I can see no grounds for setting it aside or quashing it and I agree, therefore, that the motion fails.

Order of certiorari refused.

Solicitors: *Lees & Co.* (for the applicants); *Solicitor, Ministry of Health* (for the Minister of Housing and Local Government); *M. H. B. Gilmour* (for the London Transport Executive).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

A Re RUSSIAN COMMERCIAL AND INDUSTRIAL BANK.

[CHANCERY DIVISION (Wynn-Parry, J.), December 7, 8, 14, 1954.]

Company—Winding-up—Foreign bank dissolved abroad—Branch office in England—Debt, balance on current account, in foreign currency—Proof by customer in English liquidation—Conversion into English currency—Date at which conversion to be effected.

Bank—Current account with branch of foreign bank—Dissolution of bank abroad—Balance due.

A bank, which was incorporated in Russia in 1890, established in 1911 a branch in London. In or about December, 1917, the bank was dissolved under the laws of the Union of Soviet Socialist Republics, but continued business in London until, on Feb. 3, 1922, a petition was presented for its compulsory winding-up in England. On Oct. 24, 1922, an order was made for the compulsory winding-up of the bank. For many years prior to the winding-up R. had a current account with the bank at the London branch, and he proved in the winding-up for a balance of some 36,430 roubles due to him as at July 1, 1921. For the purposes of proof it was necessary to convert the sum in roubles into sterling and the question arose at what date the conversion should be effected.

Held: the appropriate date was that of the commencement of the winding-up of the bank in England in the year 1922 and not that of the dissolution of the bank in Russia at or about the end of the year 1917, because, although a debt expressed in foreign currency should be converted into sterling at the date when it became due (*Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] 2 Ch. 589, and *Madeleine Vionnet et Cie v. Wills*, [1939] 4 All E.R. 136, followed), and although a customer's balance on current account with a banker becomes due when the relationship of banker and customer terminates (dicta of ATKIN, L.J., in *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. at pp. 127, 132, applied) which in the present case happened when the bank was dissolved in Russia, yet for all purposes of the liquidation the dissolution of the bank in Russia was to be ignored (dictum of LORD ATKIN in *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.* [1936] 1 All E.R. at p. 518, applied), and R. having proved in the winding-up must accept for the purposes of the winding-up that the dissolution was to be treated as not having taken place.

DICEY'S CONFLICT OF LAWS (6th Edn.) p. 745, r. 165, para. (3), criticised.

[Editorial Note.] The present case involves consideration of three different branches of the law. First, it is a decision that the date for the conversion into sterling of a debt expressed in foreign currency is the date when the debt became due. Second, it relates to the law between banker and customer and decides that a balance on current account with a banker which, while the relationship of banker and customer continues, is payable on demand, becomes due also when the relationship of banker and customer is ended by, in the present case, the dissolution of the bank abroad. Third, it concerns the winding-up of foreign companies, such as are now termed oversea companies, which establish places of business in England. Such a company may be wound-up in England, notwithstanding that the company abroad has been dissolved, under s. 400 of the Companies Act, 1948, 3 HALSBURY'S STATUTES (2nd Edn.) 756, and in such a winding-up, so the present case shows, the dissolution of the foreign company abroad is, as regards proofs of creditors, to be disregarded.

As to the Conversion of Obligations expressed in Foreign Currency, see 23 HALSBURY'S LAWS (2nd Edn.) 173, para. 251.

As to Money on Current Account with a Bank, see 2 HALSBURY'S LAWS (3rd Edn.) 166, para. 311 et seq.

As to the Winding-up of a Foreign Company, see 6 HALSBURY'S LAWS (3rd Edn.) 844, para. 1729; and for cases on the subject, see SUPP. to 10 DIGEST 1208, 8548.] A

Cases referred to:

- (1) *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] 2 Ch. 589; 91 L.J.Ch. 765; 127 L.T. 284; 35 Digest 174, 46. B
- (2) *Madeleine Vionnet et Cie v. Wills*, [1939] 4 All E.R. 136; [1940] 1 K.B. 72; 109 L.J.K.B. 22; 161 L.T. 311; 2nd Digest Supp.
- (3) *Cummings v. London Bullion Co., Ltd.*, [1952] 1 All E.R. 383; [1952] 1 K.B. 325; 3rd Digest Supp.
- (4) *Joachimson v. Swiss Bank Corp.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 21 Digest 639, 2188. C
- (5) *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; Digest Supp.
- (6) *Russian & English Bank v. Baring Bros. & Co., Ltd.*, [1932] 1 Ch. 435; 101 L.J.Ch. 157; 146 L.T. 424; Digest Supp.

Summons in company winding-up. D

By summons in the compulsory liquidation of the Russian Commercial and Industrial Bank, Basil Einar Ronaasen as executor of Emil Albert Ronaasen asked that the decision of the liquidator rejecting his proof be reversed. It was, however, subsequently agreed by the parties, solely for the purposes of this summons and of making this a test case on the rate of exchange applicable, that the applicant had a right of proof in respect of a credit balance due on current account at the English branch of the bank amounting to 36,430 roubles 65 kopecks. E

Raymond Jennings, Q.C., and *Peter Foster* for the applicant.

Raymond Walton for the liquidator.

Cur. adv. vult.

Dec. 14. **WYNN-PARRY, J.**, read the following judgment: This is a summons in the compulsory liquidation of the Russian Commercial and Industrial Bank (to which I shall refer as "the bank") by the applicant as a creditor of the bank asking that the decision of the Official Receiver as liquidator rejecting the applicant's proof may be reversed. F

The relevant facts are as follows. The bank was incorporated in Russia in 1890 with a view to carrying on the business of bankers in Russia and elsewhere. The bank did in fact carry on such business in Russia until the month of December, 1917, when the Bolsheviks took possession of the bank's head office and branch offices in Russia and confiscated all its assets. It is common ground between the parties that the bank was dissolved under the laws of the Union of Soviet Socialist Republics in December, 1917, or January, 1918, the exact date being immaterial. In 1911 the bank established a place of business in England and filed the particulars required to be filed by the Companies (Consolidation) Act, 1908, s. 274. Banking business was conducted at the English branch from 1911 until long after the dissolution of the bank in Russia. On Feb. 3, 1922, a petition for the compulsory winding-up of the bank was presented to this court, and on Oct. 24, 1922, an order was made on that petition for the compulsory winding-up of the bank. G

The applicant is the executor of one Emil Albert Ronaasen, who died in 1935, and who for many years prior to the winding-up order had a current account with the bank at the London branch. During the late war virtually all the documents of the London branch were destroyed by enemy action, and consequently there are gaps in the evidence, which otherwise would have been much more detailed. So far as this current account is concerned, the only document in evidence is a statement on the paper of the London branch showing a credit balance due to Mr. Ronaasen of 36,430 roubles 65 kopecks on July 1, 1921. It has not been H

A strictly proved what sum was owing on this current account to Mr. Ronaasen at the date of the dissolution of the bank, and it is impossible to do so. In order, however, to obtain a decision on this summons, which is a test case, brought by the applicant at the request of the liquidator, the liquidator is prepared to admit for the purposes of this particular summons, but for those purposes only, that at all material times the bank owed Mr. Ronaasen 36,430 roubles on current
B account. The applicant by his proof also claimed to rank as a creditor in respect of certain Russian 5½ per cent. 2nd war loan 1916 purchased by the bank on his behalf in 1917. This claim was abandoned at the hearing, and I need say no more about it

I am concerned, therefore, only with the claim in respect of the current account. It is conceded in respect of the credit balance to this account, 36,430 roubles
C 65 kopecks, that the applicant has a right of proof. For the purposes of proof that sum in roubles must be converted into sterling, and the two questions with which I am concerned are (i) as at what date and (ii) at what rate is the conversion to be effected.

It will be convenient to deal with the second question first because only two dates have been suggested as the dates respectively as at which conversion
D should take place, viz., the date of the dissolution of the bank in Russia and the date of the commencement of the winding-up of the bank. The evidence as to the rate of exchange between the rouble and the £ sterling on each of those dates is scanty, but for the purposes of this summons I propose to proceed on the basis that at the date of the dissolution of the bank in Russia the rate was 360 roubles to £1 sterling and that at the date of the presentation of the petition the rate
E was 400,000 roubles to £1 sterling. The effect is that if the applicant succeeds in his contentions on the first question he will be entitled to prove for something over £100; if the liquidator succeeds the applicant will only be entitled to prove for about 2s.

I turn, therefore, to consider the substantial question which arises, viz., as at what date is the conversion to be effected? The first proposition which
F counsel for the applicant put forward was that in a winding-up by this court a proof for a debt expressed in foreign currency must be for a sum in sterling converted as at the date when the debt became due. I agree with counsel that this proposition is established by the authorities, which he cited. First there is the judgment of P. O. LAWRENCE, J., in *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim* (1), where he reviewed the prior authorities.
G As I understand his judgment, he is to be taken as having stated the rule, as a rule of general application, that on a claim in the winding-up of a company in England for a debt due from the company to the claimant in foreign currency the correct date on which that debt ought to be converted into sterling for the purpose of ascertaining the amount for which the claimant ought to be admitted as a creditor, is the date when the debt became due. This decision was approved
H and followed by the Court of Appeal in *Madeleine Vionnet et Cie v. Wills* (2).

In this connection I feel bound to say that I do not accept the statement in *DICEY'S CONFLICT OF LAWS* (6th Edn.) at p. 745 where, as para. (3) of r. 165 it is stated:

I "Whether a debt expressed in foreign currency must, for the purpose of litigation in England, be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable or with reference to the day of the judgment is an open question."

It is certainly not an open question in this court, nor I apprehend in the Court of Appeal; nor am I aware of any observations in any later authorities indicating any dissatisfaction with the general rule to which I have referred. I observe that in the argument for the appellants in *Madeleine Vionnet et Cie v. Wills* (2), the relevant passage from *DICEY'S CONFLICT OF LAWS* (5th Edn.) was quoted. The passage in the argument reads as follows ([1940] 1 K.B. 73):

"The rule is stated in DICEY'S CONFLICT OF LAWS (5th Edn.) p. 728, r. 181, as follows: 'When a debtor, or upon the breach of a contract, a person in default, becomes liable for the payment of a sum of money in a foreign currency, the debt or damages for the purpose of an English judgment must be assessed at the date of the debt becoming due or the default, and the sum payable must be converted into English currency at the rate of exchange current at that date'."

DR. CHESHIRE in his book on PRIVATE INTERNATIONAL LAW (4th Edn.), p. 663, says:

"There was formerly a controversy whether the rate of exchange prevailing at the date of the wrong or at the date of the judgment must be followed in making this conversion from foreign to English currency. The date chosen may be of great importance to the parties in view of the violent fluctuations of the rate of exchange that not infrequently occur in the modern world. It is now settled that the relevant date is the date of the wrong. The extent of the loss for which the plaintiff is entitled to compensation falls to be determined at the date when it was suffered, not at the date when the judgment happens to be delivered."

Finally I would add that counsel for the liquidator said, in my view very properly, that he was unable to support the statement which I have quoted from DICEY'S CONFLICT OF LAWS (6th Edn.). The subject of private international law is difficult enough without unnecessary doubts being cast on a clearly established rule.

Counsel for the liquidator contended, however, that a gloss had been made on the rule by the Court of Appeal in the recent case of *Cummings v. London Bullion Co., Ltd.* (3). As I read that case, the Court of Appeal expressly recognised the general rule, which I have stated above, but felt compelled to choose a date different from the date when the debt became due, because of the construction which they placed on the Exchange Control Act, 1947, s. 33. I cannot, therefore, regard this case as in any way impinging on the general rule. In the present case, I find no circumstance which should militate against its application. I therefore hold that the date as at which the sum in roubles should be converted into sterling is the date when they became payable to Mr. Ronaasen.

Then comes the crucial question at what date is the debt on current account to be treated as having become due. As I have said, the debt was one which was owed by the bank as banker to Mr. Ronaasen as customer. The incidents of that relationship are discussed by ATKIN, L.J., in *Joachimson v. Swiss Bank Corpn.* (4). In the course of his judgment he said ([1921] 3 K.B. at p. 127):

"I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at

- A which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. The result I have mentioned seems to follow from the ordinary relations of banker and customer, but if it were necessary to fall back upon the course of business and the custom of bankers, I think that it was clearly established by undisputed evidence in this case that bankers never do make a payment to a customer in respect of a current
- B account except upon demand."

At the end of his judgment he said (*ibid.*, at p. 132):

- "Finally it is perhaps unnecessary to say that the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by a bank of the customer's right to be paid any particular sum would no doubt be
- C a waiver of any demand in respect of such sum."

- Now as I read that paragraph, ATKIN, L.J., was not designing to make an exhaustive statement as to the circumstances in which a demand by the customer would be unnecessary. He gave waiver by the banker as an example and he gave repudiation as a possible example of waiver. Much debate turned on the word "repudiation". Counsel for the applicant urged on me that by going
- D out of existence the bank must be treated as having repudiated the debt, and therefore the necessity of a demand had been waived. On the other hand counsel for the liquidator contended that repudiation demanded some volition on the part of the person or body alleged to have committed the repudiation, and that no such volition was possible on the part of the bank, because the circumstance alleged to constitute repudiation was the involuntary suffering of
- E extinction.

- For myself, I prefer to approach this aspect of the matter from a different point of view. The last paragraph in the judgment of ATKIN, L.J., in *Joachimson v. Swiss Bank Corpn.* (4) proceeds, as I read it, on the assumption of the continued existence of the relationship of banker and customer; it is an incident of that relationship so long but only so long as it lasts; just as the banker has the
- F corresponding obligation not to stop acting as the customer's banker without reasonable notice. If, however, the relationship of banker and customer is terminated, there can be no need for either of those incidents of that relationship to continue, and indeed they must cease with the termination of the relationship. It appears to me that on such termination any balance belonging to the customer

- G In this case the bank was dissolved in December, 1917, or January, 1918—it matters not which. In my view, the effect of that dissolution was to terminate the relationship of banker and customer. The *persona juridica* having ceased to exist, it appears to me impossible to say that the previous relationship of banker and customer continued.

- H In October, 1922, came the order for compulsory winding-up. The effect of such an order in relation to a foreign dissolved company has been authoritatively stated by LORD ATKIN in *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.* (5). In the course of his speech he said ([1936] 1 All E.R. at p. 518):

- "My Lords, I think that we are entitled to imply, indeed I think it is a necessary implication, that the dissolved foreign company is to be wound-up as though it had not been dissolved and therefore continued in existence. This seems to me with respect the necessary result of saying that it shall be wound-up in accordance with the provisions of the Act. There is nothing abnormal in such a provision. The municipal law of this country as of other countries accepts the principle of international law that countries ordinarily accept the existence of juristic persons brought into being or recognised as existing in their country of origin. Similarly they accept the destruction or cessation of such a juristic personality under the law of its country of origin.
- I

But if the municipal law choose, it may in defined conditions refuse to accept or may accept only under conditions either the creation or destruction of a foreign juristic person: whether it has done so is for the municipal court to decide, but if it has then the municipal court must accept the situation. I see nothing incongruous in the legislature saying in effect, we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound-up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding-up it shall be deemed not to have been dissolved: for that event would defeat our municipal provisions for winding-up a corporation. This does not appear to me to be recreating or reconstituting a new corporation: it is for particular and limited purposes refusing to recognise the dissolution of the old."

It is to be observed that LORD ATKIN was careful to say that the refusal to recognise the dissolution was for particular and limited purposes, and not for all purposes. The particular and limited purposes are as he states "so that its assets here shall be distributed amongst its creditors" and "for the purpose of the winding-up it shall be deemed not to have been dissolved". The interesting question then presents itself, what is the scope of the phrase "for the purpose of the winding-up it shall be deemed not to have been dissolved"? If a foreign company is dissolved according to the law of the country of its incorporation, and is subsequently wound-up here, can any recognition be given, for the purposes of the winding-up, to the fact of dissolution? The question is a very real one in the case of a company such as the bank, because the evidence shows that for a considerable time after its dissolution in Russia business was carried on at the London branch and transactions in the normal course of banking business were entered into as if the dissolution had not occurred. It is surely clear that in the winding-up of the bank and similar companies, regard must be had to those post-dissolution transactions. The difficulty of doing otherwise is recognised by LORD ATKIN in the *Russian & English Bank* case (5). He says (*ibid.*, at p. 519):

"Nor is it any easier to confine the distribution to assets existing at the date of the dissolution amongst creditors in existence at the same date."

Again in the earlier case of *Russian & English Bank v. Baring Bros. & Co., Ltd.* (6), EVE, J., said ([1932] 1 Ch. at p. 444):

"But I cannot help thinking that these difficulties can be mitigated, and the acts of those who have intermeddled with the affairs and assets of the branch, after the destruction of the parent company, be regularised by adoption and ratification by a liquidator in a winding-up constituted under s. 338 of Part X of the Companies Act, 1929."

For myself, I can see no other logical conclusion than that for all purposes of the liquidation the dissolution of the bank is to be ignored. A customer of the bank to whom money is owing on current account at the date of dissolution can only obtain payment (either in whole or in part) by proving in the winding-up; but if he proves in the winding-up he must accept that the dissolution which, looked at outside the winding-up, was effective to determine the relation of banker and customer, is to be treated by the liquidator, who examines his claim, and the court which may have to pronounce on it, as not having taken place. In other words he can rely on the dissolution as having terminated the relation of banker and customer, if he stays outside the winding-up, in which case he will be without remedy; or on the other hand he can prove in the liquidation, in which case he must accept the non-recognition by the liquidator and the court

A of the event which in fact caused the termination of the relationship of banker and customer between the bank and himself. In the liquidation, therefore, the relationship must be deemed to have continued. On this basis, the commencement of the liquidation is the earliest date when that relationship came to an end; and that is the date when the debt became due.

The summons must therefore be dismissed.

B *Application dismissed.*
Solicitors: *Nisbet, Drew & Loughborough* (for the applicant); *Slaughter & May* (for the liquidator).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

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D

MAYNARD v. WILLIAMS AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Devlin, JJ.),
December 14, 17, 1954.]

E *Gaming—Lottery—Private lottery—Lottery conducted by supporters' club to provide funds for football club—Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58), s. 24 (1).*

The T. Supporters' Club was formed (in terms of its rules) with the object of promoting the welfare of the T. Football Club and for that purpose to obtain funds and to use such funds in such manner as its executive committee might direct. Membership of the Supporters' Club was open to all persons and an annual subscription of 1s. was charged. The activities of the Supporters' Club comprised, among other things, frequent social functions such as dances, whist drives, jumble sales, darts and skittle matches, all primarily aimed at raising money. The club also provided voluntary labour at the football ground. In March, 1954, the club formed a sub-committee to organise a lottery. The sale of tickets in the lottery was confined to members of the club and it was conducted so as to comply as far as possible with the requirements for private lotteries laid down in the Betting and Lotteries Act, 1934, s. 24. The Supporters' Club had a membership of seven thousand, but the sale of tickets was limited to five thousand as this provided all the funds needed to meet the requirements of the Football Club. Before the organisation of the lottery, the Supporters' Club had been contributing annually £2,000 to the Football Club. The lottery brought in an income which was distributed as to sixty per cent. by way of prizes and as to forty per cent. as a contribution to the funds of the Football Club, and this contribution amounted to about £90 per week. The respondents, who were members of the Supporters' Club and who assisted in the organisation of the lottery, were prosecuted for conducting an illegal lottery contrary to s. 22 (1) of the Act.

I **Held:** (DEVLIN, J., dissenting) the Supporters' Club was a society conducted for purposes connected with lotteries, and, therefore, the lottery was not a "private lottery" within s. 24 (1) of the Act of 1934 and was unlawful under s. 21 of that Act.

[**Editorial Note.** The reasons why the majority of the court in the present case decided that the Supporters' Club was not a society "established and conducted for purposes not connected with . . . lotteries", within the meaning

of those words in s. 24 (1) (a) of the Betting and Lotteries Act, 1934, are not exactly the same. LORD GODDARD, C.J., took the view that part of the business of the club was to raise money and that, therefore, when the club raised money by lotteries, the club was conducted for purposes connected with lotteries. CASSELS, J. considered that the words "established" and "conducted" were used in the enactment to convey separate meanings, and that on the facts the club was conducted, though not established, for purposes connected with lotteries. DEVLIN, J.'s dissenting judgment is based on a distinction between the purposes of the club and the means by which the purposes are effected; the lotteries being the means, he holds that the purposes of the club were not connected with lotteries. In this connection the decision in *Pearse v. Hart*, p. 91, post, may usefully be compared with the present case, for it affords an example of circumstances in which, on DEVLIN, J.'s view, the justices were justified in holding that the lotteries were a purpose of the club and not merely a means by which other purposes were effected.

For the Betting and Lotteries Act, 1934, s. 24, see 10 HALSBURY'S STATUTES (2nd Edn.) 804.]

Case referred to:

(1) *Pearse v. Hart*, p. 91, post.

Case Stated by the Appeal Committee of Quarter Sessions of the County of Devon.

The respondents were convicted at petty sessions for unlawfully using premises for purposes connected with the promotion or conduct of a lottery contrary to the Betting and Lotteries Act, 1934, s. 22 (1) (f). On appeal to quarter sessions, the appeal committee allowed the appeal on the ground that they were satisfied that the lottery was a private lottery and complied with the requirements of s. 24 of the Act. The facts appear in the judgments.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.), C. R. N. Winn and J. T. Molony for the appellant.

Dingle Foot, Q.C., and T. O. Kellock for the respondents.

Cur. adv. vult.

Dec. 17. **LORD GODDARD, C.J. :** This is a Case Stated by the Appeal Committee of the Devon Quarter Sessions, who allowed an appeal by the respondents against convictions for offences against the Betting and Lotteries Act, 1934.

It is not disputed that unless the lottery is protected by s. 24 of the Act the offences have been committed, and the only question for this court is whether or not the appeal committee were right in holding on the facts which they found that the lottery was a private lottery within the meaning of s. 24 of the Act. It is observable that in the Act of 1934* all lotteries are declared to be illegal subject to the provisions of the Act, i.e., subject to the exceptions which are found in s. 24. The material words of s. 24 (1) for this purpose are:

"In this section, the expression 'private lottery' means a lottery in Great Britain which is promoted for, and in which the sale of tickets or chances by the promoters is confined to, either—(a) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries; or . . ."

Two other exceptions follow which are not material for this case.

The case arises out of the practice which has been going on all over the country whereby supporters of local football clubs, I think mostly professional clubs, form themselves into a club for the purpose of assisting financially the local

* I.e., by s. 21 of the Betting and Lotteries Act, 1934, 10 HALSBURY'S STATUTES (2nd Edn.) 801.

A professional football club. They raise money in a variety of ways, and the justices have found in this case that:

B “Torquay United Football Club is a professional club . . . The Torquay United Supporters’ Club was formed over thirty years ago. Its aims and objects in the terms of its own rules are the welfare of the Football Club and for this purpose to obtain funds and to use such funds in such manner and for such purposes as its executive committee may direct. Membership of the Supporters’ Club is open to all persons without distinction and the annual subscription is 1s. Its membership now exceeds seven thousand. The activities of the Supporters’ Club in furtherance of its aim and objects are numerous and varied. They comprise, inter alia, social activities frequently throughout the year such as dances, whist drives, jumble sales, darts and skittle matches, all primarily aimed at raising money; providing gatemen, stewards and other voluntary services at home matches and the entertaining of visiting supporters; improving the amenities of the Plainmoor ground by means of voluntary labour on the part of members of the Supporters’ Club. A notable instance was the construction of a terraced bank along the whole of one side of the Plainmoor ground which made it possible to accommodate approximately five thousand additional spectators; organising and making all necessary arrangements for the running of the Football Club ‘A’ team; organising transport arrangements for supporters wishing to attend ‘away matches’, maintaining and repairing of playing kit, raising money by means of lotteries.”

E Then the Case tells us:

F “The Football Club incurs an annual deficit of about £5,000 and the unpaid services and financial support provided by the Supporters’ Club has been essential to its continued existence. The gross income of the Supporters’ Club from all sources excluding lotteries has been of the order of £4,000 to £4,500 per annum and this has enabled the Supporters’ Club to pay over to the Football Club a yearly total of about £2,000.”

Then the Case tells us that in the last five years or so the Supporters’ Club has for the express purpose of raising funds started to hold lotteries.

G “. . . In October, 1953 a lottery on football results was conducted by the Supporters’ Club for two or three weeks and again between November, 1953 and early March, 1954 a weekly lottery was organised . . .”

Then objection was taken on the part of the police and those lotteries were stopped, but

H “. . . On Mar. 24, 1954, the executive committee of the Supporters’ Club appointed by resolution a sub-committee in order to organise the promotion of a fresh lottery . . .”,

which was to be a legal lottery, or, I suppose I should say, protected by s. 24. Then:

I “. . . The said sub-committee accordingly organised a weekly lottery on football results which was called ‘the Torquay United Supporters’ Club Private Lottery Competition’, which ran for eleven weeks from Mar. 27 to June 7, 1954, when the institution of proceedings against the respondents caused a cessation of this effort to raise funds . . . Tickets in the said lottery could only be obtained by members of the Supporters’ Club, through duly authorised members upon payment of 1s. for each ticket. The number of tickets sold each week amounted to an average of approximately five thousand, some members buying more than one ticket. The conditions

prescribed by the Betting and Lotteries Act, s. 24 (2), were strictly observed. After deducting the cost of printing and stationery sixty per cent. of the net receipts was devoted to the provision of prizes and the other forty per cent. used by the Supporters' Club for the benefit of the Torquay United Football Club. The accountants' fee for auditing the accounts of the lottery was paid out of the general funds. The money retained by the Supporters' Club averaged £90 per week and this sum was forthwith remitted to the Football Club. The lottery was capable of considerable expansion if the demand was warranted and the club desired to extend it. The tickets printed were, however, limited to the number of five thousand because of the large amount of clerical work involved and because a lottery of this size was sufficient to yield such a profit to the Supporters' Club which, together with the proceeds of its other activities would cover the normal annual deficit of the Football Club."

So it is quite obvious that this was a lottery which was large enough as it was and would have been capable of being extended all over the county of Devon and, for that matter, all over England if there had been the requisite clerical assistance and would be quite as large as the various football pools in various parts of England. Then the justices say:

"We were of the opinion that the running of the lottery was only incidental and ancillary to the other methods and enterprises used by the Supporters' Club to carry out its declared purpose of helping the Football Club . . .",

and they held that no offence was committed.

So far as the matter is a question of fact, of course we are bound by the findings of fact by the justices but, taking the facts, this court has to consider whether the justices have directed themselves properly and have applied the law to the facts. I recognise that quarter sessions have taken a great deal of care over this case. The first comment I make on the findings of the justices at quarter sessions, viz., that they are of opinion "that the running of the lottery was only incidental and ancillary to the other methods and enterprises used by the Supporters' Club", is that I find nothing in the Act which says that if the running of the lottery is ancillary or incidental to the business or other part of the business carried on by the club, it becomes a lawful lottery. The words of the Act, I repeat, are:

"members of one society established and conducted for purposes not connected with gaming, wagering or lotteries."

Now, what is the object here of the promoters of this lottery? It is to raise money. Their business, or part of their business, is to raise money for the purpose of handing that money over to the Football Club. If that is part of their business, as it clearly is, and is so found by the justices, the fact that they are raising money by means of lotteries seems to me to show that this society is conducted for purposes connected with a lottery. I cannot for myself see any material difference between this case and the case which we decided earlier in the week, the case of the Gloucester Football Club (*Pearse v. Hart* (1)), except that there were certain differences in the facts there. It may be said that it was easier in the Gloucester case to find that the business was nothing but the business of running a lottery. But here, although the Supporters' Club raised money by other means, they undoubtedly raised money by means of lotteries, and the declared object of the club is to raise money in order that they may make over that money to the Football Club and so assist the Football Club to keep going. For myself, I can see no material difference between this case and the case we decided earlier this week, and I do not think it is a question whether the lottery is incidental or ancillary to the declared business of the club. It is first

A of all necessary to see what is the business of the Supporters' Club and then to see if it is conducted in a way connected with lotteries. If, for the purpose of raising income to enable them to maintain the Football Club, the Supporters' Club conduct lotteries I confess that that seems to me to come exactly within the words which I have read from s. 24 (1). It is true that the provision is put in a negative form—it must be for purposes not connected with lotteries—but if B the business is connected with lotteries, it follows that an offence has been committed. In fact, I have asked myself this question: If, on these facts, it is to be held that there is no offence, would it not be possible to say that no offence would be committed if the directors of a commercial company conducted a lottery which was confined to shareholders in the company for the purpose of raising money to enable the company to continue or to enable the company to extend C its operations? These are weekly lotteries held to provide a weekly sum of money, and if that is not conducting a business in connection with lotteries, I find great difficulty in understanding what would be. In my opinion, the decision of the justices was right, the decision of quarter sessions must be set aside and the convictions upheld, and I would allow the appeal accordingly.

D CASSELS, J.: I agree with the judgment which the Lord Chief Justice has just delivered. As the court is not unanimous, I desire to indicate my reasons.

Associated with the Football Club is this Supporters' Club. One of its objects is to raise money for the Football Club by means of lotteries. Although the Supporters' Club has been in existence for thirty years, it was not until five years ago that the Supporters' Club added to its other activities, such as whist drives and dances, the conduct of periodical lotteries which by March, 1954, had become weekly. It was for being concerned with such lotteries in April and May that the respondents were convicted by the justices in petty sessions. The respondents appealed to quarter sessions and their appeal was allowed.

The weekly sale of tickets in the lotteries was limited to five thousand because of the heavy clerical work involved. After defraying the cost of printing and stationery, sixty per cent. of the net proceeds of the lotteries went in prizes, whether in money or kind, or both, is not stated, and the remaining forty per cent. was handed over by the Supporters' Club to the Football Club. The average amount which the Supporters' Club passed over to the Football Club was £90 a week. A sub-committee of the Supporters' Club managed the lottery in a room set apart at the football ground for the use of the Supporters' Club. There were 7,187 members of the Supporters' Club and it was estimated that about one-third of them purchased tickets, in other words, between two thousand and two thousand five hundred members bought tickets in the lotteries.

The justices in quarter sessions were of the opinion that the running of the lottery was only incidental and ancillary to the other methods, like dances, whist drives, jumble sales, darts and skittle matches, to carry out the declared purpose of the Supporters' Club to help the Football Club. I do not understand the use in this connection of these words "incidental" and "ancillary"; I think the word "additional" would have been a better word.

H The Betting and Lotteries Act, 1934, s. 21, declares all lotteries to be unlawful, and s. 24 exempts private lotteries, which means a lottery

I "promoted for, and in which the sale of tickets or chances by the promoters is confined to, either—(a) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries; or (b) persons all of whom work on the same premises; or (c) persons all of whom reside on the same premises."

I need not trouble about para. (b) and para. (c). On the facts shown by the Case this was a society conducted for purposes connected with lotteries. Where

Parliament uses two words, as here, "established" and "conducted", I think A
Parliament intended to convey two separate meanings. A society may be
established for one purpose and conducted for another. This society was
established to help the Football Club financially. It was conducted for a purpose
connected with lotteries. I think frequency is an important feature. Here
there was a weekly lottery. If frequency is not to be regarded there would seem
to be nothing to prevent a society established for other purposes adding to and B
probably vastly increasing its funds by daily lotteries on the results of racing
events or other chances. If scale is not to be regarded, there would seem to be
nothing to prevent a society established for other purposes adding to and probably
vastly increasing its funds by attracting many thousands of people who, on a
nominal payment could belong to the society and would then indulge in participa- C
tion in a lottery which had a prize fund amounting to sixty per cent. of the net
receipts.

In this case, the respondents formed a sub-committee which conducted these
lotteries. The sub-committee organised the printing and sale of the tickets,
checked the returns, sorted the results and worked out and distributed the prize
moneys. The Supporters' Club was being conducted for purposes connected
with a lottery. It is not, in my opinion, necessary that it should be the sole D
purpose of the Supporters' Club. I think it was at the material times its main
purpose, and indeed the result was to pay over to the Football Club a sum of
money which was larger than the sum of money which came from all the other
efforts combined; it was whist drives and the other activities which were
incidental and ancillary to the lotteries, if those words are to be used.

I think on the facts found in the Case Stated the appeal committee arrived E
at a wrong conclusion in law, and they should have upheld the convictions by
the justices. There is no magic about this being a Supporters' Club of a Football
Club or any other club engaged in sport or games. If the respondents are within
the law then a society formed for any purpose, political, social or otherwise,
provided it is not an illegal purpose, can have a supporters' club to collect funds
for it, and that supporters' club can conduct weekly lotteries along with some F
dances and whist drives. It can make those lotteries its main method of collecting
these funds and can attract an enormous membership on a merely nominal
subscription. The lucky members who have bought one or two tickets can
share a big percentage of the net money return on the sale of tickets in the
lotteries and a smaller percentage can be given to the society: and yet it would
have to be held that the supporters' club was conducted for purposes not G
connected with lotteries. If that be so, then there is nothing to prevent such a
club from running a gaming or wagering establishment as well as handing over
the proceeds, and s. 24 (1) becomes a nullity. I do not believe that that was the
intention of the legislature. I do not believe that that is the construction that
has to be put on the Act.

I agree that this appeal succeeds, and I agree with what my Lord has said H
about these convictions having to be restored.

DEVLIN, J., read the following judgment: The Torquay United Supporters' I
Club has existed for over thirty years and its object, as its name indicates, is to
support the Torquay United Football Club. The Football Club could not carry
on if it had to rely simply on gate-money. The Supporters' Club helps it in
two ways, first by giving unpaid labour for the maintenance of the ground,
by the provision of gatemmen and stewards and by discharging other similar
duties; and secondly, by raising money. Money is raised by a number of social
activities, such as dances, whist drives and so forth, and recently the Supporters'
Club has taken to raising additional money by means of weekly lotteries. By
activities other than lotteries the Supporters' Club had previously succeeded
in raising enough money to hand over to the Football Club about £2,000 per
annum. This left an annual deficit of more than twice that amount, and by

A means of the weekly lotteries the club has raised enough money to hand over to the Football Club about £90 a week to cover this deficit. The club has over seven thousand members but only five thousand tickets are issued for each lottery, as these produce enough to raise the amount required for the deficit. A member may take more than one ticket, and in fact only about one-third of the members participate in each lottery.

B The question to be determined is whether in these circumstances the Supporters' Club is "conducted for purposes not connected with gaming, wagering or lotteries" within the meaning of the Betting and Lotteries Act, 1934, s. 24 (1) (a). The Torquay justices thought that it was not so conducted and they convicted the respondents. The Appeal Committee of the Devon Quarter Sessions allowed the appeal and stated a Case for the opinion of this court.

C There is no doubt that the Supporters' Club now raises a large proportion of its funds, about two-thirds, by holding regular lotteries. Does this mean that one of the purposes for which the society is conducted is the holding of lotteries? Very few societies exist merely for the purpose of raising funds; the raising of funds is done in pursuance of one or more of the society's objects. On the other hand very few societies exist for purposes the furtherance of which does

D not require the provision of funds. Counsel for the respondents argues that the raising of funds is not by itself one of the purposes of this club, and that because it raises funds so as to further its true purposes, the raising of the fund is not in itself to be described as a purpose. He concedes, however, that a society might adopt a particular means of raising funds, such as a lottery, on such a scale that the means dwarfed the ends, with the result that the holding of the lottery became

E one of the purposes for which the society was conducted.

The Solicitor-General does not accept this distinction between means and purposes. He does not submit that the mere fact that some part of the funds is raised by means of a lottery is of itself enough to constitute "a purpose", but he says that it becomes a purpose if it is done on a sufficient scale to form part of the society's business. It is, he says, a matter of degree and in determining

F the question one must look at all the circumstances. In this case he relies on the regularity and frequency with which lotteries are now held and the large amount of money which they now raise. Questions of degree are, he concedes, primarily questions of fact for the appeal committee to determine, but he submits that in this case the raising of funds by means of lotteries is so considerable that no justices who directed their minds to the proper question could rightly come

G to any other conclusion than that it is one of the purposes for which the society is now being conducted.

Part II of the Betting and Lotteries Act, 1934, begins with s. 21 which, subject to the provisions thereafter set out in Part II, makes all lotteries unlawful. The exemptions from this general provision are contained in s. 23 and s. 24 and from their nature it is apparent that, while Parliament intended to prohibit entirely

H any large lotteries open to the public generally, it did not intend to prohibit small lotteries restricted to groups of people, provided they were conducted in accordance with a number of specified conditions. Section 23 exempts small lotteries which are promoted as an incident of certain entertainments such as bazaars, sales of work, etc. Section 24 exempts private lotteries, and the question

I in this case is whether the lottery falls within the definition of a private lottery in sub-s. (1). This sub-section defines three classes of private lottery, and there is a common element in each definition, that common element being the limitation of the sale of tickets to a limited group of persons. Two of these groups are very simply described and are easily identifiable because the nexus is physical in character. The former consists of persons who work on the same premises, and the latter of persons who reside on the same premises. A common place of employment or a common residence are the factors which respectively unite these groups. The remaining group—the first to be specified—is "members of

one society". Here the nexus is mental and not physical. People do not belong to one society unless the society is formed for a common purpose or purposes. The common purpose is thus the factor which unites the members of this group. But the terms of the definition are not restricted to "members of one society". If they were, there would be an easy means of evasion. Societies would be formed for the common purpose of holding lotteries. That would produce an absurd result and the Act uses words to exclude it; the words are wide. If an expressed purpose of the society were to hold lotteries, naturally it would stand condemned; but if the objects are tainted by any such purpose, likewise it is condemned. So the respondents are required to show that their purposes are "not connected with gaming, wagering or lotteries".

Another possible evasion that Parliament has foreseen is that a society might be formed for one purpose and conducted for another. The original purpose might be lost sight of or become a facade for some other purpose. The society's affairs might be so conducted that a new purpose not contained in its original objects grows up and becomes one of the purposes of the society. Therefore the Act uses the phrase "established and conducted". The respondents must show that their society is neither established nor conducted for a tainted purpose. This reference to the conduct of the society naturally leads to an inquiry into what it is doing. Its objects are to be judged not merely by the aims which it declares on establishment, but also by its deeds. But its deeds are to be scrutinised only in order to see what light they throw on the purpose of the association. One must not lose sight of the fact that the object of this definition is not to forbid a course of conduct, but to define a group. If the group comes within the sub-section it may hold as many lotteries as it likes. If the lottery is a private lottery—the word "private" is I think used to show that the distinction to be emphasised is concerned primarily with character and not with size—the Act imposes no limitation on the amount of money which the lottery raises or on the frequency with which it is held. This is clearly shown by reference to the other groups within the sub-section whose definition is beyond doubt. Thus there may be a large number of people working on the same premises, I suppose many hundreds work in this building where we are now sitting. Such people may form a committee to organise lotteries and may hold lotteries as often as they like, raise any amount of money they like and do what they like with the money. The conduct of their affairs is unrestricted. It is indeed irrelevant to inquire how they conduct themselves, so long as they observe the special conditions. It is worth noting that under s. 24 the condition which forbids the sending of tickets through the post must of itself be restrictive of size. But the inquiry into "conduct" under s. 24 is relevant only if it throws light on the bond of purpose which unites its members.

The Solicitor-General does not contend that this society was established for a tainted purpose. He submits that it is now conducted for such a purpose. I think that a misconstruction of the word "conducted" in the section leads to a fallacy underlying the Solicitor-General's argument. The question is not whether the society conducts lotteries, nor even whether it conducts a business consisting largely of lotteries, but whether its affairs are so conducted that the untainted purposes for which it was established have either been overthrown or joined by a tainted purpose. Of course, in one sense every time the club holds a lottery, it might be said to be conducting itself for the purpose of holding a lottery. If this were the right test of purpose, it would make nonsense of the definition, for it would be impossible to hold a lottery and remain within it. What the sub-section refers to is not these smaller purposes which govern the doing of the individual act, but the larger purposes which unite the members of the society. No doubt each activity of the society, whether it be a lottery, a whist drive or cutting the grass, is done with the immediate purpose of doing the act itself. In that sense you may say that the society has as many purposes as it has

A activities. But if a measurement of its activities had been intended as the test, it would have been a simple matter to have phrased the definition as one which covered any society which held enough lotteries to amount to a substantial part of its activities, and exempted only those which held occasional lotteries. That sort of test is contemplated by s. 23, where one of the conditions (sub-s. (2) (d)) provides that

B “the facilities afforded for participating in lotteries shall not be the only, or the only substantial, inducement to persons to attend the entertainment.”

No doubt the word “conducted” in s. 24, if taken by itself, might suggest that what one has to look at is what the society is doing, and not what the society is aiming at. But on the true construction of the section, I think that the word

C “conducted” is used in order to broaden the word “established”. What has to be considered is not the immediate purpose of the act but the purpose of the association. The conduct of the society is material only if it effects a change in the purposes for which the society was established.

If this construction is right, then the matter which the justices have to inquire into is whether the holding of lotteries has joined the proclaimed objects of the society as one of its purposes. That such a thing may happen is illustrated by the case of *Pearse v. Hart* (1) which this court decided earlier this week. In that case a supporters’ club, similar to the one we are now considering, started holding lotteries in January, 1953. It had then one thousand four hundred members. Within six months its membership rose to twelve thousand five hundred. It is only reasonable to suppose that the vast majority of these new members were attracted solely by the idea of joining in the lotteries. If

E the justices thought that eighty or ninety per cent. of the members had joined the society without any particular sympathy for its proclaimed objects, but with the object of having a flutter, they would manifestly be entitled to find that the holding of lotteries had become one of the common purposes which held the members together. Whether or not it had become one of the society’s purposes is a question of fact; and there was certainly in that case ample evidence on which

F the justices could so hold.

In the present case the committee have, I think, applied their mind to the right question. It would perhaps have been better if they had expressed their finding in the terms which the Act uses and had found specifically that none of the purposes for which the club was established or conducted were connected with gaming, wagering or lotteries. I have noted before that justices seem reluctant

G to express their findings of fact in the express terms which the Act specifies, perhaps because they fear that they may be thought to be deciding the point of law which is being submitted to the court. They might consider employing the formula much used in commercial arbitrations: “In so far as it is a question of fact we find, and in so far as it is a question of law we hold, etc.” That leaves it to the superior court to decide what is fact and what is law, but also leaves

H the superior court in no doubt, if it turns out to be a question of fact, about the conclusion of the justices on it. Here the appeal committee has in para. 6 of the Case expressed the opinion

“that the running of the lottery was only incidental and ancillary to the other methods and enterprises used by the Supporters’ Club to carry out its declared purpose of helping the Football Club . . .”

I

I think this finding shows that they have applied what I believe to be the right test. They have distinguished between purposes and the means adopted for the carrying out of such purposes, and they have held in effect that the raising of money by lottery is only one of the means and has not changed the purposes for which the club was established. I think that this is a conclusion which they could reasonably reach on the evidence, and it is a question of fact for them. The holding of lotteries now forms a substantial part of the club’s activities,

but I am unable to say that as a matter of law it had grown to such overwhelming proportions that the committee could only hold that it had become one of the purposes of the association. A

A failure to distinguish between purposes and means leads to difficulties which are inherent in the Solicitor-General's argument. Is the raising of funds per se one of the purposes of the club? I can understand an argument that it is. I can follow an argument that if a club has a number of objects and those objects require the raising of money, then the raising of money for those objects must itself become one of the purposes of the club. But then if the raising of funds is one of the purposes of the society, and the raising of funds is "connected with . . . lotteries", the society is outside the sub-section. The raising of funds would be connected with lotteries (the words are extremely wide) if any part of the funds was raised by lotteries. This would mean that a single lottery held for the purpose of raising funds would take the society outside the sub-section. The Solicitor-General shrinks from this conclusion. But if this conclusion is not accepted, it can only be because, for the purposes of this sub-section, the raising of funds for the society's objects is not to be regarded as one of the purposes of the society, but only as a means for achieving its purpose. Of course the means may grow so great as to swamp the ends: the holding of the lotteries may be indulged in on such a scale as to be no longer a means of raising money but an end in itself. But that is simply to express in other words the test I have already applied. B C D

I can see no warranty in the Act for any half-way house or for saying that it is all right to hold an annual or quarterly or maybe a monthly lottery, but not to hold a weekly one; or that it is all right to raise, say, ten per cent. of the society's funds by means of a lottery but not to raise fifty per cent. or more. The definition is not in my view, as I have already said, concerned with limiting the frequency or size of lotteries, but simply with ascertaining the nature of the common bond defining the group within which the sale of tickets is to be confined. E

For these reasons, I think that the decision of the appeal committee was right and I would uphold it. F

LORD GODDARD, C.J.: The order of the court is that the appeal be allowed; the question submitted is answered in the negative, the order of the appeal committee is quashed and the convictions restored. The respondents will have to pay the costs of the appeal.

Appeal allowed.

Solicitors: *Director of Public Prosecutions* (for the appellant); *Arthur & Co.* (for the respondents).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

NOTE.

PEARSE AND OTHERS v. HART.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Devlin, J.J.), December 14, 1954.]

Gaming—Lottery—Private lottery—Lottery conducted by supporters' club to provide funds for football club—Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58), s. 24 (1).

[For the Betting and Lotteries Act, 1934, s. 24, see 10 HALSBURY'S STATUTES (2nd Edn.) 804, 805.]

Case referred to:

(1) *Maynard v. Williams*, p. 81, ante.

Case Stated by the justices for the City of Gloucester.

The first two appellants were members of the Gloucester City Association Football Club Supporters' Club who were charged with unlawfully selling tickets in a lottery contrary to the Betting and Lotteries Act, 1934, s. 22 (1) (b), and the third appellant, a limited company, was charged with unlawfully printing the tickets contrary to s. 22 (1) (a) of the said Act.

The Supporters' Club was formed in 1936 and, according to its rules, its objects were: (i) to promote among the citizens of Gloucester and the neighbouring district the furtherance of association football; (ii) to encourage athleticism; (iii) to provide funds to support the Football Club; (iv) to provide facilities to enable members to attend "away" matches of the Football Club; (v) to promote social or other activities among members of the club.

In 1949, the Supporters' Club had one thousand members. In April, 1954, the Supporters' Club had over sixteen thousand members each of whom paid an annual subscription of 1s., and received a membership card and a copy of the rules of the Supporters' Club. In January, 1953, the Supporters' Club commenced a lottery in which the sale of tickets was confined to members of the Supporters' Club. Membership of the lottery was confined to members of the Supporters' Club and the annual membership fee of the lottery was 1s. At the end of 1952, the membership of the Supporters' Club numbered about 1,400, but by June, 1953, the membership had risen to 12,500. On Apr. 10, 1954, 14,784 chances were sold, and a week later 14,726. Without taking into account the lottery the estimated income of the Supporters' Club for 1954 (based on 1953 figures) was £2,920; for 1953 the proceeds of the lottery amounted to £34,400 of which seventy-five per cent. was distributed in prizes.

H. Heathcote-Williams, Q.C., and C. B. Priday for the appellants.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.), C. R. N. Winn and Paul Wrightson for the respondent.

LORD GODDARD, C.J. (having stated the facts): The justices came to the conclusion that this was an unlawful lottery because the appellants had not shown that it was a private lottery within s. 24 (1) of the Betting and Lotteries Act, 1934. The justices were justified in coming to that conclusion because on the facts they found that it was impossible to say, although only members of one society could take tickets, that the club was not conducted for a purpose connected with lotteries; it was their way of raising money. There was first of all a Supporters' Club and then a separate club within a club, or at any rate a department of it, because an extra shilling was paid for membership of the lottery competition.

This matter is a question of fact provided a proper reading is given to s. 24 (1) and the justices apply their minds and direct themselves correctly as to what

the section means. I do not think that the fact that the club supports other activities affects the matter at all. It is not a question whether the club has one purpose and one purpose only. The club may have a variety of purposes. I have no doubt that the Gloucester Football Club Supporters' Club had, but if one of their purposes is connected with lotteries, it seems to me that their lottery ceases to be a private lottery and is, therefore, unlawful. There is no suggestion here that the lottery was run for improper purposes, still less that it was not properly run, but that is not a matter with which this court is concerned any more than the justices were concerned. The justices were amply justified in coming to the conclusion they did in this case and I do not think that they could have come to any other decision.

For these reasons the appeal should be dismissed.

CASSELS, J.: I agree. The justices came to the conclusion that this was a society conducted for purposes connected with gaming, wagering or lotteries. There was ample evidence to support their finding to that effect. I think that this Supporters' Club has for one of its purposes the running of a lottery and, therefore, the appellants come within the mischief of the Act, they were properly convicted and I think this appeal must be dismissed.

DEVLIN, J.: The meaning and effect of the Betting and Lotteries Act, 1934, s. 24, is one of the matters which the court will consider in *Maynard v. Williams* (1) in which it has reserved judgment and, therefore, all that I think it is necessary to say in the present case is this: that even if the construction most favourable to the appellants were adopted, there would still be ample evidence to justify the conclusion of the justices that one of the purposes for which this society was conducted is connected with gaming, wagering or lotteries. Accordingly, I agree that the question stated in the Case should be answered in the affirmative and that the conviction should be upheld.

Appeal dismissed.

Solicitors: *Devonshire & Co.*, agents for *Bretherton & Sons*, Gloucester (for the appellants); *Director of Public Prosecutions*.

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

A MOORHOUSE (INSPECTOR OF TAXES) v. DOOLAND.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.J.J.), November 19, 22, 23, December 15, 1954.]

Income Tax—Income—Voluntary payments—Professional cricketer—Collections made for meritorious performances—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Rules Applicable to Sch. E, r. 1.

The taxpayer, who was a professional cricketer of a league club, was entitled, under his contract of employment which incorporated a rule of a cricket league applying also to amateur players, to have a collection made whenever he had a particularly meritorious performance in batting or bowling for the club. Such performances occurred with considerable frequency and collections were made. The General Commissioners of Income Tax found that the collections were not taxable on the ground that they were not a profit arising from the taxpayer's employment within r. 1 of the Rules Applicable to Sch. E to the Income Tax Act, 1918.

Held: (i) in determining whether a voluntary payment to the holder of an employment is taxable under Sch. E to the Income Tax Act, the character of the payment, i.e., whether it is a perquisite or profit from the employment, is to be judged in relation rather to the recipient than to the giver; accordingly, the collections were taxable in the present case because (a) they arose in the ordinary course of the taxpayer's employment, (b) occasions for the collections arose repeatedly and (c) the taxpayer was entitled by the terms of his contract to invite subscriptions, and, therefore, from the standpoint of the taxpayer, the proceeds of the collections were earnings accruing from his employment.

Seymour v. Reed ([1927] A.C. 554) distinguished.

(ii) the case had not been determined by the commissioners on a question of fact, and their finding was one of mixed fact and law which it was open to the court to review.

Per SIR RAYMOND EVERSLED, M.R.: (a) I am unable to assent to the wide proposition that if it be shown of a voluntary payment to an employee . . . made by the employer or by a third party, that it was only made because the recipient was the employer's servant . . . therefore the sum is taxable . . . In my view a gift or present made either on some special occasion as a wedding, a century at cricket, a birthday or at a season of the year when it is customary to make presents, does not necessarily cease to be non-taxable merely because the ties that link the recipient and the giver are, or are substantially, those of service (see p. 99, letter F, and p. 100, letter B, post).

(b) in my judgment the authority of *Blakiston v. Cooper* ([1909] A.C. 104) is necessarily limited by its own particular facts (see p. 102, letter B, post).

Appeal allowed.

[As to Taxation of Voluntary Payments to the Holder of an Office or Employment, see 17 HALSBURY'S LAWS (2nd Edn.) 213, para. 435; and for cases on the subject, see 28 DIGEST 85, 490-507.]

For r. 1 of the Rules Applicable to Sch. E to the Income Tax Act, 1918, see 12 HALSBURY'S STATUTES (2nd Edn.) 177; and for the replacing provisions of para. 1 of Sch. 9 to the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 522.]

Cases referred to:

- (1) *Seymour v. Reed*, [1927] 1 K.B. 90; 95 L.J.K.B. 796; 135 L.T. 259; *revid.* H.L., [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; Digest Supp.

- (2) *Blakiston v. Cooper*, [1907] 2 K.B. 688; 76 L.J.K.B. 1041; 97 L.T. 531; *A*
affd. H.L., [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; 5 Tax Cas.
 347; 28 Digest 86, 495.
- (3) *Davis v. Harrison*, (1927), 96 L.J.K.B. 848; 137 L.T. 324; 11 Tax Cas.
 707; Digest Supp.
- (4) *Calvert v. Wainwright*, [1947] 1 All E.R. 282; [1947] K.B. 526; [1947]
 L.J.R. 1335; 177 L.T. 159; 27 Tax Cas. 475; 2nd Digest Supp. *B*
- (5) *Herbert v. McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349;
 66 J.P. 692; 4 Tax Cas. 489; 28 Digest 86, 492.
- (6) *Turton v. Cooper*, (1905), 92 L.T. 863; 5 Tax Cas. 145; 28 Digest 86, 494.

Appeal.

The Crown appealed from an order of *HARMAN, J.*, dated May 27, 1954, *C*
 dismissing an appeal by Case Stated from a decision of the General Commissioners
 of Income Tax for Blackburn.

The commissioners held by a majority that collections for meritorious perfor-
 mances to which the taxpayer, a professional cricketer, was entitled under his
 contract of service with a league cricket club were not taxable under r. 1 of the *D*
 Rules Applicable to Sch. E to the Income Tax Act, 1918, on the ground that they
 were not a profit arising from the taxpayer's employment but were given as
 testimonials to his abilities. The taxpayer contended that he received the
 collections from the spectators as testimonials in recognition of his skill as a
 player and not from his employers and that they were not a profit arising from
 his employment but a voluntary gift. The Crown contended that the voluntary *E*
 nature of the collections was immaterial and that the frequency of the collections
 distinguished the case from *Seymour v. Reed* (1), in which gate receipts paid to a
 county cricketer's benefit were held not taxable; that the taxpayer's contract
 of employment and the league rules gave him the right to the collections and
 that they were a profit accruing to him by reason of his employment. *HARMAN, J.*,
 held that the right to the collections arose out of the league rules and that there
 was evidence on which the commissioners could hold that the collections were *F*
 personal tributes to the taxpayer and did not arise out of his employment, and
 he dismissed the appeal.

The Crown appealed.

Roy Borneman, Q.C., and *Sir Reginald Hills* for the Crown. *G*
F. N. Bucher for the taxpayer.

Cur. adv. vult.

Dec. 15. The following judgments were read.

SIR RAYMOND EVERSHERD, M.R.: In this appeal the question is
 whether the Crown are entitled to recover income tax in respect of a sum (not *H*
 finally ascertained, but treated for the purposes of the proceedings as amounting
 to £48 or thereabouts) which represents the proceeds of collections made at
 cricket matches during the cricket season of 1951 for his own benefit by or on
 behalf of the taxpayer, Mr. Bruce Dooland, a professional cricketer employed
 as such at the relevant dates by the East Lancashire Cricket Club, one of the
 clubs commonly known as "the Lancashire League". *I*

The taxpayer was at the relevant dates assessed for tax—and, as is agreed,
 rightly assessed—under Sch. E to the Income Tax Act, 1918, his service as
 cricket professional being an "employment" which, as the result of s. 18 (1)
 of the Finance Act, 1922, was translated from the scope of Sch. D to that of
 Sch. E. It follows that the taxpayer's liability has to be tested having regard
 to the well-known language of r. 1 of Sch. E " . . . all . . . fees, wages, perquisites
 or profits " arising from the employment concerned. The Crown have not

- A relied on any of the special words, for example, particularly "perquisites", in this rule. This, in the event, is not therefore a case related to any of the peculiar differences between the terms of Sch. D and Sch. E or their respective rules. The question is whether, on the whole facts of the case as proved and found, these collections were in truth and in substance part of the taxpayer's earnings as a professional cricketer and taxable as such: whether they fall fairly within
- B the words which are found in the Rule Applicable to Case II of Sch. D "all profits and earnings of whatever value arising from" the employment, a formula which for present purposes may be taken as synonymous with that quoted from the Rule Applicable to Sch. E.

Since all cases of comparable character must, in my judgment, turn on their facts, I find it desirable to quote at some length from the Case Stated and the

C documents annexed thereto. The taxpayer's engagement was governed by a contract in writing (annexed to the Case) dated Aug. 27, 1949, and made between Mr. Eli Higham on behalf of the East Lancashire Club of the one part and the taxpayer of the other part. By that contract the taxpayer agreed to serve as cricket professional to the club for the two seasons of 1950 and 1951. Clauses 2 and 3 were in the following terms:

- D "2. The salary payable by the club to the professional shall be the sum of £800 for each of the said two seasons to be paid by equal weekly payments throughout the said seasons or in such other manner or at such other times as may be mutually agreed upon and the club shall also pay in each of the said seasons the sum of £150 for or towards the cost of one passage for the
- E professional between Australia and England. 3. Talent money shall be paid to the professional by the club at the rate of one guinea for each and every score of fifty runs made by the professional in any Lancashire League or Worsley Cup match in which the club takes part during the term of his engagement and also a like sum on every occasion on which he obtains six wickets or performs the hat trick in any such match. Collections shall be
- F made for any meritorious performance by the professional with bat or ball in any Lancashire League or Worsley Cup match in accordance with the rules for the time being of the Lancashire Cricket League."

As will later appear, the last sentence of cl. 3 is, in my view, of particular importance.

- G There followed a number of clauses strictly regulating the taxpayer's obligations as to playing in club matches, acting as coach and the like; including provisions, in the event of the taxpayer's incapacity, enabling the club to engage a substitute at a remuneration to be paid, up to a stated limit, by the taxpayer, and also in certain circumstances to determine the agreement. The final clause, cl. 13, was as follows:

- H "Provided always and it is hereby declared that this agreement is made subject to the rules for the time being in force of the Lancashire Cricket League a copy of which has been produced to the professional and such rules so far as they relate to the professionals engaged by any Lancashire League club and so far as they are not hereby varied or inconsistent herewith
- I shall be read with this agreement and deemed to be incorporated herein."

There was, in fact, no express obligation on the taxpayer's part to play in the matches to the best of his ability; but it may no doubt be assumed from the nature of the engagement and of the game of cricket that he would do so, and that he would be encouraged to such efforts by the provisions for talent money and collections in cl. 3.

The relevant rules of the league are also set out in the Case. At the date of the contract, 1949, r. 33 was, as set out in para. 2 (3) (b) of the Case:

"Each club must play one professional, but not more than one, in league matches; the whole of a professional's remuneration must be in the form of a weekly wage plus usual talent money and collections, and all other forms of payment such as benefit matches, commission on gate money, agreement signing fee, etc., are strictly forbidden. All professional agreements must be deposited with the league secretary within fourteen days of completion thereof, and shall then be examined by him to see that they conform to the league rules. The knowledge of any part of the agreement shall be confined to the president and honorary secretary, unless they decide that the interests of the league require that any portion of the agreement should be laid before the league committee. All agreements must contain the following clause :— 'The said . . . shall not at any time during the continuance of this agreement play in any cricket match other than the matches arranged by the . . . cricket club without first obtaining the consent of the committee of the said club in writing under the hand of the chairman or secretary of such committee'."

This rule was altered before the opening of the 1950 cricket season by the omission from the opening paragraph of the words "and collections". It follows, therefore, that during the relevant seasons, "collections", according to the league rules and therefore to the taxpayer's contract, were not and could not be part of the professional's "remuneration" (as defined by r. 33); but they were (in view of r. 38) still clearly permissible, and in fact made, in the taxpayer's case. The taxpayer's contract gave him the right to the benefit of such collections in the circumstances stated in r. 38. In fact, during the seasons 1950 and 1951, collections were made by or for the taxpayer as a result of performances on his part which qualified him therefor on five and eleven occasions respectively. The claim in the present case (as I have already stated) arises from the latter season. To judge from the list of fixtures in the rules annexed to the Case, the East Lancashire Club played about twenty-five matches in the season. It appears, finally, from the Case that the collections (which were made on the ground and might be made on the occasion of home or away matches) were handed, after counting, immediately to the player concerned, the club neither contributing to nor handling the money. It was stated in evidence by the treasurer of the East Lancashire Club that the financial standing of a club might influence a professional in deciding which club to join (a fact which appears to me obvious) and that in fact the East Lancashire Club was "the wealthiest and best supported" in the league.

On these facts counsel for the taxpayer contended that, since the performances which qualified a player for the taking of a collection were performances of exceptional personal prowess, which, in the taxpayer's case, it was not his contractual duty to achieve, they were therefore distinct from and outside the scope of his employment and the sums collected represented (unlike talent money), not earnings, but the spontaneous expression by way of gift on the part of members of the public of their grateful pleasure in witnessing the taxpayer's skill. This argument was (according to counsel) strongly reinforced by the facts; (i) that amateurs could qualify like professionals (albeit by reference to a somewhat less exacting standard) for the making and taking of collections, the true character of which could not differ from those taken for professionals, but which, in the case of an amateur, could not constitute professional earnings; (ii) that the sums collected were small in comparison with the regular salary; and (iii) that there was no finding and no evidence that the possibility or expectation of collections had played any part in influencing the taxpayer to make the contract which he did. On these grounds, therefore, counsel for the taxpayer contended, applying the principle which has found similar judicial expression, including the language of that very experienced judge, ROWLATT, J., in the cases to which

A I shall later refer, that these collections were "mere personal gifts" and not "by way of payment for his services". Counsel further submitted that, in any case, the conclusion of the majority of the General Commissioners was one of fact and, there being no error of law shown, was conclusive.

There emerge, however, from the facts of the present case three circumstances of the most significant relevance. First, though it is true that the taxpayer B qualified for the collections by excellences of performance on his part, they were excellent performances of his professional duty as a cricketer, and they arose in the ordinary course of his service while playing as the cricket professional of the East Lancashire Club. Second, though the performances were exceptional in the sense of being outstanding, they were not exceptional in the sense of being very rare and unlikely to be, save very occasionally at most, repeated. Third, C and not the least, it was a term of the taxpayer's contract of service that, on each occasion on which he performed his service with the requisite degree of skill, he should be entitled to invite subscriptions for himself from bystanders. It was a right capable of enforcement at law, if the taxpayer's employers infringed it, by refusing to permit the taking of a collection when, according to the league rule incorporated in his contract, his performance had reached the qualifying D standard. The right, in other words, was part of the consideration for his services flowing from his employers. And if the question were asked "What is the right worth?" the corresponding question would be naturally provoked "How much in fact was collected?"

In light of these circumstances my own conclusion on the facts, unless I am precluded by a contrary finding of the commissioners, is that the collections E received by the taxpayer during the 1951 season constituted, in truth and substance, part of the earnings of his profession and cannot fairly be called "mere personal presents" distinct from his earnings. To put my conclusion in the form posed by JENKINS, L.J., during the argument, if the question had been asked of the taxpayer at the end of the 1951 cricket season—what were his earnings as the East Lancashire Cricket Club professional?—an answer which ignored altogether F the proceeds of the collections would, by ordinary standards of common sense and accuracy, have fallen short of the truth.

I have said "unless I am precluded by a contrary finding of the commissioners", and it will be convenient for me to dispose at once of this point made by counsel for the taxpayer. I cannot myself assent to the view advanced by counsel for G the Crown that it is "dangerous" to leave matters of this kind, viz., the discrimination between earnings arising from an employment on the one hand and mere personal presents on the other, to the commissioners as questions of fact. No doubt problems of this character commonly involve mixed questions of fact and law. But as VISCOUNT CAVE, L.C., observed in *Seymour v. Reed* (1), the case of the Kent county cricketer ([1927] A.C. at p. 559):

H "The question to be answered is, as ROWLATT, J., put it: 'Is it in the end a personal gift or is it remuneration?'"

In many cases at least, and more particularly perhaps where the sum involved is small, provided that the commissioners have been properly instructed on the principles to be applied, the question will, as ROWLATT, J., said, "in the end" I be one to be answered, in my judgment, as a matter of substance, of common sense and, therefore, of fact. In the present case, however, the commissioners did not, as I understand them, purport so to answer the question. Paragraphs 8 and 10 of the Case Stated were thus expressed:

"8. After due consideration of the facts and the arguments submitted to them the commissioners, by a majority, were of the opinion that the collections in question were not a profit arising from the [taxpayer's] employment within the meaning of the statutes but were given as testimonials to his

abilities . . . 10. The question in law for the opinion of the High Court is whether on the evidence before them the commissioners were entitled to hold that the collections in question were not a profit arising from the [taxpayer's] employment within the meaning of the statutes."

In my judgment, therefore, the question in the present case has not been determined as a matter of fact conclusive in the courts. In *Seymour's* case (1), supra, the commissioners, after setting forth the rival contentions of the Crown and the subject, and after, indeed, a somewhat jejune statement of facts, on any view, stated their conclusion thus (11 Tax Cas. at p. 628):

"We, the commissioners . . . after due consideration of the facts and arguments submitted to us, were of the opinion that the contentions of the respondent were correct."

LORD CARSON in the House of Lords was able to treat this statement as a conclusive statement of fact; but I cannot find that any other of the noble Lords or of the judges who heard the case was conscious of any embarrassment on this ground. In this respect the present case is, in my judgment, of the same character as *Seymour's* case (1).

We were referred to a number of well-known cases in which analogous questions had come before the courts—cases relating, for example, to Easter offerings [*Blakiston v. Cooper* (2)], to the "benefits" enjoyed by a professional footballer [*Davis v. Harrison* (3)] or a professional county cricketer [*Seymour v. Reed* (1)] to the "tips" given to a taxicab driver in augmentation of his fares [*Calvert v. Wainwright* (4)]. In these cases the relevant contrast, as I have already stated, was expressed as being between that which was in substance remuneration or earnings arising from the profession or employment as such, being taxable (on the one hand); and that which was (on the other hand) a mere personal gift and was not taxable. I have already referred to the language of ROWLATT, J., approved and adopted by LORD CAVE, L.C., in *Seymour's* case (1). I quote by way of further example some language used by SIR RICHARD HENN COLLINS, M.R., in *Herbert v. McQuade* (5), which related to the so-called clergy sustentation fund for augmentation of the stipends of the clergy ([1902] 2 K.B. at p. 641):

"If, as the respondent contended, it was in fact a gift personal to himself, I do not think that it would fall within Sch. E; if, on the other hand, it accrued to him by virtue of his office of incumbent, the respondent himself could hardly dispute his liability."

In the context of the facts of those cases the contrast thus simply expressed was sufficient. I observe only that the alternatives were intended to be mutually exclusive—if the sum in question was a mere personal gift, then, ex necessitate rei, it was not received by way of earnings of the office or employment, and vice versa. But the attempt to apply the antinomy to the facts of the present case seems to me to have produced the result of an over-simplification or over-statement on each side of their respective cases. Counsel for the taxpayer did not, of course, seek to contest the proposition that a sum received might be taxable earnings though it was given voluntarily. But it was his contention that, since the contributions of the spectators were on their part entirely "spontaneous" donations having no relation to any contract of employment between the taxpayer and his club, they could not, therefore, be earnings arising from that contract. Counsel relied also on a passage from the judgment of STIRLING, L.J., in the same case of *Herbert v. McQuade* (5) ([1902] 2 K.B. at p. 650):

"... a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part . . ."

A And counsel emphasised the point that the collections here in question were made to the taxpayer, not because he was the professional member of the East Lancashire Club XI, but because he had individually performed an outstanding cricketing feat. In my judgment, however, this argument disregards, inter alia, the special term of the taxpayer's bargain conferring on him the right, in the appropriate circumstances, to solicit the collections. And it fails also, in my
B judgment, to pay due regard to another highly significant matter, namely, that the character of the sums received is to be ascertained and judged in relation rather to their recipient than to their giver. For that proposition I make a third citation from *Herbert v. McQuade* (5) ([1902] 2 K.B. at p. 649) where the Master of the Rolls referred to the

C " . . . principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it."

D It follows, in my judgment, that a sum received may be earnings arising from the recipient's employment although it was a mere gift on the part of him who paid; and that it is not sufficient in this case merely to say that the collections were spontaneously given by members of the public in token of their admiration for a special feat of bowling or batting.

E It was said on behalf of the Crown that, though a sum paid by an employer might be voluntary in the sense that it was a "mere present" on his part, nevertheless, if the fact of the payment was essentially attributable to the circumstance that the payee was his employee, it followed that the sum so paid was part of the employee's earnings and taxable as such. On this view Christmas boxes paid by an employer to an employee would or might be taxable. It is not
F necessary for me in the present case to decide whether such Christmas boxes are or are not taxable. I am unable, however, to assent to the wide proposition that, if it be shown of a voluntary payment to an employee, whether it be a Christmas box, a wedding present or any other kind of gift, made by the employer or by a third party, that it was only made because the recipient was the employer's servant or that it would not otherwise have been made, therefore the sum is
G taxable; and, accordingly, that the collections in this case are taxable because they owe the fact of their having come into existence to the taxpayer's contract with the East Lancashire Club. In my judgment, such a proposition is inconsistent with the decision in *Seymour's* case (1), for it is clear that the renowned Kent professional indubitably owed his benefit, in one sense at least, to the fact that he had played cricket for many years as a professional for the Kent County Cricket Club and to the fact that the benefit was entirely organised on his behalf
H by the committee of the club, which, in effect, contributed about one half of the total sum provided. The proposition, to my mind, confuses an incidental, albeit essential, circumstance of the collection of the sum received with its substantial character in the hands of the recipient. Thus, in *Seymour's* case (1), in the Court of Appeal, SARGANT, L.J. (in the course of his judgment dissenting from
I the view of the majority of the court which was rejected in the House of Lords) thus expressed himself ([1927] 1 K.B. at p. 106):

" . . . the substantial reason why these moneys were to be paid to Seymour was, not because he had been a mere member of the eleven and as part of an addition to what was given to him by virtue of his office, but as a personal present by way of recognition of the pleasure that had been afforded to the patrons of the club and the general public who had flocked to see the play, by the brilliance of the particular individual cricketer's play."

And VISCOUNT CAVE, L.C., in the same case, immediately before his reference to ROWLATT, J., already quoted, had said ([1927] A.C. at p. 559) that taxable payments under Sch. E

“ . . . include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services.”

It follows, in my view, that a gift or present made either on some special occasion as a wedding, a century at cricket, a birthday or at a season of the year when it is customary to make presents, does not necessarily cease to be non-taxable merely because the ties that link the recipient and the giver are, or are substantially, those of service and are not, or not exclusively, those of blood or friendship; and this may still be so although the present is (for example, whenever another century is made or according to custom at Christmas) repeated.

The case of *Seymour v. Reed* (1) from which I have already made citations, was naturally much referred to, being clearly on its facts most akin of the decided cases to the present. In that case the claim of the Crown to tax the benefit subscribed for Seymour was confined to that part of the total (in sum about half) which had in effect been contributed by the Kent county club as representing the gate money paid at the benefit match which in the ordinary course belonged to the club. The Crown made no claim to—in the words of ROWLATT, J., they “shied at”—that part of the fund which had been subscribed independently by members of the public. It was a point much stressed, and naturally, by counsel for the taxpayer, who referred to the Lord Chancellor’s language ([1927] A.C. at p. 560):

“ . . . those subscriptions, which are the spontaneous gift of members of the public, are plainly not income or taxable as such . . . ”

In truth, as was observed passim in the judgments and speeches in *Seymour’s* case (1), there was no valid distinction in principle between the two kinds of contribution for the purpose of taxability; and the Crown, who have displayed no similar “shyness” in the present case, were disposed, as I understood their counsel, to admit that their concession in *Seymour’s* case (1) was unnecessary and logically unsound.

In my judgment, the facts on which *Seymour’s* case (1) was determined in vital respects, are different from those in the present case. The terms of Seymour’s contract nowhere appear but quite plainly they did not include any right in any circumstances to a “benefit”. At most, as SARGANT, L.J., observed, it was said to be a settled practice of the Kent club to arrange a “benefit” for a professional who had rendered long and distinguished service to the club, so that there might be some claim on the part of a cricketer after such service to expect a donation of that kind. The grant or arrangement of a benefit was a matter entirely in the discretion of the club—as was also the method of disposition of the sum subscribed, which, according to the evidence, was not handed over to the professional but invested on his behalf as a means for providing for him after his retirement from the game. These circumstances plus the facts that (according to the evidence) except in the rarest instances, a player had only one benefit and that one towards the end of his career as a professional, and that the sum subscribed was very large by comparison with the professional’s regular salary (the converse of the present case) were the basis of the decision and have no correspondence with the facts of the present case.

In my judgment, therefore, *Seymour’s* case (1) cannot be treated as an authority which ought to govern our decision in the present case. On the facts of the latter, and particularly having regard to the three essential characteristics to which I drew attention earlier in this judgment, I conclude that the proceeds of the

- A collections made in the year 1951 were, from the standpoint of the taxpayer, substantially earnings arising from his employment as cricket professional, and taxable as such. Whether the result would be the same if any one or more of those characteristics were absent, it is quite unnecessary for me to say. For example, if there was no right for the taxpayer by contract to have these collections—so that his position in that respect would be analogous to that of an amateur player in the league—and if the qualifying exploits were of such a kind, as, for example, the making of fifty runs and taking all ten wickets in an innings in the same match, so that their achievement or repeated achievement could be regarded as altogether exceptional, the result might be different. I base my decision on, and limit it to, the particular facts proved and found in the case before us.
- C In the Easter offerings case—*Blakiston v. Cooper* (2)—LORD LOREBURN, L.C., said ([1909] A.C. at p. 107):

“In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present.”

- D I observe that LORD LOREBURN says “*might not*”. Applying that language to the present case, although no doubt the collections were “testimonials” “peculiarly due to the great qualities” of the taxpayer as a cricketer, in my judgment, for the reasons I have given, they were not mere presents so as not to be taxable but were, in the taxpayer’s hands “substantially in respect of his services” as the club’s professional.
- E Counsel for the Crown contended that the facts of the case were so plain that *res ipsa loquitur* in the Crown’s favour. I cannot agree. Although I think the Crown entitled to succeed, I have, for my part, found the case far from easy and have felt, if I may say so, much sympathy with the view taken by the majority of the commissioners and by HARMAN, J. As I understood him, counsel for the Crown also suggested in opening that the decision of HARMAN, J., involved an anomaly, unjust to parsons, as regards Easter offerings, and to professional footballers as regards their benefits. I cannot by any means assent to that suggestion. The case of the professional footballer is plainly quite different,

- G since, in his case, benefits appear to be payable at stated times by his employer as a term of his contract (see *Davis v. Harrison* (3))* . As regards Easter offerings to the clergy, there is no doubt that to the extent that the facts relating to them correspond with the facts in *Blakiston v. Cooper* (2), *supra*, they are taxable. The House of Lords so decided in that case in 1908 and Parliament has not since altered the law. With the income tax at its present rate, it might perhaps appear
- H startling to those who on a particular Sunday—and that one of the most significant in the Christian Year—contribute to the collection in their church, should be rendering unto Caesar nearly half their contributions. But so undoubtedly it is. I observe, however, that the decision in *Blakiston v. Cooper* (2) turned largely on the circumstance that the offerings there in suit had been prompted by a letter from the bishop alluding ([1907] 2 K.B. 689) to

- I “... the laudable practice of making freewill offerings at Easter to the parochial clergy, who are seldom sufficiently endowed”,

and LORD PHILLIMORE in *Seymour’s* case (1) ([1927] A.C. at p. 569) referred to the historical connection between Easter offerings and the common law Easter dues. Offerings made, therefore, in circumstances similar to those in *Blakiston*

* *Davis v. Harrison* (3) was considered in relation to slightly different circumstances, where the proceeds of a benefit match and accrued shares of benefit were involved, in *Corbett v. Duff* ([1941] 1 All E.R. 512).

v. Cooper (2) must be regarded as systematic and recurrent augmentations of the stipends of the clergy. On the other hand, offerings made to a particular clergyman out of regard for, and in relief of, his particular circumstances may well still not be taxable (see *Turton v. Cooper* (6)).

In any case, the clergyman, unlike the professional cricketer, is the holder of an office. In the case of the clergy, the office (i.e., that of the incumbent of a particular living) and its holder for the time being are clearly distinguishable. Easter offerings (as ordinarily understood) are contributions made to the holder of the office as such so that (as has been observed), if a particular incumbent should die before the time arrived for payment of the offerings, they would go to his successor. Such considerations have no place with an employment such as that of a professional cricketer. In my judgment, the authority of *Blakiston v. Cooper* (2) is necessarily limited by its own particular facts.

The court, however, is not concerned with anomalies—save at least in those cases (of which the present is not one) in which it will tend to favour an interpretation of a doubtful matter of law or an obscure passage in an Act of Parliament or other instrument which will avoid anomalies. Here the court's duty is to relate particular facts to established principles. Since, however, the matter of anomalies was raised, I must observe that our decision in favour of the Crown may well be said to create an anomalous distinction between the large benefits received by professional county cricketers which are not taxable and the relatively small collections received by Lancashire League cricketers which are. An anomaly which may be thought more startling still arises within the Lancashire League itself between the collections of the professional cricketer which are taxable and the collections of the amateur in corresponding circumstances which (seemingly) are not; a point which strongly appealed to HARMAN, J., and led him to the view that the contractual element in the taxpayer's collections was incidental only and should not be regarded as significant. In light of these considerations, I confess that I have reached my conclusion with little satisfaction or enthusiasm; but I think that the appeal must be allowed.

JENKINS, L.J.: If this had been the first case of its kind, there might have been something to be said for the view that the proceeds of the collections were not in their nature taxable at all, for the simple reason that these were not sums paid or provided by or at the expense of the taxpayer's employers, but were contributed voluntarily by spectators under no obligation to make any such payment, and were accordingly in the nature of casual profits as distinct from income derived from a regular source. But it has long been settled that payments voluntarily made by third parties to the holder of an office or employment may in some circumstances be taxable as profits arising to such holder therefrom, although the immediate source from which they proceed consists in the generosity of persons on whom he has no legal claim.

The present case cannot, therefore, be dismissed on the short ground above suggested, and it becomes necessary to consider whether on the authorities the circumstances in which the taxpayer received the proceeds of these collections, albeit contributed voluntarily and by strangers to his contract of employment, were such as to make those proceeds when considered in relation to the nature and terms of his employment, "perquisites or profits . . . therefrom" within the meaning of r. 1 of the Rules Applicable to Sch. E as applied to his case by s. 18 of the Finance Act, 1922.

The circumstances in which voluntary payments may be made to the holders of offices or employments are obviously capable of wide variation from case to case, and each case must be judged by reference to its own facts. But the authorities indicate certain general principles to which regard should be had in determining whether the circumstances of a particular case are or are not such as to bring it within the line of tax liability. In *Herbert v. McQuade* (5), which concerned the liability of the vicar of a certain parish to tax on sums granted

A to him by the Queen Victoria Clergy Sustentation Fund, SIR RICHARD HENN COLLINS, M.R., said ([1902] 2 K.B. at p. 649):

B “Now that . . . is certainly an affirmation of a principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it”.

C In the same case STIRLING, L.J., said (*ibid.*, at p. 650):

D “I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part; and what we have to determine is whether the sum in question does so come to the holder of this office.”

In *Blakiston v. Cooper* (2) LORD LOREBURN, L.C., said ([1909] A.C. at p. 107):

E “In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present”.

F In *Seymour v. Reed* (1) where tax was unsuccessfully claimed on the proceeds of a professional cricketer's benefit, VISCOUNT CAVE, L.C., after referring to the terms of r. 1 of Sch. E, said ([1927] A.C. at p. 559):

G “These words and the corresponding expressions contained in the earlier statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as ROWLATT, J., put it: ‘Is it in the end a personal gift or is it remuneration?’ If the latter, it is subject to the tax; if the former, it is not. Applying this test, I do not doubt that in the present case the net proceeds of the benefit match should be regarded as a personal gift and not as income from the appellant's employment. The terms of his employment did not entitle him to a benefit, though they provided that if a benefit were granted the committee of the club should have a voice in the application of the proceeds. A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement; and, except in a very special case, it is not granted more than once. Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities. It is usually associated, as in this case, with a public subscription; and, just as those subscriptions, which are the spontaneous gift of members of the public, are plainly not

income or taxable as such, so the gate moneys taken at the benefit match, which may be regarded as the contribution of the club to the subscription list, are (I think) in the same category. If the benefit had taken place after Seymour's retirement, no one would have sought to tax the proceeds as income; and the circumstance that it was given before but in contemplation of retirement does not alter its quality." A

In the same case, LORD PHILLIMORE, after referring to *Blakiston v. Cooper* (2) B and *Herbert v. McQuade* (5) said (*ibid.*, at p. 570):

"In fact, in these cases of ministers of religion there is always, I think, some element of periodicity or recurrence which makes another distinction between them and the case of a single gift by an employer or employers".

From these citations I deduce the following principles: (i) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words by way of remuneration for his services. (ii) If the recipient's contract of employment entitles him to receive the voluntary payment, whatever it may amount to, that is a ground, and I should say a strong ground, for holding that, from the standpoint of the recipient, it does accrue to him by virtue of his employment, or in other words by way of remuneration for his services. (iii) The fact that the voluntary payment is of a periodic or recurrent character affords a further, but I should say a less cogent, ground for the same conclusion. (iv) On the other hand, a voluntary payment may be made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, as for example a collection made for the particular individual who is at the time vicar of a given parish because he is in straitened circumstances, or a benefit held for a professional cricketer in recognition of his long and successful career in first-class cricket. In such cases the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual paid and received by reason of his personal needs in the former example and by reason of his personal qualities or attainments in the latter example. C D E F

Applying these principles to the facts of the present case, I find: (i) that, under his contract of service with the East Lancashire Cricket Club, the taxpayer was entitled to make, or have made on his behalf, collections from spectators on the ground, whenever he achieved one of the performances in batting or bowling which carried the right to a collection according to the rules of the Lancashire Cricket League; and (ii) that occasions on which he attained one or other of the stipulated performances, and enjoyed a collection accordingly, recurred with considerable frequency, there having been no less than eleven of such occasions during the 1951 season. According to the principles above stated, these facts afford cogent grounds for holding that the present case falls within the line of tax liability. G H

On the other hand it is to be observed: (i) that, in order to earn the right to a collection the taxpayer had, not only to play in a given match, but also to achieve in the course of play one or other of the stipulated performances, and (ii) that, according to the rules of the Lancashire Cricket League, amateurs were entitled to make, or have made on their behalf, similar collections whenever they achieved like performances in batting or performances in bowling of a slightly less exacting standard. I

Counsel for the taxpayer contends that these features of the present case show that spectators contributing to his collections were not contributing, albeit voluntarily, to the remuneration of the taxpayer as professional to the East Lancashire Club but were merely expressing, in terms of cash, their spontaneous appreciation of a display of skill given by one of the players, who happened to be Mr. Dooland, the club's professional, but might equally well have been any

- A other player in the match, professional or amateur, who achieved a comparable performance. Counsel submits that the necessity of achieving one or other of the stipulated performances in order to earn the right to a collection amounts to a condition which suffices to take the proceeds of it out of the category of profits arising by virtue of the employment, and in support of this submission he refers to the observation of STIRLING, L.J., in *Herbert v. McQuade* (5), to which
- B I have already referred. He further contends that, while sums voluntarily contributed may be profits of an office or employment, to bring them within the line of tax liability, there must be some nexus between recipient and contributor in the shape of services rendered by the former for the benefit of the latter. He says that, while such a nexus may be said to exist between a taxi-driver or waiter and a passenger or customer who gives him a tip, or between the vicar of a parish and a member of his flock who contributes to his Easter offering, there
- C was no similar bond between the taxpayer and the spectators he helped to entertain.

- I hope I will not be thought to undervalue these arguments if I say that I regard them as disposed of by the application of the principle that the question whether a given receipt is a profit of an employment must be decided from the standpoint of the recipient. From the standpoint of the taxpayer, the proceeds
- D of the collections were by the very terms of his contract of employment part of what he was to get under the contract by way of remuneration or reward for what he was to do under the contract. True it is that the amount of any collection would depend on the number and good will of the spectators present; but the terms of his employment entitled him as of right to collect what he could.
- E True it is, also, that his right to collect depended on his achieving one or other of the stipulated performances; but that condition was itself a term of the contract. His right to talent money likewise depended by the terms of his contract on his attainment of specified feats in batting or bowling; but it could hardly be maintained that whatever talent money he might earn would not be profits of his employment. The term of his contract giving him the right to
- F collect cannot be regarded as nugatory. It gave him a contractual right to do something which he could hardly have done without the permission of the club—i.e., to solicit contributions from spectators on the ground. If the club had prevented him from collecting on attaining one or other of the stipulated performances, he could, I take it, have sued them in damages. Even in the case of an away match, where the permission of the club on whose ground the match
- G was played to the making of a collection was necessary, the taxpayer's own club were, I take it, under a contractual obligation to him to apply for, or at all events to support his application for, such permission.

- I do not think the rights given by the league rules to amateurs in the matter of collections really assist the taxpayer's case. If the proceeds of collections made by or for amateurs are not taxable, that is merely because they are
- H amateurs playing cricket for their own amusement and not as a source of income. I do not think the submission of counsel for the taxpayer to the effect that sums paid voluntarily by third parties to the holder of an office or employment are only taxable if there is some nexus between the payer and the recipient in the shape of services rendered by the latter for the benefit of the former can be accepted. The presence of some such nexus may no doubt support the conclusion
- I that the payment in question is a profit of the office or employment, but it does not follow that the absence of any such nexus will necessarily conclude the matter the other way. Here the link between the taxpayer's employment and the proceeds of the collections is supplied by an express term in the contract of employment. Moreover, I am by no means satisfied that there is any such distinction as counsel for the taxpayer seeks to draw, for the purposes of the submission, between tips voluntarily given to a taxi-driver or waiter, who has rendered services to the payer in the shape of transportation or attendance,

and the contributions made by spectators to a collection for the taxpayer, A who by his skilful play had helped to entertain them.

Counsel for the taxpayer also submitted that this case resolved itself into a question of fact which was concluded by the commissioners' decision. In my view, however, the question involved is essentially a mixed question of fact and law which was open to HARMAN, J., and is open to this court, and which was correctly stated by the commissioners in para. 10 of the Case as being B

"whether on the evidence before them the commissioners were entitled to hold that the collections in question were not a profit arising from the [taxpayer's] employment within the meaning of the statutes."

For the reasons I have endeavoured to state, I am of opinion that this question should be answered in the negative and would accordingly allow the appeal. C

BIRKETT, L.J.: It is with some regret that I have come to the clear conclusion that this appeal should be allowed. At the end of his judgment, HARMAN, J., made it quite plain why he decided the case in the taxpayer's favour. Speaking of the collections which the Crown sought to tax he said:

"In what capacity does [the money] come to this recipient? Does it come to him because he is the professional employed by the East Lancashire Club, or does it come to him because he strikes the person who pays it as being a very brilliant cricketer on that particular Saturday afternoon? Those are the questions which the commissioners had before them . . . The commissioners came to the view that these were personal testimonials to the skill of the [taxpayer] as a cricketer, and were not paid to him because he was the professional employed by the East Lancashire Club. They did not, in other words, arise out of his office or employment but were personal tributes to him." D

The learned judge then went on to treat the findings of the commissioners as findings of fact which they were entitled to make, and with which he would not interfere. But as I read paras. 8 and 10 of the Case Stated, the commissioners did not purport to make findings of fact, but expressed an opinion, and stated the question of law for this court whether they were entitled to hold that opinion on the evidence before them. E

In my judgment the opinion expressed by a majority of the commissioners and supported by HARMAN, J., F

"that the collections in question were not a profit arising from the [taxpayer's] employment within the meaning of the statutes but were given as testimonials to his abilities" G

was clearly wrong. The taxpayer is a very distinguished cricketer and on Aug. 27, 1949, he entered into the contract with the East Lancashire Cricket Club the terms of which have been read by my Lord. The East Lancashire Cricket Club belonged to the Lancashire Cricket League and the taxpayer served the club as professional in the years 1950 and 1951. It is the terms of this contract which make it impossible in my view to support the judgment of HARMAN, J. It was not challenged that the taxpayer's service with the club was an "employment" under Sch. E to the Income Tax Act, 1918, or that his liability was to be governed by the words of r. 1 of that schedule, the material words being "profits arising therefrom". The taxpayer was contractually entitled to the benefit of the collections taken up on the cricket grounds where he played, if he fulfilled the conditions laid down in the contract (which incorporated the rules of the Lancashire League); and if necessity arose he could enforce his contractual rights against the club at law. The assessment in the present appeal is on the amount of money received by the taxpayer from the collections made in the cricket season of 1951, and those collections were made because of the provisions in the contract of Aug. 27, 1949. That seems to me to be quite decisive. H I

A There was an employment and there were profits arising therefrom, and inexorably Sch. E and the rules come into operation.

The arguments for the taxpayer have been so fully dealt with in the two judgments that have been delivered that I will only add a very few words. I quite appreciate that the warm-hearted and generous Lancashire public were contributing their sixpences and shillings as a token of the pleasure that the taxpayer had given them when performing one of the feats laid down in the contract. They knew nothing of the contract, and would no doubt be much surprised to hear that the taxpayer was not going to get the whole of their gift. But the taxpayer knew what the terms of the contract were, and knew that the collections would be part of his profit when fulfilling his employment as the professional to the club, and whether he knew the money would be liable to tax is immaterial. The money given to these collections by the cricketing public from whatever motive, and however they are described, whether as gifts, testimonials, tributes or what not seem to me to be governed for tax purposes by the provisions of the contract, and it is the recipient and not the giver who is the concern of the tax collector.

D The case of *Seymour v. Reed* (1) was naturally much relied on by counsel for the taxpayer, and the Master of the Rolls has dealt fully with the decision in that case so far as it relates to the present appeal. It does appear to be a great anomaly that a famous cricketer may receive a benefit running into many thousands of pounds tax free, whilst a professional cricketer in Lancashire playing for a few brief seasons, and receiving small sums by way of collections, should be liable to tax. But the facts in *Seymour's* case (1) were quite different from the facts in the present case, and it is quite clear that the present appeal cannot be determined by applying the decision in *Seymour's* case (1) to it.

I should have been glad to find, if I could, that the collections made to the taxpayer were essentially of the same character as the benefit given to Mr. Seymour, and to say that the collections were voluntary payments made by the cricketing public on grounds which were purely personal to the taxpayer, because he was well-liked and because of his cricketing skill, and were not a profit accruing to him by virtue of his employment. But in my opinion this case is concluded by the special facts, the chief and decisive fact being the contract of employment, which had provided for these very collections to be made to him in the circumstances which arose in this case.

G I am in full agreement with the judgment of the Master of the Rolls and the judgment of JENKINS, L.J., and in my opinion this appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Gibson & Weldon, agents for Crockford & Anderson, Nottingham (for the taxpayer).*

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

JARVIS v. WILLIAMS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
December 13, 14, 1954.]

Detinue—Proprietary interest essential—Property had passed to buyer of goods—Arrangement to cancel sale—Seller to collect goods from buyer's agent—Refusal of agent to deliver up goods—Cause of action against agent.

J. agreed to sell goods to P. and at his request delivered them to W. Differences arose between J. and P. (who had failed to pay the purchase price) and J. offered to take the goods back if P. would pay the cost of their collection. P. accepted that offer and J.'s agent went to W.'s house to collect the goods, but was not permitted to take them. J.* claimed against W. in detinue for the return of the goods.

Held: on delivery to W. at P.'s request, the property in the goods passed to P., and the arrangement whereby the goods were to be collected by J. from W. at P.'s cost did not re-vest the property in J.; and, therefore, at the time of demanding the goods from W., J. had no such right of property in the goods as enabled him to sustain an action in detinue.

Dictum of COURT OF APPEAL in *Rosenthal v. Alderton & Sons, Ltd.* ([1946] 1 All E.R. at p. 584) applied.
Appeal allowed.

[**Editorial Note.** The decision shows that under such an arrangement for return of goods as was made in the present case the property in the goods did not pass back to the original seller. It seems clear that the arrangement did not amount to a re-sale, and accordingly that the provisions of s. 18 of the Sale of Goods Act, 1893 (52 & 53 Vict. c. 71), 22 HALSBURY'S STATUTES (2nd Edn.) 996, had no application. If the arrangement for return of the goods had amounted to a contract of sale there might have been a question whether the property passed before the goods were collected (compare *Gale v. New*, [1937] 4 All E.R. at p. 649, letter B).

As to Maintaining an Action of Detinue, see 33 HALSBURY'S LAWS (2nd Edn.) 62, para. 98; and for cases on the subject, see 43 DIGEST 496, 351 et seq.

As to the Passing of Property on a Sale of Goods, see 29 HALSBURY'S LAWS (2nd Edn.) 83, para. 97; and for cases on the subject, see 39 DIGEST 482-484, 1032-1048.]

Case referred to:

- (1) *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583; [1946] K.B. 374; 115 L.J.K.B. 215; 174 L.T. 214; 2nd Digest Supp.

Appeal.

The defendant appealed against an order of His Honour JUDGE GLAZEBROOK at Tonbridge County Court, dated Sept. 16, 1954. The facts appear from the first judgment.

G. B. M. Reed for the defendant.

J. H. S. Elliott for the plaintiff.

SIR RAYMOND EVERSLED, M.R.: The action which now comes before us on appeal appears originally to have been an action brought in the Queen's Bench Division of the High Court by the present respondent, Jarvis, against one Paterson, and was for £72 15s. for goods sold and delivered. The items are set out in the special indorsement on the writ, and I will refer to them hereafter as bathroom fittings. That writ was issued in October, 1951, which in fact was some four years or more after the date of the original alleged sale, so that it is not entirely surprising if some of the facts are a little obscure. However that may be,

A the later history of the proceedings was that the plaintiff joined as a defendant one Williams, the present appellant, and as against him claimed in detinue for the return of the goods with, further or alternatively, damages for detention of the same goods. The short facts leading up to that alleged cause of action are as I will state in a moment. At or about the time that the defendant Williams was joined, as I understand, the plaintiff discontinued the proceedings
B against Paterson. The only question which now arises here is whether the plaintiff has a good cause of action in detinue against the defendant, viz., Williams, in respect of these goods. The judgment of the learned county court judge makes most of the matter quite plain; thus, as he points out in his judgment, the goods, the bathroom fittings in question which had been ordered by Paterson from the plaintiff, were delivered in fact at Paterson's request not to Paterson's house,
C but to the premises of the defendant, and there for some considerable time they remained. There were some questions whether they were damaged, or had been damaged, since delivery; but nothing, I think, turns on those questions. On the other hand, in May, 1949, a question arose between the plaintiff and Paterson, whether or not the plaintiff would take these goods back, and the plaintiff appears to have written to Paterson in May, 1949. That letter is not
D before us, and all we know of it is that, according to the plaintiff's affidavit which was read, the affidavit made by him when he sought to obtain summary judgment against Paterson on the original claim, he said:

E "I wrote to the defendant Paterson as to whether he wished to retain the fittings, and, if not, I would, under the circumstances, be prepared to take them back if he was prepared to pay me for collection."

It appears that that letter was unacknowledged, and that the plaintiff wrote again at the beginning of September, 1949. The second letter brought forth the reply which is set out in the learned county court judge's judgment. It is from Paterson to the plaintiff, dated Sept. 14, 1949, and ran thus:

F "I am obliged for your letter of Sept. 9 and please accept my apologies for not replying to yours of May 6, 1949. I had the impression that you had collected long ago, but as you evidently have not will you kindly do so, and I agree to pay the cost of collection."

G To complete the narrative, which I can do briefly, on receipt of that letter the plaintiff sent his foreman or lorryman, one Sands, armed with the letter, to the premises of the defendant. He, Sands, asked that the bathroom fittings should be delivered to him, but he was told by a lady, who may, or may not, have been Mrs. Williams, that he could not take the bathroom fittings away, and so he left empty handed. It was after that episode that the present proceedings started,
H though the plaintiff, for some reason or another, allowed a period of some two years to elapse before he began the proceedings, and it was another three years before eventually they were tried in the county court.

The first question is, what was the effect of the arrangement made as a result of the letter of Sept. 14, 1949? I have said that the two letters therein referred to are not before us. But the judge said that he had some evidence from the
I plaintiff which explained the terms of the letter, and he came to this conclusion. First, he said (and counsel for the plaintiff relied strongly on this) that the effect of the arrangement was: "I, the plaintiff, agree to take the fittings back; he (that is Paterson) to pay the carriage." Then, after stating the subsequent narrative which I have already myself stated, the judge said:

"It is clear to me that the arrangement of 1949 to take the goods back never transferred the property back to the plaintiff. It remained in Paterson because the plaintiff in fact never got the goods back, and never

intended the property to revert until he got them back. This is confirmed by the writ for the price of goods sold and delivered." A

I think for my part that the learned county court judge was quite right in that conclusion.

Counsel for the plaintiff submitted that the question was really one of fact, and was determined in his favour by the brief statement I earlier read of the effect of the arrangement. The question, in my view, is one of mixed fact and law, if not, indeed, really of law. What was the effect of this arrangement as regards the vesting or re-vesting of the property in these fittings? There is no doubt (at least I so assume, as we have heard no argument to the contrary), that when these fittings were first delivered at Paterson's request to the defendant's house, the property in them, as on an ordinary sale of specific goods, passed to Paterson, who became liable to pay their price accordingly. Was this somewhat vague arrangement of 1949 such as to re-vest the property back in the plaintiff? Counsel for the plaintiff referred to the Sale of Goods Act, 1893, s. 18. I am not myself satisfied that the transaction of 1949 could properly be described in any circumstances as a sale of goods. But even if the rules in that section were applicable, they are expressed to be subject to the formula "unless a different intention appears". If counsel for the plaintiff is right, then, as it seems to me, it would follow from the re-vesting, eo instanti, on the receipt of the letter of Sept. 14, 1949, of the property in the plaintiff, that Paterson ceased himself to be liable for the price of those goods. The most he would be liable for, on this view, would be for a breach of the contract or bargain for putting an end to the original sale when his agent, the defendant, refused to permit the plaintiff to re-collect the goods. In my judgment, that argument cannot be sustained, nor can I attach any significance to the statement made by the plaintiff in the course of his evidence: "I say the goods are mine because of this letter from Paterson accepting my offer" (meaning the letter of Sept. 14, 1949). The plaintiff was answering questions in cross-examination, and no doubt stated in answer to counsel's suggestion what his case was. I observe, indeed, that in answer to the judge he said later: B C D E F

"When the arrangement with Paterson that I should collect the goods came to nothing, I suppose the goods still remained goods sold to him which he had not paid for."

He is there stating an opposite view of the legal consequences of the arrangement. However, and without taking further time on it, I am of opinion that the learned county court judge rightly interpreted the arrangement made and its essential character. That, however, leaves the question on which the judge decided in favour of the plaintiff: Was he at the date of the demand, which I take to be the demand by Sands when he called at the defendant's house, entitled to sustain an action for detinue in respect of these goods against the defendant? The relevant part of the learned county court judge's judgment is to this effect: G H

"But the plaintiff says that detinue can be brought by anyone entitled to possession. Counsel for the defendant put up a number of defences to that. It is clear that under the agreement the plaintiff was entitled to these goods. True, it was all done very informally."

After referring to the call of Sands at the defendant's house and saying that he inferred that the lady was the agent of the defendant, the learned county court judge proceeded: I

"Therefore the villain of this piece is Paterson who owes both the plaintiff and the defendant money: there are some merits in the plaintiff, but it is not a question of merits at all, but a legal question. The plaintiff is entitled to recover the goods or their value, and if they have deteriorated damages for their detention."

- A I take that to mean that the contractual right which Jarvis had vis-à-vis Paterson to go and collect these goods from Paterson's agent was a right of a sufficient character to enable Jarvis to bring an action in detinue against the agent of the owner of the property in these goods. But, with all respect to the learned county court judge, I am unable to accept that as a good proposition of law. Certain classes of persons like bailees have, no doubt, a special right to
- B sustain actions in trover and detinue, but the general rule is, I think, correctly stated in the text of 33 HALSBURY'S LAWS (2nd Edn.) 62, para. 98:

"In order to maintain an action of trover or detinue, a person must have the right of possession and a right of property in the goods at the time of the conversion or detention; and he cannot sue if he has parted with the property in the goods at the time of the alleged conversion, or if at the time of the alleged conversion his title to the goods has been divested by a disposition, which is valid under the Factors Act, 1889."

- C
- D The point arose in the case in this court of *Rosenthal v. Alderton & Sons, Ltd.* (1). The real question there was, at what date, since the goods had disappeared, ought their value to be ascertained for the purpose of giving to the successful plaintiff damages for their wrongful detention—the date of the detention or the date of the judgment? No such question, of course, arises here. But in the course of the judgment of the court in that case, it is stated as follows ([1946] 1 All E.R. at p. 584):

- E "It is further to be noted that the action of detinue was essentially a proprietary action implying property in the plaintiff in the goods claimed, see e.g., VINER'S ABRIDGMENT, vol. VIII, p. 23; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol. VII, pp. 438, 439. It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed up to the date of the verdict."

- Although it is, no doubt, true in a sense, and certainly in its original medieval conception, that when one speaks of property in chattels one has in mind the right to their immediate possession, nevertheless the sense of property in chattels is now well understood. It is, of course, involved in the Sale of Goods Act, 1893, itself. Even though, by contract between himself and Paterson, Jarvis may have had a right which, if infringed, could form the subject-matter of an action for breach of contract, and although he had a right to go and possess himself of these goods, nevertheless, until he had done so, according to my construction of the arrangement, there was in him no proprietary interest in the goods in the sense in which that term is now commonly understood. That being so, it seems to me that he had not, on the authorities that I have mentioned, the necessary foundation on which to sustain an action for detinue against the defendant. He, no doubt, could sue Paterson either for the price of the goods or for damages for breach of this arrangement for the return of the goods when the defendant refused to deliver them over, but I think the rights of the plaintiff, Jarvis, as regards these goods were not such as entitled him to bring an action in detinue against the defendant, in whose possession they were, as agent, at the time, of the person in whom the property in the goods was then vested.

- H For these reasons, I think that this appeal must be allowed and that the action against the defendant should have been dismissed.

- I **BIRKETT, L.J.:** I am of the same opinion. I must confess that as the argument proceeded in this court I felt very considerable satisfaction with this, that all the matters which ought to be raised in order to arrive at a true determination were clearly before the learned county court judge, and the note which the learned county court judge made of counsel's argument shows quite plainly that the essential legal matters were before him. Of course, not all the arguments have been repeated in this court, but the two main ones have. My Lord has dealt with them both fully. One was the construction

of the letter of Sept. 14, 1949—whether or not that letter re-vested the goods in the plaintiff; and the second question, if it did not, did that letter, or the arrangement then made, give to the plaintiff a contractual right to collect the goods or a sufficient proprietary interest for him to maintain or to sustain an action in detinue? I agree with the judgment of my Lord on both those points. A

I may just add that there was a time during the argument when I was much troubled by the evidence given by the plaintiff himself, because it is quite clear that the plaintiff said, in the words to which my Lord has referred: B

“The arrangement was that if I got them back and he paid the carriage his liability would be discharged and it would be an end of the matter: I communicated that arrangement to the defendant only by sending him the letter of Sept. 14, 1949. I said the goods are mine because of this letter from Paterson accepting my offer.” C

Of course, that was a matter which quite properly and quite naturally was made much of in the court below, but I am bound to say I had not quite in mind when I was troubled about those passages the passage in which the plaintiff made answer to the judge: D

“When the arrangement with Paterson that I should collect the goods came to nothing I suppose the goods still remained goods sold to him which he had not paid for.”

Apart from that matter, I think the situation is fairly plain, and I agree with the judgment of my Lord that this appeal ought to be allowed. E

ROMER, L.J.: I also agree. Anything that I could add to the judgments which have been delivered would be mere repetition, and I propose to add nothing, notwithstanding that we are differing from the learned county court judge.

Appeal allowed; action dismissed.

Solicitors: *Powell, Skues & Graham Smith*, agents for *T. E. Rodgers & Pembroke*, Bexhill-on-Sea (for the defendant); *Sprott & Sons*, Tunbridge Wells (for the plaintiff).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A

SMITH AND OTHERS v. CARDIFF CORPORATION.

[CHANCERY DIVISION (Danckwerts, J.), December 6, 7, 8, 17, 1954.]

Housing—House of local authority—Rent—Increases—Differential rent scheme based on income of tenant—Reasonableness of charges—Validity of scheme—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 51), s. 83 (1), s. 85 (6).

B

Anticipating very substantial deficits in their housing revenue account, a local authority introduced a differential rent scheme in respect of houses provided by them under Part V of the Housing Act, 1936. Under this scheme, a tenant earning more than £500 per annum, or whose wife or adult children were in paid employment, or who had another family or a lodger or sub-tenant living in his house, paid up to 12s. 6d. per week additional rent. The scheme made provision for changes in the amount of the rent to take account of fluctuations in the tenant's income or other changes of circumstances, and also provided for appeals against the re-assessment of rent in cases of hardship. The estates manager of the local authority was given discretion to waive the additional charge in certain cases. Tenants claimed that the scheme was ultra vires the local authority, or alternatively that the charges were unreasonable, and that the scheme was, therefore, invalid.

C

D

Held: (i) the scheme was not ultra vires because the local authority was under the duty imposed by the Housing Act, 1936, s. 85 (6), from time to time to review rents and make such changes either of rents generally or of particular rents as circumstances might require, and, in performing that duty, the local authority was entitled to raise or reduce the rents payable by particular tenants, and circumstances making requisite such variations included the means of the particular tenants concerned.

E

Leeds Corpn. v. Jenkinson ([1935] 1 K.B. 168) and dictum of LINDLEY, L.J., in *London Asscn. of Shipowners & Brokers v. London & India Docks Joint Committee* ([1892] 3 Ch. at p. 251) considered.

F

(ii) the reasonableness of charges made by the local authority was open to review by the court because by s. 83 (1) of the Act of 1936 the charges were required to be reasonable in fact and not merely reasonable in the opinion of the local authority; but the onus of showing that they were not reasonable was on the person asserting their unreasonableness, and on the facts, although the scheme was open to criticism and might operate unfairly in some cases, that onus had not been discharged.

G

[For the Housing Act, 1936, s. 83 (1) and s. 85 (6), see 11 HALSBURY'S STATUTES (2nd Edn.) 522, 524.]

Cases referred to:

H

(1) *Smith v. Cardiff Corpn.*, [1953] 2 All E.R. 1373; 118 J.P. 33; 3rd Digest Supp.

(2) *Belcher v. Reading Corpn.*, [1949] 2 All E.R. 969; [1950] Ch. 380; 114 J.P. 21; 2nd Digest Supp.

(3) *Leeds Corpn. v. Jenkinson*, [1935] 1 K.B. 168; 104 L.J.K.B. 182; 152 L.T. 126; 98 J.P. 447; Digest Supp.

I

(4) *London Asscn. of Shipowners & Brokers v. London & India Docks Joint Committee*, [1892] 3 Ch. 242; 62 L.J.Ch. 294; 67 L.T. 238; 30 Digest (Repl.) 172, 229.

(5) *A.-G. for Ontario v. Canadian Niagara Power Co.*, [1912] A.C. 852; 82 L.J.P.C. 18; 107 L.T. 629; 31 Digest (Repl.) 244, 3794.

(6) *Ex p. Voisey, Re Knight*, (1882), 21 Ch.D. 442; 52 L.J.Ch. 121; 47 L.T. 362; 35 Digest 329, 727.

(7) *Pigg v. Clarke*, (1876), 3 Ch.D. 672; 45 L.J.Ch. 849; 44 Digest 588, 4110.

- (8) *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.
- (9) *Nakkuda Ali v. Jayaratne (M.F. De S.)*, [1951] A.C. 66; 2nd Digest Supp.
- (10) *Howell v. Falmouth Boat Construction, Ltd.*, [1951] 2 All E.R. 278; [1951] A.C. 837; 2nd Digest Supp.

Action.

The plaintiffs, who were tenants of houses provided by the defendants, the Cardiff Corporation, under Part V of the Housing Act, 1936, claimed a declaration that the introduction and operation of a differential rent scheme by the defendants in relation to such houses was ultra vires the corporation and void. The relevant facts, which appear fully in the judgment, are summarised in the headnote.

Kenneth Diplock, Q.C., Dingle Foot, Q.C., and P. B. D. Ashbrook (for R. Millner) for the plaintiffs.

H. Edmund Davies, Q.C., and D. Pennant for the defendants.

Cur. adv. vult.

Dec. 17. **DANCKWERTS, J.**, read the following judgment: This is an action against the Corporation of the City of Cardiff by four tenants of houses provided by the corporation, commonly called "council houses". The subject of the action is a differential rent scheme introduced by the corporation in respect of their houses, under which provision is made for the payment of higher rents by certain tenants. The scheme is alleged by the plaintiffs to be ultra vires and unreasonable, and therefore, to be null and void.

The scheme was introduced by the corporation as a result of a report by the city treasurer, which estimated prospective deficits in the housing revenue account (required to be kept by the corporation under the Housing Act, 1936) rising from £29,153 in the financial year 1953-54 to £77,733 in the financial year 1956-57, and amounting in the aggregate for four years to £224,882. The original recommendation of the estates committee was an overall increase of 7½ per cent. to all rents on Apr. 1, 1953. But subsequently the differential scheme was recommended to and adopted by the council. This scheme is not novel and was based, it appears, on a scheme carried into effect by the Plymouth County Borough Council, and there are, I understand, differential schemes of a somewhat similar nature operated by other local authorities for the purpose of houses provided under the Housing Acts. It is said that the houses of the corporation concerned number 14,267, and that 6,826 tenants are affected by the scheme.

The scheme was notified to tenants of the corporation in a circular dated June 26, 1953, the terms of which are as follows:

"Dear Sir or Madam,

Will you please complete and return to the rent collector on the next rent collection day the rent re-assessment form overleaf, so that your rent may be revised and amended as necessary, in accordance with the undermentioned decisions of the city council which operate as from a date in the near future of which you will be notified. If unable to hand same to the rent collector, will you please return the form through the post within the next seven days.

Yours faithfully, W. M. Brook,
City housing and estates manager.

DECISIONS OF THE CITY COUNCIL.

A differential rent scheme involving the following additions to basic rents will be operative as above-mentioned.

In respect of:

A		Additions per week
	(a) A tenant in receipt of a gross income at the rate of £500 per annum or over and less than £600	8s. 6d.
	(b) A tenant in receipt of a gross income at the rate of £600 per annum or over	12s. 6d.
B	(c) Each unmarried adult wage or salary earning child of tenant (up to two in number)	2s. 6d.
	(d) Wife, if wage or salary earning	2s. 0d.
	(e) Each additional family (other than a sub-tenant's family)	5s. 0d.
C	(f) Each lodger or sub-tenant	5s. 0d.

The total additions in respect of any tenancy are not to exceed 12s. 6d. per week.

'Gross income' includes salary, wage, overtime, extra earnings, interest, profits, allowances (excluding family allowances, but including superannuation allowance), emoluments and pension, before any deduction for income tax, national insurance, pension or superannuation contributions have been made. Gross income also includes pay and any allowance or emoluments received by the wife or other members of the family in respect of current service of the tenant in H.M. Forces, but excludes a disability pension, the family allowances made for children under the Family Allowances Act, 1945, as amended, wife's earned income and payments by sons, daughters, lodgers and sub-tenants.

'Adult' means a person of twenty-one years of age or over.

'Tenant' includes joint tenants.

N.B. In the event of the failure of any tenant to return the form duly completed, the council will assume that the maximum charge of 12s. 6d. per week is applicable, and will increase the rent accordingly."

On the back of the circular there was a form to be filled in by the tenant giving particulars of the tenant's occupation and gross income and details of other members of the household.

As a result of the information thus obtained the corporation re-assessed the rents of numbers of their tenants and served notices to quit on them, terminating their weekly tenancies on Aug. 17, 1953, but offering them at the same time new tenancies on the terms of the re-assessment notice. The re-assessment notice stated:

"The rent of the premises is calculated by the city council by reference to a basic rent and additions thereto based on the tenant's gross income and the persons residing at the premises. Such additions are assessed in accordance with the following scale: . . ."

The charges already mentioned are then set out, with the addition of the following requirement:

"The tenant is required (a) at all times, when requested so to do by the city housing and estates manager, to furnish in writing correct and proper information as to his or her gross income and as to the persons residing on the premises; (b) immediately to notify in writing the city housing and estates manager of any changes in the tenant's gross income or in the number of persons residing at the premises whenever such changes warrant an alteration of the additional charges as above-mentioned."

Then after setting out the details of the re-assessment of the tenant's rent, the

notice (which is sent in the name of the city housing and estates manager) A
continues:

"Alterations in the rent assessment as above-mentioned, so far as decreases are concerned, will be made as from the first rent day after the receipt by me of written notification from you of a change in circumstances which warrants an adjustment in such rent. Increases will operate from the first rent day following the date when notification of the change should have been sent to me pursuant to the above-mentioned additional conditions of tenancy." B

A provision for alleviating the hardship of an increase in certain cases is indicated in a note:

"Note. The city council is prepared to give consideration to an appeal by a tenant against the assessment of any addition or additions to his or her basic rent, as a result of the operation of the above-mentioned scale, in any case in which the circumstances, in the discretion of the city council, warrant such consideration. Appeals must be in writing addressed to 'The Housing and Estates Manager, 21/23, Charles Street, Cardiff'." C

At a later date a further alleviation in cases of hardship was intended to be provided by a direction to the city estates manager that he should use his discretion in waiving the charge in respect of a wage or salary earning wife where the amount so earned is under £2 per week, unless, in the circumstances, he considers that no hardship will be caused by such a charge. This is a minor matter; but if the discretion as to charges is committed by the Act to the corporation, it seems to me that this discretion could not be delegated in this way to the city estates manager. The right course (which seems to be the course indicated in the case of appeals to the appeals sub-committee) is for the cases to be reported with a recommendation to the council, who should make the actual decision. D

The scheme has now been operated for some time. But the attack on its validity has been delayed by the course which this action has taken. The four plaintiffs originally attempted to sue on behalf of themselves and all the other tenants, in a representative capacity, and the date of the writ was July 22, 1953. On Aug. 12, 1953, the writ was set aside by the vacation judge, but on Nov. 4, 1953, the Court of Appeal, though holding that the plaintiffs could not proceed in a representative capacity, gave leave to amend the writ, so that they might remain as plaintiffs in their individual capacities and the action might be regarded as a test action (see *Smith v. Cardiff Corpn.* (1)). The writ was amended accordingly on Dec. 21, 1953, and the statement of claim was delivered on Feb. 11, 1954. E

By a circular dated May 31, 1954, certain modifications of the scheme were notified to the tenants. The most important of these were provisions designed to alleviate hardship in cases where the gross annual income of a tenant only slightly exceeded the figures of £500 or £600. From this document appears the fact (which was not stated in the earlier circulars) that the relevant yearly period is the financial year ending on Mar. 31. F

The validity of the scheme is attacked on behalf of the plaintiffs on two main grounds. The first is that such a scheme is not authorised by the powers conferred on local authorities by the relevant Acts, and is therefore ultra vires. The basis of the other is that the Acts only authorise reasonable charges to be made to tenants and the defects of this scheme are such that the charges cannot be considered to be reasonable. The first appears to be a matter of principle, while the other depends on some detailed consideration of the terms of the scheme. G

The question whether such a scheme is within the statutory powers of the corporation must depend on the terms of the Acts which confer these powers, and I turn, therefore, to a consideration of the relevant sections. I

- A First of all it is desirable to notice the general financial scheme of the Acts. Under the Housing Act, 1936, s. 114, where the local authority receives a contribution or subsidy from the national exchequer, the local authority have to make out of their general rate fund the contributions set out in Sch. 8 to the Act; and by para. 8 of that schedule, when in any financial year a deficit is shown in the housing revenue account, a contribution (in the Act referred to as an additional contribution) for that financial year of an amount equal to the amount of the deficit has to be made out of the rate fund, so that a deficit cannot be carried over to the following year. An obligation is imposed by s. 128 on the local authority to keep a housing revenue account of the income and expenditure of the authority in respect of the houses provided by the authority. Section 129 sets out the matters which are to be carried to the credit and the debit respectively of the housing revenue account. Section 130 provides for the disposal of balances on the account, and under this section a surplus may be carried forward to any other year. For the purpose of equalising the annual charges in respect of the repair and maintenance of houses, authorities are required by s. 131 to keep a housing repairs account, to which they are required to carry from the housing revenue account in each financial year a sum in respect of each house amounting at the present time to £8. These are the general provisions of the Act.

The charging powers in respect of rents are contained in a group of sections designated by the description "Management, etc., of local authority's houses". Section 83 (1) provides as follows:

- E "The general management, regulation and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine."

Section 85 (1) provides:

- F "A local authority shall, in relation to all houses and dwellings in respect of which they are required by s. 128 of this Act to keep a housing revenue account, observe the requirements specified in the following provisions of this section."

Section 85 (5) originally provided:

- G "In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may grant to any tenant such rebates from rent, subject to such terms and conditions as they may think fit."

- H The Housing Act, 1949, which deleted from the Act of 1936 all the references to the working classes, probably because the functions of the local authorities had been extended to provision of more houses generally, and not only the provision of houses for particular classes of persons, substituted, by s. 1 and Sch. 1, for the above-mentioned sub-section, a new sub-section in the following terms:

"(5) The authority may grant to any tenant such rebates from rent, subject to such terms and conditions, as they may think fit."

- I This is the provision which is operative at the present time. Section 85 (6) of the Act of 1936 provides:

"The authority shall from time to time review rents and make such changes, either of rents generally or of particular rents, and rebates (if any) as circumstances may require."

This sub-section appears to impose a duty on the authority and not merely to confer the powers, as s. 83 (1) and s. 85 (5) do.

In *Belcher v. Reading Corpn.* (2), ROMER, J., had to consider the duties of the authority in exercising the powers and carrying out the duties which are conferred or imposed on them by the Act. He described their obligation generally in these terms ([1949] 2 All E.R. at p. 983):

"It is, of course, clear that they have to consider the welfare of their tenants and to remember that those tenants are people of small—sometimes of very small—means. On the other hand, they have also to be mindful of the interests of the ratepayers as a whole—the majority of whom, in Reading, as Mr. Clifford Jones informed me, are people of comparable means with the tenants of the council houses. It is their duty, so far as possible, to maintain a balance between these two sections of the local community, having due regard, of course, to any specific requirements of the Housing Acts. If the council house rents are much below those prevailing in comparable private estates in the locality, then, *prima facie*, a council might be suspected of unduly favouring the tenants, whilst, if they are much in excess of such other rents, the presumption would be the other way round."

That there might lawfully be discrimination between tenants of different houses of the same type by reason of the variation in the means of the tenants was recognised in *Leeds Corpn. v. Jenkinson* (3), though this was a case decided in regard to the Housing (Financial Provisions) Act, 1924, which imposed a limit on the aggregate of the rents by reference to an outside standard, and defined the normal rent by reference to the rent normally charged in the area of the local authority in the case of working-class houses erected prior to Aug. 3, 1914. ROMER, L.J., said that as the aggregate limit was not exceeded it appeared to him ([1935] 1 K.B. at p. 180):

"... impossible to say that the action of the corporation in discriminating between one house and another of the same class in the same area, to the extent of charging more in respect of one house than in respect of another, is *ultra vires* or is a breach of their undertaking."

GODDARD, J., said (*ibid.*, at p. 181):

"The Master of the Rolls has pointed out what is the object of this legislation. It is to provide houses for the classes of the community who cannot afford to pay economic rents; but the object of the Act is not to provide subsidised houses for people who can afford to pay economic rents. It seems to me that all the corporation are doing by this plan is to see that persons who can afford to pay economic rents for these houses shall pay them, which will enable them, of course, to make greater concessions in the rents to persons who cannot afford to pay economic rents."

It is true that in neither of these cases was there any question of grading-up the rents of particular tenants. It is indeed admitted that discrimination in the rents charged to tenants of comparable houses by reason of the varying means of the tenants is permissible. It was admitted on behalf of the plaintiffs in the present case, I understood, that if the Cardiff Corporation had chosen to increase all the rents of their houses by 12s. 6d. a week (the maximum advance proposed under the present scheme) and had relieved tenants from this increase in varying degrees or completely according to their means, no objection could be taken. But it is the method by which the result is obtained to which objection is taken. It is said that the only power of the corporation to make such discrimination is contained in s. 85 (5) of the Act of 1936 which confines the power of the corporation to the granting of rebates to particular tenants. For this argument, there are called in aid the observations of LINDLEY, L.J., in *London Asscn. of Shipowners*

A & *Brokers v. London & India Docks Joint Committee* (4) (in reference to the powers of a dock-owning company) ([1892] 3 Ch. at p. 251):

B “As owner, the company could make any regulations it might think proper for the use of its property; it could charge what it liked and could shut its dock altogether if people would not comply with its demands. These powers, however, are not unchecked by statute. The legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define, that is, limit the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes and authorised to acquire land for such purposes cannot, I think, admit of any doubt.”

D These are very general observations, but they must be read in connection with the issues for decision in the particular case. The point to be decided in the case appears to have been whether the regulations or bye-laws of the dock company, which had not been passed and confirmed as required by the relevant statute had any binding effect on shipowners in the absence of agreement. I do not think that the limiting principle applied by the court in that case is of universal application—for instance, a power conferred by a statute may be merely declaratory. In the present case, it seems to me that a power to discriminate by granting rebates of rent does not necessarily exclude the right to create a similar result by grading-up the rents charged for particular houses in varying amounts.

E Whether the plaintiffs' argument as to the effect of s. 85 (5) is sound or not, however, in my view it does not affect the true construction of sub-s. (6), which is plainly the sub-section under which the corporation have been acting. That sub-section casts on the corporation the duty to review from time to time the rents which they charge for their houses. The deficit with which the corporation were faced impelled them to review the rents in the light of the city treasurer's report, and to find some scheme for providing a revenue to meet or prevent a deficit. This sub-section requires the corporation on such a review to make such changes of rents generally or of particular rents, and rebates (if any) as circumstances may require. I cannot find in this sub-section anything which confines the powers of discrimination of the corporation to the matter of rebates. In my view, the changes of particular rents which the corporation may adopt as the method of complying with the duty cast on them by the sub-section, include the grading-up of the rents of particular tenants or the reducing of the rents of particular tenants as the circumstances may require. Further, the circumstances which may require such variations in the rents of particular tenants, in my view, include the circumstances of the means of tenants of particular houses.

H My conclusion is, therefore, that the method of surcharging the tenants of particular houses according to their means which the scheme adopts is not ultra vires, and is within the powers of the corporation.

I The other line of attack made on behalf of the plaintiffs on the scheme is that the charges provided for by the scheme are not reasonable charges for the tenancy or occupation of the houses within the meaning of the Housing Act, 1936, s. 83 (1). The points which have been argued are these: (i) The attempt to regulate an increased weekly rent to be charged by reference to the annual gross income of the tenant is impracticable, particularly when it is not specified (as in the original form of the scheme) what is the yearly period to which reference is to be made. (ii) In the case of children or wives who are “wage or salary earning” must they be resident in the house? And what is meant by “wage or salary earning”?

What is the position of such a person who is "self-employed"? Or is on a holiday with pay? Or is unemployed for a period? (iii) What is meant by each additional "family"? (iv) Who are included in the description "lodgers and sub-tenants"? (v) In actual practice (it is said) it is found that the discrimination by reference to the supposed means of tenants does not produce a fair and reasonable result, so that in effect tenants with less means are subsidising other tenants with greater means. A

Now, I think it must be accepted that if unfair inequalities are found to occur in the working of the scheme, this result was far from the intention of the corporation who, in introducing the scheme, were actuated by a desire to temper the inevitable rise in rents to the financial circumstances of their tenants. But it must also be recognised that the scheme is far from perfect, and it may well be that it is not the best kind of scheme to produce the results which the corporation had in mind. The merits of various schemes of this kind were discussed in the Fourth Report of the Housing Management Sub-Committee of the Central Housing Advisory Committee (published for the Ministry of Housing and Local Government). This report seems to suggest that there are other methods of dealing with the problems that arise which are more satisfactory than that adopted by the corporation. There certainly are difficulties in operating the corporation's scheme. B C D

Having regard to the obligations of the corporation under these Housing Acts the principle of relating the increases of rent to the income of the tenants does not appear to be unreasonable. Presumably the standard of the tenant's gross annual income was adopted so as to secure some stability in the rents payable under the scheme and to avoid constant detailed changes, which must throw a lot of work on the officials of the corporation who have to manage the scheme. The doubt as to the appropriate yearly period seems to have been solved by the reference to the financial year ending on Mar. 31 in the circular of May 31, 1954. It is clear that in law there is no objection to a rent which may fluctuate according to events. *A.-G. for Ontario v. Canadian Niagara Power Co.* (5), and *Ex p. Voisey, Re Knight* (6), are examples of such fluctuating rents. F The trouble in the present case is that the weekly rent is to be ascertained not by reference to a weekly standard of income, but by reference to an annual standard which cannot be ascertained until the expiration of the current financial year. It is pointed out that a tenant cannot during the progress of the financial year say with certainty in all cases what his actual rent may turn out to be. G It is easy to think of cases where tenants whose basic wage is augmented by a commission or by a bonus, depending on circumstances, or who are self-employed so that their income depends on the profits of a business, cannot ascertain their gross income for the financial year, until on or after the termination of the financial year the amounts receivable by them are revealed. But the impression which I gained from such evidence which was put before me is that the serious theoretical difficulties in the system adopted have not proved to present so many practical problems in fact. H In other words, those tenants whose yearly incomes might be likely to exceed £500 or £600 were usually sufficiently well aware of the situation for practical purposes. Another difficulty is presented by border-line cases in which a slight excess of income over the limits selected might cause hardship. An attempt to alleviate these hardships was made in the circular of May 31, 1954, but appears not to be wholly successful. I

The doubts whether wives, children or others must be resident in the house in question are not, I think, serious. The answer really appears from the statement appearing in the notification of re-assessment of rents and in the conditions of tenancy printed on the rent cards, which informs tenants that

"The rent of the premises is calculated by the city council by reference to a basic rent and additions thereto based on the tenant's gross income and the persons residing at the premises."

A No doubt questions which arise as to the meaning of the words "wage or salary earning" will have to be solved. Some of these difficulties are probably due to a desire for simplification and economy of words in the statement of the scheme.

Probably the draftsman of the scheme thought that the meaning of the word "family" was perfectly plain, though lawyers who have had anything to do with wills are aware of the uncertainties which may arise from the use of this apparently ordinary and natural word: see the observations of SIR GEORGE JESSEL, M.R., in *Pigg v. Clarke* (7) (3 Ch.D. at p. 674). It is probable that some further elaboration will be necessary to explain the intention of the corporation in using this word in particular circumstances. Similarly the words "lodger or sub-tenant" may cause difficulties of the kind which have given rise to cases in the law of elections and landlord and tenant. But these difficulties will arise, I apprehend, in a comparatively small number of instances.

I am satisfied from the evidence which was given before me that there are cases where a tenant having an income well below the limits of £500 or £600 per annum will be charged the maximum increase of 12s. 6d. a week. It is, of course, arguable that such persons are contributing unduly to the relief of persons who are in receipt of higher incomes, and, therefore, that the scheme offends against natural justice. But it is probably beyond the scope of human ability to devise a scheme which does not produce some apparent anomalies giving rise to an understandable grievance. The provision of an appeals sub-committee was presumably intended to deal with (amongst others) such hard cases. It may be possible for the council, exercising their discretion on the reports of the sub-committee, to eliminate many of these causes of complaint.

E It was said with some force on behalf of the plaintiffs that no attempt had been made to have regard to the outgoings of the household or to the actual earnings of the children of a tenant, and that arbitrary assumptions had been made and arbitrary charges imposed accordingly. Those are fair criticisms. There plainly are imperfections. But it may well be that perfection is impossible.

F An argument was put forward on behalf of the corporation suggesting that as the management of the houses and the fixing of the rents was a matter for the discretion of the corporation, the court had no power to interfere. In my view, this argument has no substance. The charges to be made by the corporation are required by the Housing Act, 1936, s. 83, to be reasonable charges. It is not sufficient that the corporation have acted in an entirely bona fide manner, and have formed the opinion that the charges are reasonable. If the reasonableness of the charges is challenged, it is necessary for the court to examine the circumstances and to decide whether the charges are reasonable, though the onus of showing that they are not reasonable must rest on the plaintiffs (*Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.* (8), per LORD ATKIN [1942] 1 All E.R. at p. 625, *Nakkuda Ali v. Jayaratne* (9), [1951] A.C. at pp. 76, 77). I have, therefore, to consider whether the scheme imposes reasonable charges or can be said to be unreasonable.

H Now I have said already that the scheme is not by any means perfect and that there are provisions which cause difficulties in calculating the rents payable by tenants and there are expressions used which are of doubtful meaning, and there are anomalous cases. It seems to me that as regards doubtful cases, the exhortation to visit the office of the city estates manager is not idle. This is not a case of a code imposing penalties for misdemeanours. It is a case of a document designed to give rise to contractual relations between landlord and tenant. It seems to me perfectly possible for the contract between the tenant on the one hand and the corporation, as the landlord, on the other hand, to be settled in doubtful cases by discussions between the tenant and an official of the corporation. I do not think that *Howell v. Falmouth Boat Construction, Ltd.* (10) (cited on behalf of the plaintiffs) is relevant to this case, which involves contract and not the application of regulations by a government official. So far as the apparent

hardships and anomalies are concerned, it seems to me that these imperfections in the scheme, or, indeed, the view that may be formed that there are other and better differential schemes that might have been adopted, are not sufficient to enable me to say that the charges made by the corporation under the scheme for the tenancy or occupation of their houses are not reasonable, and, therefore, that the scheme is void and of no effect. A

In the result, therefore, the arguments for the plaintiffs fail on both heads. B
Tenants naturally are upset when their rents are raised. But an increase in the costs of repairs and maintenance, and, indeed, of wages, may render an increase of rents unavoidable. In this event, the contest is somewhat unreal, if, in any case the local authority may lawfully raise all rents, and then grant rebates in particular cases, thus achieving exactly the same result as when rents are raised in those particular cases where it is thought that the tenants will be able to bear the increases without disaster. On the other hand, as landlords, local authorities are in a privileged position. They have been held to be free from the harassing frustration of the Rent Restrictions Acts. It is right and proper that their management of their housing estates should be capable of being challenged in a court of law. But there must be limits to this, or the day-to-day work of the officials who must carry out the management of the estates would not be practicable. For this reason it seems to me that imperfections in matters of detail cannot be held to render the particular system which is adopted unreasonable and unlawful. If the corporation in the present case are actuated by the desire to produce the fairest system to their tenants that can be devised (a desire with which I credit them), I conceive that they will feel it their duty to consider the criticisms of their scheme which have been discussed in this case with the object of securing such improvements as circumstances can permit. The action, therefore, fails. C D E

Judgment for the defendants.

Solicitors: *Wrentmore & Son*, agents for *Thomas John & Co.*, Cardiff (for the plaintiffs); *Theodore Goddard & Co.*, agents for *Town Clerk*, Cardiff (for the respondents).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A R. v. AGRICULTURAL LAND TRIBUNAL (SOUTH WESTERN PROVINCE), *Ex parte* BENNEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Devlin, JJ.), December 16, 1954.]

B *Agriculture—Agricultural holding—Dispossession for bad husbandry—Representations to Minister before action of Minister—Hearing by person appointed for that purpose—No delegation to county agricultural executive committee or sub-committee—Agriculture Act, 1947 (10 & 11 Geo. 6 c. 48), s. 17 (2), s. 104 (4), (5).*

C On Dec. 31, 1951, the Minister of Agriculture and Fisheries, acting through a county agricultural executive committee, made a supervision order under s. 12 (1) of the Agriculture Act, 1947, in relation to the farm owned by the applicant. The committee had delegated their duties to a husbandry sub-committee, and on their review of the supervision order, by letter and notice dated Sept. 15, 1953, the committee informed the applicant that it was proposed to terminate his interest in the farm under s. 17 (1) and notified him that he had a right under s. 17 (2) to make representations to the Minister and that the person appointed by the Minister to hear the representations was the committee whose function in this respect had been delegated to the husbandry sub-committee. On Oct. 8, 1953, the sub-committee heard the applicant's representations. On Dec. 31, 1953, the Minister acting through the committee gave notice in writing to the applicant that the Minister proposed to make an order terminating the applicant's tenancy on the ground of bad husbandry and requiring him to let it to a tenant approved by the Minister. The applicant appealed unsuccessfully to the agricultural land tribunal. On Apr. 30, 1954, the Minister made the dispossession order. The applicant now applied for an order of certiorari quashing the decision of the land tribunal and of the Minister, *inter alia*, on the ground that the Minister had no power to appoint the sub-committee to hear the representations.

F **Held:** as, on the true construction of s. 104 (5) of the Agriculture Act, 1947, a sub-committee of the county agricultural executive committee could not be appointed to hear representations to the Minister, the decision of the agricultural land tribunal and the Minister's order of dispossession were invalid; accordingly, an order of certiorari should be issued.

G Per DEVLIN, J.: under s. 104 (4) the Minister cannot appoint himself to hear the representations and, therefore, he cannot appoint his own alter ego, to whom he has delegated all his functions, to hear them (see p. 127, letter F, post).

H [As to Dispossession on grounds of Bad Husbandry, see 1 HALSBURY'S LAWS (3rd Edn.) 346, para. 722.

For the Agriculture Act, 1947, s. 12, s. 17, s. 104, and Sch. 9, arts. 14, 15, see 1 HALSBURY'S STATUTES (2nd Edn.) 166, 177, 216, and 226.]

Motion for certiorari.

I The applicant moved for an order of certiorari, directed to the Minister of Agriculture and Fisheries, the county agricultural executive committee for the county of Cornwall and the Agricultural Land Tribunal (South Western Province), to remove into the High Court and to quash (a) a decision of the tribunal dated Mar. 4, 1954, dismissing an appeal by the applicant against a proposal by the Minister of Agriculture and Fisheries to dispossess him of a farm known as Tucoyse Farm, Constantine, in the county of Cornwall, and (b) an order of the said Minister, dated Apr. 30, 1954, purporting to be made under s. 17 (1) of the Agriculture Act, 1947, and to dispossess the applicant of the said farm. The grounds on which the relief was sought were (i) that the provisions of s. 17 (2)

and s. 104 (5) of the Act of 1947 were not complied with in that the persons appointed to hear the representations of the applicant were the husbandry sub-committee of the county agricultural executive committee which sub-committee had no jurisdiction or authority to hear the representations and (ii) that the purported order of Apr. 30, 1954, was not made in respect of the lands the subject-matter of the purported decision of the said tribunal, but included other lands which were not the subject-matter of the hearing before the tribunal or of the said purported decision of the tribunal.

K. Diplock, Q.C., and G. C. Dare for the applicant.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and B. S. Wingate-Saul for the Minister of Agriculture and Fisheries.

J. P. Widgery for the agricultural land tribunal.

LORD GODDARD, C.J.: Under s. 12 of the Agriculture Act, 1947, the Minister of Agriculture and Fisheries has the right to make a supervision order in respect of a farm. By the supervision order the farmer is, if I may use an expression commonly used in other branches of the law, really put on probation. He is watched and somebody is appointed to see that he farms in a proper way. Before the Minister can make a supervision order he must afford

“to the owner or occupier, as the case may be, an opportunity of making representations to the Minister, whether in writing or on being heard by a person appointed by the Minister . . .”,

so that he may endeavour to persuade the Minister not to make a supervision order. Then by s. 17 (1):

“Where a supervision order is in force in relation to the farming of an agricultural unit, and the Minister is satisfied that the farming thereof does not while the order is in force show satisfactory improvement, then subject to the provisions of this section”,

a dispossession order can be made. By s. 17 (2) the Minister shall not make an order under s. 17 (1)

“until, after affording to the occupier and, in the case of a proposal to make an order under para. (a) thereof [relating to land where the occupier is not the owner], to the owner of the land to which the proposed order is to relate an opportunity of making representations to the Minister, whether in writing or on being heard by a person appointed by the Minister . . .”

If the Minister makes a dispossession order, the matter can be referred to the agricultural land tribunal under s. 17 (3) and s. 74 (1) of the Act of 1947. The land tribunal is a new tribunal set up under s. 73 of the Act of 1947 and hears the whole case by means of an independent body consisting of* a legal chairman, a person “appearing to the Minister to represent the interests of farmers” and a person “appearing to the Minister to represent the interests of owners of agricultural land.”

Section 104 of the Act provides:

“(1) Any enactment in this Act providing, in relation to the taking of any action by the Minister, for his taking the action after affording a person an opportunity to make representations to the Minister, whether in writing or on being heard by a person appointed by the Minister, shall be construed as a provision that the Minister shall comply with the following requirements . . . (4) If, whether or not representations are made to the Minister in writing, the said person within the prescribed time and in the prescribed manner requires that an opportunity be afforded to him of being heard by a person

* The constitution of the tribunal is established by the Agriculture Act, 1947, s. 73 and Sch. 9, paras. 13-18, as amended by the Agriculture (Miscellaneous Provisions) Act, 1954, s. 4.

- A appointed by the Minister for the purpose, such an opportunity shall be afforded to him and, on the same occasion, to any other person to whom under the enactment referred to in sub-s. (1) of this section the Minister is required to afford such an opportunity, and the Minister shall not take the action in question until he has considered any representations made at the hearing. (5) No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof, shall be appointed under the last foregoing sub-section to receive representations relating to land in the area of the committee."

C By s. 72 of the Act the Minister delegates his powers to the county agricultural committee and no doubt in practice and common sense for "the Minister" in this Act can be read "county agricultural committee". The committee can also, by s. 71 (3), delegate its powers to the husbandry sub-committees and, as I understand, a sub-committee is really the county agricultural committee. The Minister has purported to delegate to the county agricultural committee the power of receiving representations under s. 104 (4)*; one of the functions which the county agricultural committee has delegated to the sub-committees is the duty of hearing these representations. The question on which the decision in the present case turns is whether or not the sub-committee is the body under the Act to receive these representations.

E The applicant was told that he could make representations to the sub-committee and he attended by a solicitor and did so. The sub-committee decided to recommend the Minister to make a dispossession order, and, when that decision of the sub-committee or of the Minister was taken before the land tribunal, the land tribunal upheld it. A great many points were taken by counsel for the applicant, but I think I am speaking for my brothers when I say that the court is satisfied that there is nothing in the applicant's points, though they were urged with skill and pertinacity, until we come to the last point, which is an extremely important point, and for my part I decide the matter entirely on a question of construction.

F The point is whether or not the sub-committee is authorised by the Act to be the body to receive representations. I will read s. 104 (5) again:

G "No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof, shall be appointed under the last foregoing sub-section to receive representations relating to land in the area of the committee."

H I cannot believe that, if the parliamentary draftsman had meant that only the officers or servants of a sub-committee as well as of an agricultural committee were debarred from hearing these representations, he would not have put in the word "of" before the words "any sub-committee". He has not. I listened with interest, though I will not say with understanding, to an argument addressed by the Solicitor-General which was supported by some quotations from MODERN ENGLISH USAGE by DR. H. W. FOWLER, as to the meaning of "or" after an adjectivally used "no". I know the sort of common modern English which a farmer uses and having read those quotations, I am quite certain that no farmer would understand what that great grammarian was writing about. I think any farmer, or any person not a lawyer, or even a lawyer, reading this would say that it is obvious that officers and servants of the county agricultural committee are barred and so are sub-committees. I have no difficulty when I see the word "thereof", in reading s. 104 (5) in this way: "No officer or servant of a county agricultural committee or any sub-committee or district committee of a county agricultural executive committee". The parliamentary draftsman put it in this way because he used the word "committee" in one sentence and said

* The delegation was effected by the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I. 1948 No. 187).

"No officer or servant . . . or any"; he is barring all those four bodies and saying they shall not be appointed under s. 104 (4) to receive representations. In the present case they were the persons to receive representations. When one considers s. 104 (4) one can see the reason of it. A sub-committee makes the order which can be appealed to the land tribunal; therefore, it is said: "You are not to tell the farmer that he is to make his representations to the sub-committee, the sub-committee being the people who are really to decide whether or not the supervision order or the dispossession order is to be made". There would be no sense in that and the farmer would say: "What is the good of my going before these people who have already decided that they are going to make this dispossession order. If I go before some independent person I may be able to satisfy him that he ought not to make the order and he will tell them so". That seems to me to be what the statute is contemplating. I think the plain reading of s. 104 (5) is clear, that sub-committees and district committees of the executive committee are not to be appointed to receive representations. I dare say it has been done all over England because these delegations, I suppose, are all arranged from headquarters and committees and sub-committees are told what they are to do. As **DEVLIN, J.**, pointed out in the course of the argument, if the Solicitor-General's argument is sound, the Minister could himself receive the representations. I do not think that is intended at all. I think it is intended that he should appoint some person to receive them so that the farmer can open up his soul and air his grievances to him and try to persuade him to tell the Minister or the committee or whoever it may be that they ought not to make the order. I think that is the common-sense view of the machinery of the Act and on the clear words of s. 104 (5) the sub-committee cannot be the persons to receive the representations and, therefore, these proceedings have been bad ab initio.

There is no reflection here on the land tribunal; they had put before them a case and they heard that case. This point whether or not the preliminary proceedings were in order was, I imagine, not before them at all; at any rate the order must go and the proceedings must be brought up and quashed.

CASSELS, J.: I agree. I think the important words of s. 104 (5) of the Agriculture Act, 1947, are to be found in the last few words, namely, "to receive representations relating to land in the area of the committee". I think the sub-committee, the district committee, the county agricultural executive committee, their officers and their servants are precluded from receiving representations from the farmer.

DEVLIN, J.: I agree with the judgment which my Lords propose, and also with the reasons which they have given for it. I should be prepared, if necessary, to decide this case on the construction of s. 104 (5) of the Agriculture Act, 1947, because, although I have not, after hearing the Solicitor-General, found the question of construction altogether easy, I think the construction my Lords have put on it is on the whole right. I should also decide it, and I prefer, therefore, to put this as my main ground, on the effect of s. 104 (4), and I should like to deal with that in any event because it raises a matter of some public importance.

Section 104 (4) requires that if a person is aggrieved, viz., the farmer about to be dispossessed,

" . . . an opportunity be afforded to him of being heard by a person appointed by the Minister for the purpose, such an opportunity shall be afforded to him and, on the same occasion, to any other person to whom under the enactment referred to in sub-s. (1) of this section the Minister is required to afford such an opportunity, and the Minister shall not take the action in question until he has considered any representations made at the hearing ".

- A Let me deal with the matter first of all as a question of what I might call legality and secondly in a rather broader way. First, the Act talks of the Minister affording an opportunity to a person to be heard. No one supposes that in practice the Minister himself acts in the early stages, though no doubt, if it is a question of some difficulty, he may act in the end. No one supposes, therefore, that the Minister would be likely to deal with the matter himself in all its early
- B stages, but in fact I think it is clear, if one may test it from the point of view of the legal effect of the sub-section, that even if he wanted to, he could not do so. It is true that before this stage has been reached the Minister has had to satisfy himself that it is desirable to propose that there should be a dispossession order. If he had in fact literally to satisfy himself, he could not under s. 104 (4) appoint himself as the person who is to receive the representations. The sub-section, I
- C think, makes it quite clear that he would have to appoint somebody else. In the present case the Minister, for the purpose of discharging the administrative function of satisfying himself that it was a desirable case for a dispossession order, delegated all his powers to the county agricultural executive committee and that committee passed them on to the husbandry sub-committee; it was, therefore, the husbandry sub-committee who acted in all the initial stages.
- D The Minister appointed, for the purposes of hearing the representations, that same husbandry sub-committee that had previously acted. In my judgment, there is no power so to do under the sub-section. The Minister could not appoint himself. He could not, therefore, on any fair or reasonable construction of the sub-section, appoint an alter ego to discharge all his administrative functions and then say to that alter ego: "Now you can do what I could not
- E do myself; you can hear the representations I could not hear". The sub-section must be construed broadly enough to mean that if he delegates all his functions and appoints someone else, then he cannot appoint that same person to hear the representations. I should have been prepared to arrive at that conclusion, though it is not necessary that I should express a definite opinion on this, merely from the words "be afforded to him of being heard
- F by a person appointed by the Minister for the purpose". I think that means that he must appoint a person for the purpose of hearing the representations and that he may not appoint someone who has already acted in the matter for some other purpose. I think that is probably the right construction of the sub-section, but it is not necessary for the purposes of the present case that I should go as far as that. It is sufficient to say that just as the Minister cannot
- G appoint himself to hear the representations, so he cannot appoint his own alter ego to whom he has delegated all his functions.

That is how the matter stands on the literal wording of the Act. The Solicitor-General's argument for giving a different construction to the Act is, I think, really based on this. He says: "This is all mere executive machinery. There is nothing for the person appointed to do except [as he puts it], to be

H an ear-trumpet to convey representations to the Minister and that being so, looking at the object of the section, what reason can there be for not saying that the Minister can appoint the sub-committee to act as the ear-trumpet; what could be more convenient administratively than that the sub-committee which has already had to satisfy itself about the whole matter should be appointed also the ear-trumpet which is to convey the representations to the Minister?"

I I am bound to say, without any intention of disrespect to the Solicitor-General or the Ministry for whom he appears, that I am sorry to hear that argument advanced, because I think it shows a failure to appreciate the spirit, as well as the letter, of the Act. I do not think it was intended by this Act that the person appointed should be merely an ear-trumpet to convey representations to the Minister. It is quite plain that if the body appointed is the sub-committee which has already considered the matter, the ear-trumpet would necessarily be partially blocked. I say that without disrespect to the members of the sub-

committee, but it is impossible if one has already been into the matter and made up one's mind about it, to approach further representations in the same way as if one brought an entirely fresh mind to bear. It is true that the Minister is not obliged to ask for the advice of the person he appoints to consider the representations. I have no doubt that in practice he does so, but he is only bound, I suppose, to receive a report of the representations that are made because in practice, if someone is appointed to hear representations he does not take them down word for word, he selects what he thinks are the significant points to put into a written report to the Minister and the selection may be done differently by the man who comes to the matter with a fresh mind than it would be done by those who have necessarily made up their minds about the whole matter. That the spirit of the Act should be observed is important, I think, not only for that purpose, but also for giving a sense to the dispossessed farmer that justice is being done and he is being given a hearing. What is the advantage of telling the farmer who has been, or is proposed to be, dispossessed by a body of men who live in the locality and who already know probably all that is to be known about the subject-matter of the case in question and who have probably heard quite unofficially all that the farmer has to say: "If you want to go and make further representations, go and make them to the same people"? That would give him no real sense of satisfaction. It would give him satisfaction, if he heard that an independent person with a fresh mind was going into the matter again. It is quite true that that independent person would probably be an official of the Ministry, but I think the experience of most people in this country is that the officers of the Ministry who are sent down to hear representations do come with an open mind. I think it is the intention of Parliament that they should come with an open mind, and that they should be prepared to make recommendations to the Minister, if necessary, which may not be the recommendations he has received from some other of his servants of some other department of the Ministry.

For those reasons I think s. 104 (4) is, if I may so put it, a real live sub-section, that it is intended to confer something of value on the farmer, and is not merely executive machinery for repeating through an ear-trumpet observations which have already been made, I suppose, for the more natural means of communication. I think it is only right that I should say that there is, of course, an additional protection afforded by this Act to the farmer and the applicant has had in the present case the full benefit of it. The full protection is a hearing before the agricultural land tribunal. There is nothing to suggest that the tribunal did not act in the matter properly and justly, and it may well be that no injustice has been incurred in the present case, but in fact if the Act provides the farmer with two safeguards, as I think it does, he is entitled to have both of them and it is irrelevant to say in the present case that he has been deprived of one, but the other may have operated satisfactorily. I agree, therefore, with the judgment proposed by LORD GODDARD, C.J.

Order of certiorari to be issued.

Solicitors: *Lucien Fior*, agent for *Thrall, Llewellyn & Spooner*, Truro (for the applicant); *Solicitor, Ministry of Agriculture and Fisheries*; *Parker, Garrett & Co.*, agents for *Michelmores*, Exeter (for the land tribunal).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

PHIPPS v. ROCHESTER CORPORATION.

[QUEEN'S BENCH DIVISION (Devlin, J.), November 10, 11, 12, December 3, 1954.]

B

Child—Negligence—Licensee—Child of tender years—Injured by falling into trench on housing estate—Liability of local authority—Danger obvious, but child too young to appreciate it.

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In September, 1951, the defendant corporation, while developing a housing estate, dug a trench, for the purpose of laying a sewer, in the middle of a piece of open ground belonging to them and adjoining a site where their building works were going on. The trench was about a hundred yards long, eight or nine feet deep and two and a half feet wide, and the soil which had been taken out was heaped along one side to a height of about four feet. By Oct. 1, 1951, the drain had been laid, but the trench was still open. Houses in the neighbourhood which were already completed and occupied had their own gardens, where small children could play. Although the corporation knew that children from these houses were resorting to the open space where the trench was, they did not prevent the children doing so and took no steps to show that they objected to the children going there. On the evening of Oct. 1, 1951, the infant plaintiff, a boy aged five years who lived in the neighbourhood, fell into the trench while walking across the open space with his sister, aged seven years, and was injured. In an action against the corporation for damages for negligence the court found, on the facts, that children as a class were licensed to play on the open space; that the trench was neither an allurement to a child nor a danger concealed from an adult or a big child, but that it was a danger imperceptible by a little child of the plaintiff's age because he was not old enough to see the necessity of avoiding it or of taking special care; and that there was no evidence to show that little children frequently went unaccompanied on the open space in a way which ought to have brought home to the corporation that that was the use which was being made of their licence. On the question of the corporation's liability to the plaintiff,

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Held: (i) in determining whether an occupier of premises has been in breach of his duty to a licensee, viz., to warn him of a known danger which cannot be perceived by a licensee using reasonable care for his own safety, account is to be taken, in cases where the licensee is a child of tender years, of the following factors, viz., (a) that reasonable parents will not permit their children to be sent into danger without protection, (b) that the guardians of the child and of the place must act reasonably and (c) that each is entitled to assume that the other will so act (see at p. 148, letter E, post; principle stated by LORD SHAW of DUNFERMLINE in *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. at p. 61, applied): and that in the circumstances, although the infant plaintiff was on the land of the defendant corporation as their licensee, they were not in breach of their duty towards him.

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(ii) alternatively, the licence to the infant plaintiff to be on the land was conditional on his being accompanied by an adult, and, as he was not so accompanied, he was a trespasser and the claim failed.

Per CURIAM: a licensee must be taken to know generally the habits, capacities and propensities of those whom he himself has licensed, but not their individual peculiarities (see p. 143, letter A, post).

[**Editorial Note.** In this case *DEVLIN, J.*, had to decide whether a little child, or child of tender years (the plaintiff was five years old), was entitled in law to protection against a danger which, though obvious to an adult, was imperceptible to the child because he was too young to appreciate the necessity of avoiding it. Previous cases have not formulated one comprehensive principle of law on this question. The alternatives were (a) that the test was the same for a

little child as for an adult, or (b) to impose on parents the burden of contributory negligence, or (c) to treat the child's licence to be on the place as conditional on being accompanied by a responsible adult or (d) the alternative which *DEVLIN, J.*, adopted and which is stated in holding (i) above. This was preferred to the theory of a conditional licence which, however, the judge adopted as the second alternative. As regards the theory of conditional licence the present case may be compared with *Bates v. Stone Parish Council* ([1954] 3 All E.R. 38) where, however, the facts were not sufficient to support the theory's being applied. A
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The present case is not concerned with distinctions between an occupier's duty to an invitee and his duty to a licensee. A distinction can be based on the difference that an occupier's duty to an invitee extends to dangers of which the occupier ought to have known but that his duty to a licensee extends only to dangers of which the occupier did know, but recent cases have gone some way to eliminating the distinction (see Third Report of the Law Reform Committee, Cmd. 9305, p. 15, para. 27). C

As to the Degree of Care Required towards Children, see 23 *HALSBURY'S LAWS* (2nd Edn.) 584, para. 836; and for cases on the subject, see 36 *DIGEST* (Repl.) 115-122, 577-619.] D

Cases referred to:

- (1) *Edwards v. Railway Executive*, [1952] 2 All E.R. 430; [1952] A.C. 737; 36 Digest (Repl.) 121, 611.
- (2) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest (Repl.) 49, 262.
- (3) *Burchell v. Hickisson*, (1880), 50 L.J.Q.B. 101; 36 Digest (Repl.) 69, 374. E
- (4) *Hastie v. Edinburgh Magistrates*, 1907 S.C. 1102; 44 Sc.L.R. 829; 15 S.L.T. 194; 36 Digest (Repl.) 119, 869.
- (5) *M'Phail v. Lanarkshire County Council*, 1951 S.C. 301; 36 Digest (Repl.) 65, 338.
- (6) *Stevenson v. Glasgow Corpn.*, 1908 S.C. 1034; 45 Sc.L.R. 860; 16 S.L.T. 302; 36 Digest (Repl.) 74, 423. F
- (7) *Reilly v. Greenfield Coal & Brick Co., Ltd.*, 1909 S.C. 1328.
- (8) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest (Repl.) 118, 590.
- (9) *Schofield v. Bolton Corpn.*, (1910), 26 T.L.R. 230; 54 Sol. Jo. 213; 36 Digest (Repl.) 115, 567.
- (10) *Hardy v. Central London Ry. Co.*, [1920] 3 K.B. 459; 89 L.J.K.B. 1187; 124 L.T. 136; 36 Digest (Repl.) 120, 603. G
- (11) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 1922 S.C. (H.L.) 1; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest (Repl.) 119, 597.
- (12) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; 103 L.J.K.B. 527; 151 L.T. 202; 98 J.P. 319; 36 Digest (Repl.) 120, 607. H
- (13) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 1929 S.C. (H.L.) 51; 98 L.J.P.C. 119; 140 L.T. 650; 36 Digest (Repl.) 120, 604.
- (14) *Morley v. Staffordshire County Council*, [1939] 4 All E.R. 92; 36 Digest (Repl.) 119, 598.
- (15) *Williams v. Cardiff Corpn.*, [1950] 1 All E.R. 250; [1950] 1 K.B. 514; 114 J.P. 126; 36 Digest (Repl.) 119, 596. I
- (16) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 36 Digest (Repl.) 54, 296.

Action.

The infant plaintiff, a boy of five years suing through his father as next friend, brought an action against the defendants, Rochester Corporation, for negligence, and claimed damages for injuries which he sustained as a result of falling into an

A unfenced trench on a piece of open land belonging to the defendants. The facts appear in the judgment.

M. D. Van Oss for the plaintiff.

P. M. O'Connor for the defendants.

Cur. adv. vult.

B Dec. 3. **DEVLIN, J.**, read the following judgment: In 1947 the defendant corporation began to construct a housing estate on the outskirts of Rochester on a site adjoining the Maidstone Road and to the east of it. The estate was a large one involving the laying out of roads and the erection of a very considerable number of houses, and the whole operation covered some years. The land for the whole estate, which up to 1947 was being used as farm land, was taken over C in stages as the building proceeded; and early in 1951 work began on a part of it which is marked on the plan as site D. Site D is oblong in shape and bounded by the Maidstone Road on the western side and on the other sides by new roads which were laid out by the defendants and called Wake Road, The Tideway and Hawser Road. Immediately to the east of site D and bounded on the west D by The Tideway was site A where the houses had already been completed and in one of them the plaintiff lived.

Site D was roughly five hundred yards long by one hundred yards wide; and no doubt by now the whole of the site has been occupied by houses and gardens and subsidiary roads. But by Oct. 1, 1951, which is the material date in this case, only a comparatively small number of houses had been actually built and about twenty were still in the course of being built. The rest of the E site, which up to the previous year had been farmed, was open grass land waiting to be built over. There were, however, two building works going on in this open space. One was a new road which was in the course of being excavated, and the other was the laying of a sewer. For this latter purpose a long deep trench had been dug right in the middle of the space about the beginning of September, 1951. Its length is uncertain, but it seems to have been at least a hundred yards. It F was eight or nine feet deep and two and a half feet wide. The soil which had been taken out was heaped along one side to a height of about four feet. By Oct. 1 the drain had been laid but the trench was still open. It was intended that a bulldozer should be brought to shovel the earth back again, and this was, in fact, done about the middle of October.

G In the afternoon of Oct. 1, Yvonne Phipps, then aged seven years, came back from school and took her little brother, Ian, aged five years, the infant plaintiff, to pick blackberries. The girl had been out the day before to some blackberry bushes which grew somewhere near Wake Road, but this was the first time the boy went out. They went by a round-about way across the open space, and, either going there or on their way back, they found the trench across their route. They were, in fact, near one end of it and the girl saw it and turned to H go round the end. The boy, who was following behind her, fell in and broke his leg. There is really no satisfactory evidence of how he came to fall. It has been suggested that the edge crumbled, but I am not satisfied of that. There is no evidence that they were playing around the trench. I think that they were I just walking—rambling perhaps—for children of that age do not make a business of getting from one point to another by the shortest possible route in the shortest possible time. I think that the infant plaintiff fell into the trench simply because he was not of an age to be certain of negotiating such obstacles safely without assistance. The plaintiff claims that the defendants are liable for the accident.

A corporation developing an estate of this sort is faced with a problem. As soon as each house is completed it is filled up, probably by a family; and as the numbers of completed houses increase, there will be any number of children who want to run about and play over the space which is still left uncovered. The

corporation may want to use the space for operations such as laying the drain which I am considering in this case. In small spaces in the centre of a town it is, no doubt, practicable to fence off the whole site, but in the case of a space such as this it would be an expensive thing to do and perhaps then not very satisfactory. A

It is, however, only a new aspect of an old problem, and the principles that have to be applied have been considered many times. I have first to inquire whether the infant plaintiff is a licensee or a trespasser. It has been argued on his behalf that, even if he was a trespasser, there was in this case such a reckless disregard of ordinary humanity as to impose liability on the defendants. The point was not taken with much confidence, and it seems to me to be putting the case altogether too strongly. If the child was a trespasser, the defendants, in my judgment, succeed. If he was a licensee, I have to consider whether the duty owing to an infant licensee has been broken. It has been argued on his behalf that, even if he was a trespasser, there was in this case such a reckless disregard of ordinary humanity as to impose liability on the defendants. The point was not taken with much confidence, and it seems to me to be putting the case altogether too strongly. If the child was a trespasser, the defendants, in my judgment, succeed. If he was a licensee, I have to consider whether the duty owing to an infant licensee has been broken. As the argument developed, it became apparent that the two points were not entirely separate. I shall, however, begin by considering them separately, and shall deal first of all with the facts which are said by the plaintiff to be sufficient to constitute an implied licence. C

The evidence on both sides shows that children were in the habit of playing or trying to play in the houses that were under construction. If they did this during working hours, they were shooed away by the workmen. The workmen had all been given instructions not to allow anybody, whether children or adults, on to the "site". The site is a rather ambiguous expression, but in the light of all the evidence I think it must be taken to mean the plots on which building was going on. The main object of the instructions was to prevent pilfering of materials or damage to the work. There is a conflict of evidence on whether children frequented what I have called the open space, which was as yet not built over. On the plaintiff's side, both parents of the child have said that they did, but one naturally looks for some independent evidence. One neighbour said she never saw any; her own child was too young to go there. Another neighbour, whom I thought to be a good witness, said that she quite often saw children playing there. The defendants called three witnesses, the site engineer, the foreman and the clerk of the works, whose testimony was that they never saw any children on the open space. At first sight it might seem possible to reconcile this conflict by the consideration that working hours are also school hours, and that the time when children would be most likely to be there would be in the summer evenings and at week-ends when the defendants' officials would have gone home; but Oct. 1 was after the summer holidays and the plaintiffs' evidence is that children were playing on weekdays in holiday time. D E F G

I am bound to say that I require very little evidence to satisfy me that the plaintiff's case on this point is the better one, since it appears to me to be almost inevitable that children would go on to an open space of this sort. Two further considerations support this view. The first is that I find it difficult to believe that, if children had to be chased off the building sites during working hours, the same children or others like-minded were never to be seen on the open space. The second is that the type of witness whom the defendants called is not the type most likely to notice a matter of this sort. In September, 1951 there were in the open space a group of about half a dozen men engaged on the road that was being excavated and in the laying of the drain. These men were in a much better position to see who came on the open space and none of them has been called. I find it almost impossible to believe that nobody went on it at week-ends. None of the three watchmen who might have observed this have been called. I think the truth is that the defendants' officials were not really concerned about the open space and did not see any harm in people going on it, so they did trouble to notice what was happening on it. They were really concerned with the sites that were actually being built on. H I

A I am, therefore, satisfied that throughout the summer of 1951 children from the neighbouring houses resorted to this open space. There is no evidence that they did so in great numbers, or that they swarmed over it or that it was anything like an organised playground. I accept, however, the evidence that they did go on it for the ordinary purposes for which children might be expected to use it. I think that this must have been apparent to the defendants' officials at the time, B though I have no doubt that they have now forgotten it. I think that they must have seen enough of what was going on during the working day to make it plain to them without using more than ordinary powers of imagination that there would probably be quite a considerable use made of it at week-ends and in the evenings.

I, therefore, find that the defendants did know that children were using the C land. Knowledge, however, is not of itself enough to constitute a licence; there is a distinction between toleration and permission. The owner of moorland or downland, for example, in any favoured part of the country may know quite well that people are walking on his land for pleasure, but he cannot be held merely by that fact to license them to do so. As it was put in SALMOND ON TORTS (11th Edn.), p. 571:

D "An occupier who resigns himself to the occasional and perhaps inevitable presence of trespassers on his property does not thereby take upon himself the obligations of a licensor."

I have to ask myself how the matter would be regarded by the reasonable man. There must be something more than casual trespassing by individuals who come E once and perhaps never again. There must be a class of people who form something of a habit; and then one must ask oneself whether a reasonable owner would feel that, unless he acted to stop the trespass, the belief would naturally be induced in those who used the land that they had his tacit permission to do so. This is a matter of degree which in this case I do not find it easy to evaluate. It can and has been argued that this was a short user, that there is no real evidence F of any use before the spring of 1951, and that it was a use that was temporary in character since the land was in process of being built over. On balance, however, I think there is enough evidence to satisfy the test that I have propounded. It seems after all a very natural thing to allow children to play on open grass G land which is not immediately required for any other purpose and which is just beside their homes, and I do not think that more than has been proved in this case is necessary to give rise to the assumption in the mind of the reasonable man that, unless he does something to stop it, children will take it for granted that they are acting unobjectionably.

With this conclusion the stage is reached which was expressed by LORD PORTER in *Edwards v. Railway Executive* (1) ([1952] 2 All E.R. at p. 435), in these terms:

H "No doubt, the owner of the premises must take steps to show that he resents and will try to prevent the invasion."

On the facts of the present case the plaintiff has, in my judgment, only to reach this stage to succeed on the point, for there is no evidence that the defendants in this case took any steps at all. I have already expressed the view I that the instructions which they gave were intended and understood to be confined to the building plots. There is no evidence that any child was ever chased off the open space, and it would seem such a harsh measure that I think, if it had been done, it would have been remembered. The fact is that the defendants have already lost this point by staking their case on the contention that there never were any children to chase off. It follows that they never took any steps to show that they resented the invasion.

I do not think that, having reached that conclusion, it is necessary for me to examine whether any steps they took would have been effective. A fence

might not have been practicable in the circumstances. A notice might not have been sufficient to deter all or most children, but it would have made it plain to parents that children were not allowed and they might have taken the necessary action. At any rate, it is, I think, only when the owner does something to show his resentment, that the further question may arise whether what he does is in the circumstances enough. In this case it is sufficient for me to find that he did nothing. In truth, if the defendants had wanted to do something—if, for example, they had met to consider whether a notice should be put up—it is probably far from certain that any exhibition of resentment would have been generally approved. It might have been felt, justly or unjustly, that it would be a shame to keep the children off land that was not immediately required and that the defendants would have been adopting a “dog-in-the-manger” attitude if all that summer they had kept children off a natural playing ground for most of which they had no particular use. At any rate, the defendants cannot have the benefit of being indulgent towards children playing and at the same time of calling them trespassers: “People who will be publicly good-natured must pay the price” (per HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (2) [1913] 1 K.B. at p. 421).

I have, therefore, reached the conclusion that children as a class were licensed to play on the open space. Whether that licence extends unconditionally to the infant plaintiff in this case is a question which arose in the course of the argument, but not until after I had been invited by counsel for the defendants to consider the nature of the duty towards children as licensees. The general duty towards a licensee is that of warning him of a concealed danger or trap. There is no duty to warn him of an obvious danger; that is, one which a reasonable man using proper precautions for his own safety would perceive for himself. But what test of obviousness does one apply when dealing with children and what reasonable precautions are to be expected from them? Counsel for the defendants argued that this question was to be answered by the application of adult standards, except in so far as the doctrine of allurement afforded a special protection for children. On the facts of this case he contended that there was no allurement in the trench and that its dangers were obvious to an adult. The fact that work on a building estate was in progress and the existence of the heap of soil four feet high by the side of the trench would be ample warning to an adult, even before he saw the trench, that he must avoid it.

As to the facts, I accept the submission of counsel for the defendants. The trench was neither an allurement to a child nor a danger concealed from an adult or even from a big child. It was, however, a danger imperceptible by a little child of the plaintiff's age simply because he was not old enough to see the necessity of avoiding it or of taking special care; whether or not it was obvious to his eye, it was concealed from his understanding. The question of law is whether he is entitled to protection against that sort of danger.

Counsel for the plaintiff submits that, irrespective of any question of allurement, the duty towards little children should not be judged by adult standards. He admits, however, that the duty cannot be so high as to require the licensor to make the premises absolutely safe for them. The difficulty is to see on what principle one stops short of that, once one gets away from the test of obviousness as perceived by the adult. A commonplace feature of a building or of land may be a danger to a little child; he may see much but apprehend little; he is usually impervious to warning. Is then the licensor, in the words of HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (2) ([1913] 1 K.B. at p. 414) “. . . practically bound to see that the wandering child is as safe as in a nursery”? If the duty of a licensor towards such a child is converted into an obligation to make the premises safe, it means that the normal relationship of licensor and licensee has entirely ceased to apply.

- A The cases which deal with the licensor's duty towards children in general are well known. The law recognises for this purpose a sharp difference between children and adults. But there might well, I think, be an equally well-marked distinction between "big children" and "little children". I shall use those broad terms to denote broadly the difference between children who know what they are about and children who do not. The latter are sometimes referred to
- B in the cases as "children of tender years". Not having reached the age of reason or understanding, they present a special problem. When it comes to taking care of themselves, there is a greater difference between big and little children than there is between big children and adults, and much justification for putting little children into a separate category. Adults and big children can be guilty of contributory negligence; a little child cannot.
- C I have not been able to find in the cases that have been cited to me any clearly authoritative formulation of the licensor's duty towards little children. I think the cases do show that judges have not allowed themselves to be driven to the conclusion that licensors must make their premises safe for little children; but they have chosen different ways of escape from that conclusion. One way, which can be supported by many dicta, is to say bluntly that children, no matter
- D what their age, should get no different treatment from adults. Children must themselves bear the risks attendant of childhood: that is the way the world is made, as LORD DUNEDIN said in one of the cases. That is the principle for which counsel for the defendants contends in the first instance. Another way is to put on the parents the burden of the contributory negligence which the child cannot himself bear. A third way is to treat the licence as being conditional on the
- E little child being accompanied by a responsible adult. That is a solution for which counsel for the defendants contends in the alternative. A fourth way is to frame the duty so as to compromise between the robustness that would make children take the world as they found it and the tenderness which would give them nurseries wherever they go. On this view the licensor is not entitled to assume that all children will, unless they are allured, behave like adults; but
- F he is entitled to assume that normally little children will, in fact, be accompanied by a responsible person and to discharge his duty of warning accordingly. The third and fourth solutions will in most cases produce the same result. They are, however, radically different in law, for in the former the unaccompanied child is a trespasser and in the latter a licensee. I think it is worth collecting from the principal cases the dicta in which these different views are developed. After
- G they have been considered and compared I shall hope to be able to ascertain the principle on which the case before me ought to be decided.

One of the earliest cases was the one from which the formula of the conditional licence has been evolved. In *Burchell v. Hickisson* (3), one of the railings of a set which guarded a flight of steps leading to the licensor's house was missing; and the infant plaintiff, a boy aged four years, who was accompanied only by his sister aged twelve years, fell and injured himself. A Divisional Court decided against his claim and LINDLEY, J., expressed the principle as follows (50 L.J.Q.B. at p. 102):

- H "There could be no duty on the part of the defendant towards the plaintiff further than that the defendant must take care no concealed danger exists. The plaintiff was, no doubt, too young to see or guard against any danger, but the logical way of considering the matter is to consider it alternatively in this way: the defendant never invited such a person as the plaintiff to come unless he was taken care of by being placed in charge of others, and if he was in charge of others then there was no concealed danger. In other words, there was no invitation to the plaintiff if he was not guarded, and if guarded, then there was no trap."
- I

Hastie v. Edinburgh Magistrates (4) was the first of a group of three Scottish cases which have subsequently been referred to in the English reports, and is of

special significance because LORD DUNEDIN was the Lord President. If I understand the law of Scotland correctly, there is a duty to use reasonable care whether the person affected is a licensee or an invitee: see *M'Phail v. Lanarkshire County Council* (5), per LORD SORN, the Lord Ordinary (1951 S.C. at p. 307). These cases, however, show whether any special degree of care was thought necessary for a little child. A

In *Hastie's* case (4), a child aged four years fell into a pond in a public park. The Lord Ordinary (LORD SALVESEN) found that the water was not dangerous to any person, old or young, who was capable of taking care of himself. The claim failed. The Lord Ordinary said (1907 S.C. at p. 1105, note): B

" . . . if a child is so young as to be incapable of appreciating danger, it ought not to be allowed to be unattended." C

The appeal also failed. The Lord President (LORD DUNEDIN) said (*ibid.*, at p. 1105):

" The proximate cause was not the existence of the pond, but, the fact of the child being unattended . . . if . . . parents . . . cannot provide nurses . . . it is just one of the results of the world as we find it . . . " D

LORD KINNEAR said (*ibid.*, at p. 1106):

" Children cannot be left by their parents to play in public places except subject to the risks which must necessarily be attendant on such places."

In *Stevenson v. Glasgow Corpn.* (6), a small child fell into a river in a public park and was drowned. LORD KINNEAR said (1908 S.C. at p. 1043): E

" . . . there is no authority for imposing on the proprietors or managers of public parks a duty to protect children from such risks as are incident to their childhood . . . The only real security is that children who are too young to take care of themselves should be taken care of by somebody else." F

At the end of his judgment he said (*ibid.*, at p. 1045):

" It is impossible to lay upon the defenders a duty to protect children from risks which arise only from their own childishness and helplessness. That is the office of their parents or guardians." G

LORD MACKENZIE said (*ibid.*, at p. 1046) that the danger was an obvious one and that the proximate cause of the accident was that a child of tender years went there unattended:

" . . . if the child was in a position to take care of itself the same standard must be applied as would be applied in the case of an adult. If the child was so young as not to be able to take care of itself, it should never have been allowed to go there unattended . . . " H

In *Reilly v. Greenfield Coal & Brick Co., Ltd.* (7), a tramway owned by the defendant colliery crossed a farm road which was freely used by the public and a child aged four years was killed. The Lord Ordinary (LORD JOHNSTON) held (1909 S.C. at p. 1331, note) that any risk from the tram lines was so obvious to an adult as to be regarded in the light of a "seen danger". He said (*ibid.*, at p. 1333, note): I

" . . . the patent risk, or 'seen danger', which would have been pleadable against an adult capax does not avail against the deceased child. The plea of 'seen danger' is just one form of contributory negligence. And I doubt whether contributory negligence can be predicated of a child of three years and eleven months."

A The Lord Ordinary then went on to determine that there was no parent's negligence, which, he said, would be attributable vicariously to the child to bar the claim. The claim, therefore, succeeded, and an appeal failed. The judgment of LORD KINNEAR may be contrasted with what he said in the earlier cases. He said (*ibid.*, at p. 1339):

B "I should come to the conclusion myself upon the evidence that there was really no considerable danger to any active and intelligent man who might cross this road and who was taking reasonable care of himself. But people who run wagons of the kind I have described across a frequented road are bound to take into account that the persons using it may include aged or infirm people or very young people, who are not so well able to take care of themselves as ordinary active and intelligent men are. Therefore, I think, that when they have the misfortune to run over a child, which from its tender years is quite incapable of taking care of itself, it lies with them to show that they had taken every reasonable precaution which ordinary foresight and skill would suggest to prevent such a calamity."

D *Cooke v. Midland Great Western Ry. of Ireland* (8) is the case in which the House of Lords allowed the claim of a child aged four years who was injured on the railway turntable. It is the classic case of an allurement and, therefore, within the exception to the principle for which counsel for the defendants contends. I refer to it only to cite a dictum by LORD ATKINSON ([1909] A.C. at p. 238), which shows that, in his view, the duty imposed on the licensor is relative to the capacities of the licensee:

E "The principle that the owner of land upon which a licensee enters on his own business, or for his own amusement, is only responsible for injuries caused to the latter by hidden dangers of which the former knew, but of which the licensee was ignorant and could not by reasonable care and observation have detected, must, in any given case, be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the licence, knew, or ought to have known, the licensee possessed. To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious. The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

LORD ATKINSON then sets out the doctrine of allurement, treating it as an application of this principle. On this view the doctrine is not an exception to the application of a universal adult standard, but an illustration of the principle that the standard is not invariable but depends on the capacities of the licensee.

H In *Schofield v. Bolton Corpn.* (9), children were in the habit of playing on the licensor's field, and a gate which led from the field to the railway line was left open. The infant plaintiff, who was aged twenty-one months, got on to the railway line and was injured by a train. VAUGHAN WILLIAMS, L.J., held that there was no evidence that the invitation given by the licensor was to children of such tender years. There was nothing to show that permission to play in the sandpit exposed to danger any child whom reasonable people would allow to run about by itself. The real cause of the accident was the gross neglect of the father and mother. FARWELL, L.J., said (26 T.L.R. at p. 231) that the invitation was not given to children who were so young as not to appreciate the danger of a passing train.

I In *Latham v. R. Johnson & Nephew, Ltd.* (2), a child aged two years was injured while playing on a heap of paving stones in waste land belonging to the defendants; one of the stones apparently fell on her hand. The jury found, first, that children played on the land with knowledge and permission; secondly,

that there was no invitation to the plaintiff to go on the land unaccompanied; A
 thirdly, that the defendants ought to have known that there was a likelihood
 of children being injured by the stones; and, fourthly, that they did not take
 reasonable care to prevent such injury. From these findings it would appear
 that the child was a trespasser inasmuch as she was on the land unaccompanied.
 The trial judge, SCRUTTON, J., nevertheless entered judgment for the plaintiff; B
 HAMILTON, L.J., thought ([1913] 1 K.B. at p. 415) that the trial judge had wrongly
 assumed that the jury only meant that there was no invitation to this particular
 child unaccompanied, though there was to others; even so the lord justice
 thought the effect on the claim would be the same. At any rate, in the Court of
 Appeal the case was argued on the basis that the child was a licensee (see per
 FARWELL, L.J. [1913] 1 K.B. at p. 404, and per HAMILTON, L.J., *ibid.*, at p. 415). C
 Counsel for the plaintiff submitted (*ibid.*, at p. 401) that there was no obligation
 on the defendants to take more care than for an adult. On this FARWELL, L.J.,
 said (*ibid.*, at p. 407):

"I am not aware of any case that imposes any greater liability on the
 owner towards children than towards adults: the exceptions apply to all
 alike and the adult is as much entitled to protection as the child. If the
 child is too young to understand danger, the licence ought not to be held to
 extend to such a child unless accompanied by a competent guardian. See
Burchell v. Hickisson (3), *Schofield v. Bolton Corpn.* (9), and *Stevenson v.*
Glasgow Corpn. (6) . . ."

HAMILTON, L.J., said ([1913] 1 K.B. at p. 414):

"If his injury is not to go without legal remedy altogether by reason
 of his failure to use a diligence which he could not possibly have possessed,
 the owner of the close might be practically bound to see that the wandering
 child is as safe as in a nursery. The way out of the dilemma was found
 in *Burchell v. Hickisson* (3), by deciding that the circumstances may evidence
 the attachment of a condition to the licence or permission to enter, namely,
 that the child shall only enter if accompanied by a person in charge capable of
 seeing and avoiding obvious perils and thus of placing both himself and his
 charge in the position of an ordinary licensee both able and bound to look
 after himself."

The lord justice then quoted from the judgment of LINDLEY, J., in *Burchell v.*
Hickisson (3), and added ([1913] 1 K.B. at p. 415):

"Logically this principle is applicable to all cases of infirmity or disability
 and not to infants only."

He decided the case, I think, on the ground (*ibid.*, at p. 416) that "the child's
 permission to be there at all was conditional, and the condition was not per-
 formed". At the end of his judgment (*ibid.*, at p. 421) he treats the answer to
 the second question as decisive.

Hardy v. Central London Ry. Co. (10) was a case in which a child aged five and
 a half years in charge of an older boy was injured playing on a moving staircase,
 and the question was whether the warnings given to children were enough to
 negative a licence. It was held that they were and that the child was merely a
 trespasser. The case is, therefore, only indirectly relevant and I cite it mainly
 for the comment by BANKES, L.J., on the judgment of FARWELL, L.J. in *Latham*
v. R. Johnson & Nephew, Ltd. (2), which comment is as follows ([1920] 3 K.B.
 at p. 465):

"FARWELL, L.J., says that he is not aware of any case that imposes any
 greater liability on the owner towards children than towards adults. This is
 no doubt true, but in accepting the proposition the fact must not be lost
 sight of that a very different inference may have to be drawn from facts
 when dealing with the case of an infant, than when dealing with the case of

A an adult. For instance, what may amount to an effective warning to an adult may be no warning at all to an infant."

BANKES, L.J., said (*ibid.*, at p. 466) that, in the case before him, the elder boy, in whose charge the plaintiff was, certainly appreciated the warnings and probably the plaintiff did also, but in any event the plaintiff was not entitled to be put into a better position than the boy in whose charge he was.

B In *Glasgow Corpn. v. Taylor* (11), an appeal from the Court of Session to the House of Lords, a boy aged seven years died from eating the berries of a poisonous shrub in public gardens owned by the Glasgow Corporation. The danger from these berries was known to the corporation, but they gave no warning of it to parents. As this was a Scottish case, I take it that it turns on the question whether the corporation used reasonable care for the child's safety; LORD SUMNER said expressly ([1922] 1 A.C. at pp. 64, 65): "We are not dealing with trespassers or with licensees or with invitees, as such". The corporation relied on *Hastie's* case (4), and *Stevenson's* case (6). LORD BUCKMASTER distinguished these cases ([1922] 1 A.C. at p. 51) on the ground that they involved no element of mistake and deception. LORD ATKINSON decided the case on the basis that the berries were an allurements. LORD SHAW OF DUNFERMLINE, while not dissenting from this view, preferred the view that the danger was not an obvious one. He said (*ibid.*, at p. 61):

E "When the danger is familiar and obvious, no special responsibility attaches to the municipality or owner in respect of an accident having occurred to children of tender years. The reason of that appears to me to be this, that the municipality or owner is entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship. The parent or guardian of the child must act reasonably; the municipality or guardian of the park must act reasonably. This duty rests upon both and each; but each is entitled to assume it of the other."

F LORD SUMNER dealt with the matter on the basis of the relative duty of care between the corporation and the child when each was exercising a right. But he dealt (*ibid.*, at p. 65) with the argument that the parent

G "... had not effectually taught the child not to take what did not belong to it, or that he had not caused it to be in charge of some one able to take care of it while in the defenders' park. In some previous cases these points have been spoken of as going to the measure of care which the defenders owed to the child, so that the child would be entitled to no greater care than an adult . . ."

H He referred to the Scottish cases, some of which I have already cited, and to the difficult questions which might arise from the theory of the parents' contributory negligence or of the conditional licence. As to the latter he said (*ibid.*, at p. 66):

"... what if the person provided, though proper, is careless, and what if the accident would have happened all the same, whether such a person was provided or not."

I He treated all these as unsettled questions that remained open. At the end of his speech he said (*ibid.*, at p. 67):

"Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations."

In *Liddle v. North Riding of Yorkshire County Council* (12), the defendants placed a heap of soil by the side of a road which they were repairing and the infant plaintiff, aged seven years, climbed to the top and fell backwards and injured himself. It was held that he was a trespasser inasmuch as his right to use the highway did not permit him to climb on a heap of soil. In the Court of Appeal, however, some observations were made on the footing that he was a licensee. SCRUTTON, L.J., said ([1934] 2 K.B. at p. 112):

"In my opinion, to make the landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable.

GREER, L.J., referred (*ibid.*, at p. 117) to the alternative contention that if the child was a licensee the danger was obvious and not a hidden danger and (*ibid.*, at p. 118) to the opposing contention that the mound of soil was an allurement. Dealing with these alternative contentions the lord justice said (*ibid.*, at p. 121) that, even if the plaintiff was a licensee, he still would not be entitled to recover as the danger was open and not concealed. He referred (*ibid.*, at p. 122) to VISCOUNT DUNEDIN's speech in *R. Addie & Sons (Collieries) v. Dumbreck* (13) ([1929] A.C. at p. 371), and pointed out that his Lordship had used the words "where dangers are obvious they must run the risk of them" in relation to a claim made on behalf of a boy aged four years.

In *Morley v. Staffordshire County Council* (14), the defendants were repairing the highway and had roped off a part of it and stacked there a quantity of metal near to a heap of sand. A child aged six years playing with the sand injured himself on the stack. The Court of Appeal were in doubt whether the child was a trespasser or not and dealt with it on the assumption that he was a licensee. MACKINNON, L.J., decided the case by applying the passage in the judgment of SCRUTTON, L.J., in *Liddle v. North Riding of Yorkshire County Council* (12) ([1934] 2 K.B. at p. 112), which I have already cited. He said ([1939] 4 All E.R. at p. 94) that, the only addition necessary to that statement of the law was in the case of an allurement and that there was here no allurement or concealment. It was an obvious danger in so far as it was a danger at all. DU PARCQ., L.J., said that the danger was obvious to a child of six. He added (*ibid.*, at p. 96).

"In some cases it is right to say that a child is of such tender years that the invitation or licence cannot be taken to extend to it unless accompanied by a grown-up person who does understand danger . . ."

This, however, was not such a case.

In *Williams v. Cardiff Corpn.* (15), the corporation were the owners of a piece of waste land on which there was a bank with tins and broken glass at the bottom. The infant plaintiff, aged four and a half years, rolled down the bank on to the broken glass and tins and injured himself. The county court judge found for the plaintiff and the Court of Appeal upheld his decision. It was conceded that the child was a licensee. It is not quite clear whether the broken glass was visible to the eye or not. If it was not, it would be a concealed danger judged by any standard; the fact that adults do not usually roll down banks and so would be less likely than children to come to harm would not make it any the less a danger. If, however, the glass was visible, then it would only be a danger to a little child in the sense that though obvious to the eye, it would not be obvious to the apprehension of a child aged four. The language used by JENKINS, L.J., suggests the latter. SOMERVELL, L.J., quoted ([1950] 1 All E.R. at p. 251) the passage from the judgment of SCRUTTON, L.J., in *Liddle v. North*

- A *Riding of Yorkshire County Council* (12) ([1934] 2 K.B. at p. 112), but held that the broken glass and the bank together amounted to a trap; he regarded it as a trap rather than as an allurement. JENKINS, L.J., said ([1950] 1 All E.R. at p. 252) that broken glass scattered about the ground was from the point of view of an infant a trap or concealed danger, whatever might be said of it from the point of view of an adult. He quoted the passage, which I have already cited,
- B in the speech of LORD SUMNER in *Glasgow Corpn. v. Taylor* (11) ([1922] 1 A.C. at p. 67), in which his Lordship said the measure of care must be appropriate to the ability of those whose presence ought to be anticipated. This (JENKINS, L.J., said [1950] 1 All E.R. at p. 252) required the corporation to keep the ground free from broken glass "the danger to be apprehended from which would clearly not be apparent to persons of tender years." ROMER, J., said
- C (*ibid.*, at p. 252) that the grassy slope could not amount to a concealed danger for it could be seen, but that coupled with the broken glass and other material at the bottom it did amount to a concealed danger.

Williams v. Cardiff Corpn. (15), concludes the cases to which I have been referred, and I must now endeavour to extract from them as a whole the true principle. There is, as I have said, especially among the earlier cases, support for the first submission of counsel for the defendants that the test of concealment is the same for little children as it is for adults; or, at any rate, that trenches, like ponds, rivers and heaps, are obvious dangers from which little children need not be specially protected. Apart from the Scottish cases, *Liddle's case* (12) and *Morley's case* (14) are comparatively recent decisions of the Court of Appeal which carry that argument a long way. I do not, however, think that the solution is to be found simply by drawing up a list of "obvious dangers" which are of the same genus as ponds and contrasting it with a list of "allurements"; and I could adopt the general principle that adults and children are to be treated alike only if I were to disregard the persuasive dicta to the contrary of LORD ATKINSON in *Cooke's case* (8), LORD SUMNER in *Glasgow Corpn. v. Taylor* (11) and JENKINS, L.J., in the most recent case (*Williams v. Cardiff Corpn.* (15)).

F For myself, I much prefer the flexibility afforded by these dicta and I think I am free to follow them. A similar flexibility has been adopted in determining what is an "unusual danger" for invitees (see *London Graving Dock Co., Ltd. v. Horton* (16), per LORD NORMAND, [1951] 2 All E.R. at p. 8). To assess the obligations of the licensor simply by reference to the physical powers of the average healthy adult seems to me to be unnecessarily rigid.

- G Can the licensor be exonerated on the ground that the casualty must in all cases be treated as attributable to what has been called the contributory negligence of the parents? I do not think that this question leads to the right answer. VAUGHAN WILLIAMS, L.J., gave it as a ground in *Schofield's case* (9) but no subsequent English case has adopted it and it is inconsistent with several. The Scottish cases are concerned with a parent's claim in his own right for a solatium
- H for the death of his child, a claim unknown to English law. It is in this light that the references to the contributory negligence of the parent must be interpreted. I know of no English case in which the negligence of the parent has been visited on the child. It would not, therefore, be correct to talk in England of a parent's contributory negligence; when LORD SUMNER used the phrase, he was speaking in a Scottish appeal (*Glasgow Corpn. v. Taylor* (11)). Under English law, the
- I parent's negligence would simply be that of another wrongdoer and would not enable the occupier to escape liability if his breach of duty was also a cause of the casualty; under the Law Reform (Contributory Negligence) Act, 1945, a question of apportionment might arise. Anyway, I do not think it would be a just rule. The parent of a straying child is not ipso facto negligent. A little child may sometimes escape from careful parental control, and it would be wrong to penalise an occupier whose premises were generally safe because he could not prove a parent to be at fault.

The third principle is that of the conditional licence, and the cases show that there is excellent authority for this. Nevertheless, I think that it involves difficulties of the sort that LORD SUMNER considered in *Glasgow Corpn. v. Taylor* (11) and regarded as still unresolved. It is easy to put a condition into an express licence; the licensor can then word it as he likes. It is not so easy to settle the terms of an implied condition. They must, however, be settled with some precision, because on them will turn the question whether a person using the premises is a trespasser or not. He cannot become a trespasser according to whether or not he falls into a pit. The law cannot wait to see whether in fact he is circumspect; he must be identifiable as a trespasser so that a legalistic licensor could turn him back at the gate. What is of more practical importance is that in certain cases his status may affect his right to recover. Suppose there is on the premises something which by any standard, adult or otherwise, constitutes a trap, and an unaccompanied little child falls into it. If he is a trespasser, he cannot recover. If he is a licensee he could recover, since in such a case the presence or absence of a guardian would be immaterial.

What then is the definition of "tender years"? Is it an age qualification, or does it go by the appearance of physical capability? At the other end of mortality what degree of age or infirmity disqualifies? Should a blind man, who with the friendly help of passers-by walks the streets in comparative safety, be excluded from a public park because he cannot read the warning notices or see the dangers obvious to others? When the degree of incapacity that calls for the condition has been determined, the qualifications of the companion will have to be considered. Must the person who accompanies a child be an adult? If an older child will do, how much older must he be? If a blind man were led by a specially trained dog, would the dog do? If the qualifications of the guardian are settled, what duties does the condition impose on him? If it is an obligation to exercise reasonable care and his attention at the critical moment is distracted in the performance of some other proper duty, is the child to recover in respect of a danger which an undistracted adult would have perceived?

I think that, if this approach to the problem were followed up, the conditional licensor would soon become a legal fiction and the terms of the supposed licence would be mainly lawyers' inventions. Legal fictions have played a useful part in the formulation of principles of law, but the formula of the conditional licence has the disadvantage that it does not get at the real need. What is wanted for the reasonable adjustment of the relationship between the licensor and the licensee of diminished capacity is, not the formulation of a condition which must operate irrespective of any casualty, but something which places the casualty after it has occurred on one side or the other of the line.

For these reasons I respectfully doubt whether the notion of the conditional licence would, if further developed, be found in the end to work satisfactorily. Furthermore, I think that the general principle which governs the relationship between licensors and licensees can be made to work in the case of little children without the employment of any special device. The general principle is that a licensor must give warning of any known danger which would not be perceived by a licensee using reasonable care for his own safety. In many cases the application of the rule raises the question whether the licensee has been guilty of contributory negligence. But that does not mean that, because a little child cannot be guilty of contributory negligence, the rule breaks down. The licensor's duty is not unbounded unless he can prove contributory negligence. There are limits to his duty which exist quite independently of the behaviour of the licensee in any particular case. His duty is to consider with reasonable care whether there are on his premises, so far as he knows their condition, any dangers that would not be obvious to the persons whom he has permitted to use them; and if there are, to give warning of them or to remove them. If he rightly determines a danger to be obvious, he will not be liable because some individual licensee,

A albeit without negligence in the special circumstances of his case, fails to perceive it. He must be taken to know generally the "habits, capacities and propensities" of those whom he himself has licensed, but not their individual peculiarities. In the light of that general knowledge and on the assumption that they will behave reasonably, he must determine what steps he will take. If he makes that determination carefully, he cannot be made liable, whatever may subsequently

B happen.

I think it would be an unjustifiable restriction of the principle if one were to say that, although the licensor may in determining the extent of his duty have regard to the fact that it is the habit, and also the duty, of prudent people to look after themselves, he may not in that determination have a similar regard to the fact that it is the habit, and also the duty, of prudent people to look after their

C little children. If he is entitled, in the absence of evidence to the contrary, to assume that parents will not normally allow their little children to go out unaccompanied, he can decide what he should do and consider what warnings are necessary on that basis. He cannot then be made liable for the exceptional child that strays nor will he be required to prove that any particular parent has been negligent. It is, I think, preferable that this result should be achieved by

D allowing the general principle to expand in a natural way rather than by restricting its influence and then having to give it artificial aids in order to make it work at all in the case of little children.

The principle I am seeking to express is that contained in the passage which I have quoted from the speech of LORD SHAW OF DUNFERMLINE in *Glasgow Corp'n. v. Taylor* (11) ([1922] 1 A.C. at p. 61), where he says that the municipality is entitled to take into account that reasonable parents will not permit their children to be sent into danger without protection; that the guardians of the child and of the park must each act reasonably; and that each is entitled to assume of the other that he will. That passage was not spoken in reference to the English law of licence, but nevertheless it seems to me to express perfectly the way in which the English law can reasonably be applied. A licensor who tacitly permits

E the public to use his land without discriminating between its members must assume that the public may include little children. But as a general rule he will have discharged his duty towards them if the dangers which they may encounter are only those which are obvious to a guardian or of which he has given a warning comprehensible by a guardian. To every general rule there are, of course, exceptions. A licensor cannot divest himself of the obligation of finding out something about the sort of people who are availing themselves of his permission and the sort of use they are making of it. He may have to take into account the social habits of the neighbourhood. No doubt, there are places where little children go to play unaccompanied. If the licensor knows or ought to anticipate

G that, he may have to take steps accordingly. But the responsibility for the safety of little children must rest primarily on the parents; it is their duty

H to see that such children are not allowed to wander about by themselves, or, at the least, to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land. Different considerations may well apply

I to public parks or to recognised playing grounds where parents allow their children to go unaccompanied in the reasonable belief that they are safe.

Although, as I have said, there is good authority for the presumption of a conditional licence, I do not feel compelled to hold that it is the only way out of the dilemma that would otherwise be created. It is not a doctrine which has since its inception been extensively adopted. It is noteworthy that apart from the reference to it by DU PARCQ, L.J. in *Morley v. Staffordshire County Council* (14) ([1939] 4 All E.R. at p. 96), which I have noted, it has not even been

mentioned in the Court of Appeal in any of the cases in the last thirty years in which one might have expected it to have been discussed. Although it was put forward by HAMILTON, L.J., in 1913 in *Latham v. R. Johnson & Nephew, Ltd.* (2), as the way out of the dilemma, he plainly in 1922 felt doubts about its efficacy and preferred to state the principle as one involving "a measure of care appropriate to the inability or disability of those who are immature . . ." (see *Glasgow Corpn. v. Taylor* (11), per LORD SUMNER, [1922] 1 A.C. at p. 67). This is what LORD ATKINSON was saying in *Cooke's* case (8) when he said ([1909] A.C. at p. 238) that the duty must be measured by the licensor's knowledge of the habits, capacities and propensities of the licensees. These statements of the law are wide enough to allow as one of the factors determining the appropriate measure the licensor's knowledge of the habits of prudent parents in relation to little children. I think that LORD SUMNER and LORD ATKINSON are substantially at one with LORD SHAW in his statement of the relevant principle.

If this be the true principle to apply, then I have to consider whether the defendants ought in this case to have anticipated the presence of the infant plaintiff unaccompanied. I say "unaccompanied" because the sister, while doubtless able to take care of herself as is shown by her own avoidance of the trench, was not old enough to take care of her little brother as well. There is no evidence in this case to show that little children frequently went unaccompanied on the open space in a way which ought to have brought home to the defendants that that was the use that was being made of their licence. Apart from evidence of that sort, I do not think that the defendants ought to have anticipated that it was a place in which children aged five years would be sent out to play by themselves. It is not an overcrowded neighbourhood; it is not as if it were the only green place in the centre of a city. The houses had gardens in which small children could play; if it be material, I believe that at the relevant time the plaintiff's garden was in fact fenced. The parents of children who might be expected to play there all live near and could have made themselves familiar with the space. They must have known that building operations were going on nearby and ought to have realised that that might involve the digging of trenches and holes. Even if it be prudent, which I do not think it is, for a parent to allow two small children out in this way on an October evening, the parents might at least have satisfied themselves that the place to which they allowed these little children to go held no dangers for them. Any parent who looked could have seen the trench and taken steps to prevent his child going there while it was still open. In my judgment, the defendants are entitled to assume that parents would behave in this naturally prudent way, and are not obliged to take it on themselves, in effect, to discharge parental duties. I conclude, therefore, that the infant plaintiff was on the land as a licensee, but that there was no breach of the defendants' duty towards him.

If I have failed to discover the true principle, then the alternative that I should apply is that of the conditional licence. If the general presumption be that a licence to a little child is conditional on his being accompanied by an adult, there is nothing in the facts of this case to displace it. The infant plaintiff was not so accompanied and was, therefore, a trespasser, and so the claim would fail on that ground.

If I am wrong in these conclusions, I should assess the damages which ought to be awarded for a nasty accident, which fortunately has had no permanently injurious consequences at all, at £100.

Judgment for the defendants.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wood, McLennan & Williams*, Chatham (for the plaintiff); *Wm. Easton & Sons* (for the defendants).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

A

JACKSON v. NATIONAL COAL BOARD.

[LEEDS ASSIZES (Hallett, J.), November 23, 24, 25, 29, 1954.]

Coal Mining—Statutory duty—Breach—Security of travelling road and working place—Fall of roof occasioned by an explosion of a most abnormal character—Whether roof made secure—Whether reasonably practicable to avoid breach—Coal Mines Act, 1911 (1 & 2 Geo. 5 c. 50), s. 49, s. 102 (8).

B

A shot-firer employed by the defendants in their coal mine was killed by a fall of roof occasioned by an explosion of a most abnormal character. He was carrying in a hessian bag, which was normally used for holding stemming materials, cartridges and detonators which by the Coal Mines (Explosives) Order, 1951, he ought to have carried in his powder canister and detonator case respectively. He put the bag at the foot of the coal face within easy reach of the hole which he was stemming and, when he fired a shot in the hole, the contents of the bag also exploded. The abnormal explosion displaced props which were supporting the roof. In an action by the widow of the deceased shot-firer against the defendants for damages for breach of statutory duty, imposed by s. 49 of the Coal Mines Act, 1911, to make secure the roof,

C

D

Held: (i) in the circumstances the fall of the roof was due to a course of conduct by the deceased against which the defendants could not have been expected to provide and, accordingly, a breach of their duty under s. 49 of the Coal Mines Act, 1911, to make secure the roof was not established.

E

Dictum of LORD TUCKER in *Marshall v. Gotham Co., Ltd.* ([1954] 1 All E.R. at p. 943) applied.

(ii) even if the defendants had been in breach of their duty under s. 49 it was not practicable to make the roof secure against such an explosion as had caused it to fall in the present case, and in the circumstances the defendants would be protected from liability under s. 102 (8) of the Act of 1911.

F

[Editorial Note. The Coal Mines Act, 1911, s. 49 and s. 102 (8) are repealed as from a day to be appointed by the Mines and Quarries Act, 1954, s. 189 and Sch. 5, and are replaced with certain modifications by s. 48 (1) and s. 157 thereof.

As to the Civil Liability of Owner of Mine for Breach of Statutory Duty, see 22 HALSBURY'S LAWS (2nd Edn.) 824, para. 689; and for cases on the subject, see Supp. to 34 DIGEST 744, 1189.

G

For the Coal Mines Act, 1911, s. 49 and s. 102 (8), see 16 HALSBURY'S STATUTES (2nd Edn.) 133, 162.

For the Coal Mines (Explosives) Order, 1951 (S.I. 1951 No. 1675), see 14 HALSBURY'S STATUTORY INSTRUMENTS 103.]

Cases referred to:

H

(1) *Marshall v. Gotham Co., Ltd.*, [1954] 1 All E.R. 937; [1954] A.C. 360.

(2) *Edwards v. National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

(3) *Burns v. Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987; [1951] 1 K.B. 454; 114 J.P. 613; 2nd Digest Supp.

I

(4) *Hayes v. National Coal Board*, (Leeds Spring Assize, Apr. 29, 1952), Unreported.

(5) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.

(6) *Smithwick v. National Coal Board*, [1950] 2 K.B. 335; 2nd Digest Supp.

Action.

The plaintiff, the widow and administratrix of Lawrence Jackson deceased, claimed damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2, against the defendants who were the owners of Crigglestone Colliery near Wakefield and employed the

deceased as a shot-firer, in respect of his death on Dec. 16, 1952, when he was killed by being buried under a fall of roof. The plaintiff alleged (i) breach of statutory duty by the defendants under s. 49 of the Coal Mines Act, 1911, by failing to make secure the roof of a travelling road and working place and (ii) negligence at common law. The defendants, in addition to denying breach of statutory duty and negligence, relied in the alternative on s. 102 (8) of the Act alleging that it was not reasonably practicable to avoid or prevent such breach and that the accident was caused solely, or was contributed to, by the breach of statutory duty and negligence of the deceased. A B

The coal in the colliery was being worked by the "long wall advancing" method. The first step was to undercut the coal by means of a cutter machine to a depth of five feet six inches from the face and a thickness of five inches, thus leaving the coal above the undercut unsupported. At an appropriate time shot-holes were drilled in the face reaching to the same depth as the undercut. After the cutter and its crew had gone by the shot-firer charged a shot-hole, procedure in respect of charging and firing being subject to the Coal Mines (Explosives) Order, 1951 (S.I. 1951 No. 1675). The charge consisted of two cartridges. The outer cartridge was primed with a detonator and the shot-firer then stemmed the hole with stemming material which he carried in a hessian bag. The shot-firer had a battery which was joined by a cable to the detonator leads and supplied the current to explode the detonator which in turn exploded the cartridges. The effect of a shot was to cause the coal to fall down into the undercut. A shot fired in this way could not normally cause a fall of roof running along the face, as the roof was supported by bars and props. C

The deceased acted in contravention of a number of the provisions of the order. These were reg. 20 (2) which forbids shot-firers to charge any shot-hole until the shot is about to be fired; reg. 7 (3) which provides that no cartridge shall be taken from the canister until it is required immediately for charging a shot-hole; reg. 17 (2) which provides that no detonator shall be removed from the detonator case when not required for immediate use; reg. 25 (8) which prescribes that a cable not less than twenty yards in length shall be used when firing a single shot; reg. 28 (1) which requires the shot-firer to determine the danger zone likely to be created; and reg. 28 (2) which requires the shot-firer to ensure that all persons have withdrawn from the danger zone or have taken proper shelter and to take proper shelter himself. The court found as a fact that the deceased was carrying in his hessian stemming bag cartridges and detonators which he ought to have carried in his powder canister and detonator case respectively; that he put his stemming bag down in the normal place at the foot of the face within easy reach of the hole which he was stemming; that he fired the adjacent hole much too near to himself and the cutter crew and that either some material projected as a result of the shot struck the hessian bag and so caused the explosion which produced all the otherwise inexplicable phenomena, viz., the displacing of the bars and props supporting the roof and the fall of the roof, or possibly that the contents of the hessian bag being so close to the detonation in the shot-hole were unintentionally set off by sympathetic action. D E F G H

The plaintiff contended that the mere fact that the roof fell, which was not disputed, established a breach by the defendants of their duty under s. 49 of the Coal Mines Act, 1911; that the fall was due to the removal of a middle prop of the roof too soon after the cutting had been done and before the roof had time to settle (the court rejected this contention), and that the fall was caused by firing shots at the coal face too soon after the cutter had passed. I

The defendants contended that the cause of the fall was the course of conduct of the shot-firer described above and that the conduct was in many respects illegal and obviously unwise and was beyond anything against which they could reasonably be expected to provide.

- A *G. R. Hinchcliffe, Q.C., and R. Withers Payne* for the plaintiff.
G. Veale, Q.C., and A. B. Boyle for the defendants.

Cur. adv. vult.

Nov. 29. HALLETT, J., after considering the evidence and stating findings of fact as summarised above continued: I find that the fall of roof was occasioned solely by an explosion of a most abnormal character; that the explosion was caused in a most abnormal manner and by reason of numerous breaches on the part of the deceased, not only of regulations, but of obvious precautions for the safety of himself and others.

I must now consider the law. The plaintiff primarily relies on the provisions of s. 49 of the Coal Mines Act, 1911. That section reads as follows:

C “The roof and sides of every travelling road and working place shall be made secure . . .”

and the section goes on to prohibit anyone from travelling along a road, except in certain circumstances, which is not so made secure. That requirement, however, has to be read in conjunction with s. 102 (8) of the same Act, which is as follows:

D “The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach.”

E As I shall have occasion to refer to *Marshall v. Gotham Co., Ltd.* (1) it might be as well to mention that the statutory provisions under consideration were different. Regulation 7 (3) of the Metalliferous Mines General Regulations, 1938 (S.R. & O. 1938 No. 630), requires that the roof and sides of every travelling road, outlet and working place shall be made secure; but it was held by their Lordships in *Marshall v. Gotham Co., Ltd.* (1) that the regulation must be read in conjunction with and qualified by the prefatory provisions contained in

F s. 23 of the Metalliferous Mines Regulation Act, 1872, that

“The following general rules shall, so far as may be reasonably practicable, be observed . . .”

Although I am not sure that all their Lordships in the House of Lords took that view it may be, therefore, that the duty in the case of a metalliferous mine is a qualified duty.

G However that may be, under s. 49 of the Coal Mines Act, 1911, there is no question whatever that the duty is an absolute duty. Two questions then arise. First, was the roof here made secure? Secondly, if it was not made secure and there was accordingly a breach of s. 49, are the defendants protected from liability in damages in this action by reason of the provisions of s. 102 (8)?

H It is quite obvious and not disputed that, if the roof or side of a travelling road or working place in a coal mine falls, there is very strong, and, indeed, save in most exceptional circumstances, conclusive, evidence that the roof or side has not been made secure as required by s. 49. Counsel for the defendants, however, has contended that in the exceptional circumstances of this case the plaintiff has failed to prove that the roof was not made secure. He says that a roof is

I secure if it falls solely by reason of such an abnormal and extraneous cause as the evidence discloses in this case. If, contrary to his contention, it be held by me that in this case there was a breach of the duty imposed by s. 49, counsel further contends that the defendants are entitled to escape liability by reason of the provisions of s. 102 (8). He argues that no system of support which it would be reasonably practicable to adopt would make a roof secure against such an event as the evidence discloses to have caused the fall of the roof in the present case. If he be right in this second contention, which depends on the same view as to the cause of the fall, his first contention is superfluous; but he has pressed

me to consider and deal with both contentions and I think it right to do so. A
The success of either contention is mainly dependent on my view of what caused
the roof to fall, and it is partly for that reason that I have reviewed the facts and
stated my findings about them before I dealt with the law. Unless the cause of
the fall was that alleged by the defendants, it is to my mind quite clear that
both contentions must fail and that, subject to the question of contributory
negligence, the plaintiff must succeed. A fall due to removing props too soon B
is clearly foreseeable and it is clearly practicable to defer removing props until
the proper time.

By way of authority on the questions of law I have been referred to four cases
only, namely: *Edwards v. National Coal Board* (2); *Burns v. Joseph Terry &*
Sons, Ltd. (3); *Hayes v. National Coal Board* (4); and *Marshall v. Gotham*
Co., Ltd. (1). C

As regards the first contention of counsel for the defendants, I can derive no
assistance from *Edwards v. National Coal Board* (2). In that case the fall was
admittedly due to what is called a "glassy slant", which is a well known kind
of latent geological defect which had actually been observed in another place or
places in the same roadway. Accordingly, it was not contended that the side D
had been made secure and, indeed, it was not alleged that anything whatever
had been done to make it secure. Observations will be found in the judgments,
for instance in the judgment of SINGLETON, L.J. ([1949] 1 All E.R. at p. 748),
which make that quite plain. The defendants relied solely on s. 102 (8). There
is one passage perhaps in the judgment of TUCKER, L.J., which is of some slight
interest ([1949] 1 All E.R. at p. 746):

"On the other hand, counsel for the plaintiff argues that nothing short of E
some external interference by some unauthorised third person, or some occur-
rence which could not reasonably be anticipated, can excuse the breach of the
absolute duty."

TUCKER, L.J., however, expressed the view that the argument for the plaintiff
limited unduly the operation of s. 102 (8). He and the other members of the F
court had no occasion to consider the point which arises here with regard to
whether the roof had been made secure.

Hayes v. National Coal Board (4) is a decision of my own, and of the four cases
I have mentioned certainly is the one most in point. Before last week when my
attention was drawn to it and I was supplied with a transcript of my judgment,
I had completely forgotten all about it. Because I came to the case after two G
and a half years with a completely fresh mind, I found it quite easy to re-consider
with an unbiased mind, and I certainly should have had no hesitation in express-
ing the view that I was wrong two and a half years ago if that was the conclusion
to which I had now come; but, reviewing my judgment in that case in cold blood,
I still think it is right, although I am not sure that some of my reasoning may not
have been too widely expressed. In that case a stretcher party was taking out of H
the pit a very badly injured man when they found their passage obstructed by a
tub standing on the rails. Obviously it was undesirable for them to jolt the
stretcher and desirable for them to handle it in as smooth a manner as possible.
Accordingly, three out of four men who were following the stretcher to act as
relief stretcher bearers set to work to move the tub out of the way, one of those
men being the plaintiff Hayes. They turned the tub on its side, and then I
because it was not lying parallel to the rails they wanted to shift it a little more,
which was rather difficult because it was a heavy thing. One of them pulled
and the other two pushed, and in doing that, quite accidentally of course, they
knocked the tub twice against one of the props that held up the bars which held
up the roof. As a result of knocking the tub against the prop, the prop was
pushed out of the vertical and a small fall of matter took place, which injured
the plaintiff. It was on those facts that I had to decide the two contentions which
are also raised in the present case. I held rightly or wrongly that, although I

A there had been a fall in the circumstances which I have described, it did not show a failure on the part of the defendants to make the roof of that particular road secure.

I was influenced in so finding by, inter alia, the case of *Burns v. Joseph Terry & Sons, Ltd.* (3). In that case the question was whether transmission machinery was securely fenced within s. 13 (1) of the Factories Act, 1937. The trial judge, B HILBERY, J., had applied to the decision of that question what can be called for short the test of "foreseeability". It was not disputed in that case that in deciding whether machinery is dangerous for the purposes of s. 14 (1) of the Factories Act, 1937, the foreseeability test is a proper test, and it was pointed out that in *Walker v. Bletchley Flettons, Ltd.* (5) DU PARCQ, J., had applied that test both to the question of whether the machinery was dangerous and to the question of whether it was securely fenced. C HILBERY, J., had referred to a note in REDGRAVE'S FACTORIES, TRUCK AND SHOPS ACTS, which still appears in the 18th Edn. at p. 34, as being correct. SOMERVELL, L.J., adopted the view that the foreseeability test applied both to the question whether the machine was dangerous and also to the question whether it was securely fenced, and COHEN, L.J., agreed with him, delivering no separate judgment. DENNING, L.J., on the other hand, disagreed as regards applying the foreseeability test to the words "securely fenced", but he did not disagree as regards applying that test to the word "dangerous" ([1950] 2 All E.R. at p. 993):

E "It is apparent, therefore, that in cases under s. 14, unless s. 15 applies, the only inquiries are: (i) Is the machine dangerous?, and (ii) If so, is it securely fenced? The answer to the first question depends on foreseeability, and the courts apply the test laid down by DU PARCQ, J. in *Walker v. Bletchley Flettons, Ltd.* (5), recently approved by this court in *Smithwick v. National Coal Board* (6)"

F which was also a machinery case. In the present case the word "dangerous" does not appear, but it seems to me that as regards the roof and sides of a travelling road or working place in a pit the word "secure" must mean substantially the same as "not dangerous by reason of liability to fall". A ceiling, for instance, is, I think, secure in ordinary parlance, though an earthquake or a bomb, or even a bath overflowing in a bathroom overhead, may bring it down.

G Turning now to the case of *Marshall v. Gotham Co., Ltd.* (1), there again the cause of the fall was not in doubt. It was a latent geological defect known as "slickenside," which is a well known kind of geological defect and a known danger; see, for instance, what is said by LORD REID ([1954] 1 All E.R. at p. 941). Accordingly, it was not contended for the defendants in that case that the roof had been made secure (see per LORD REID, *ibid.*, at p. 940 and per LORD KEITH OF AVONHOLME, *ibid.*, at p. 945):

H "It is obvious that the roof of the working place at which the deceased man was working was not secure . . ."

I Thus the only question for decision was whether in the circumstances disclosed by the evidence the defendants were protected by the proviso, which, as I have said, corresponds in substance, though not in form, to what is contained here in s. 102 (8). LORD TUCKER, however, made in *Marshall's* case (1) an observation which is very greatly relied on here by counsel for the defendants. That observation, I think, was not necessary for the decision of the case; and, since the fall in the present case was not caused on the one hand by an earthquake or an atom bomb or on the other hand by a geological hazard such as a glassy slant or slickenside, LORD TUCKER's observation does not directly help me to decide on counsel's first contention that this roof was secure. LORD TUCKER said ([1954] 1 All E.R. at p. 943):

"I agree that the word 'secure' does not involve security from the

effects of earthquake or an atom bomb, but I think it must include security from all the known geological hazards inherent in mining operations.” A

LORD TUCKER clearly thought that the cause there fell within the category of “known geological hazards inherent in mining operations”. What I have to decide is whether the cause here falls within the first category of earthquake or atom bombs or within the second category of known geological hazards. I can find no further assistance on this point and I must therefore make up my own mind without the help of higher authority. Having held on the evidence that the cause of the fall was that alleged by the defendants*, I have come to the conclusion that the fall does not in the circumstances of this case establish a failure to make the roof secure as required by s. 49. B

I think I have probably already disclosed, with perhaps unwise candour, that I felt a certain temptation to burke deciding that question having regard to what I am now going to decide with regard to the second contention, because, if I be wrong in what I have held as regards the first contention, it is necessary for me to decide whether the defendants have shown that it was not reasonably practicable to avoid or prevent the breach. Having regard to the grounds on which my own decision in *Edwards v. National Coal Board* (2) was reversed, I have been particularly careful to consider whether there is sufficient evidence, if accepted, to justify me in holding that it was not reasonably practicable to make the roof secure against that which according to the defendants’ case caused it to fall, namely, the displacement of a prop or props by an explosion such as could never have been contemplated, in my judgment, as even a possibility. It might perhaps have been better if some witness had been questioned on that aspect of the matter, but it seems to me to be obvious without evidence that it was not reasonably practicable to set props supporting bars under a roof so that they would remain undisplaced by such an explosion. The result is that, in my judgment and my view of the law, the decision of this case turns on whether I accept the defendants’ case as to what caused the fall. I have already stated that I do accept that case and I have indicated to some extent the reasons why I do so. Therefore, I rule that there was no breach of the defendants’ duty to make the roof secure, but even if there was such a breach it was not reasonably practicable to avoid or prevent it. C D E F

Judgment for the defendants.

Solicitors: *Raley & Pratt*, Barnsley (for the plaintiff); *C. M. H. Glover*, Doncaster (for the defendants).

[*Reported by G. M. SMAILES, ESQ., Barrister-at-Law.*]

* The defendants’ contention as to the cause of the fall is stated at p. 146, letter I, ante.

PETHERICK v. BUCKLAND.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Devlin, JJ.),
December 13, 14, 1954.]

Insurance—Motor insurance—Disqualification for holding licence—Power to limit disqualification to driving of vehicle of the same class or description as vehicle in relation to which offence committed—Disqualification limited to “five hundredweight vehicles”—No such vehicle mentioned in the Act—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 2 (1), s. 6 (1), proviso.

The respondent was convicted before a court of summary jurisdiction of offences against the Road Traffic Act, 1930, s. 9 (4) and s. 35 (1), in relation to a motor vehicle which the justices described as “a delivery van of a size or capacity sometimes known as a ‘five hundredweight’”. Purporting to act under s. 6 (1) of the Act, which empowers the court to impose disqualification and to limit it to the driving of a motor vehicle of the same “class or description” as the vehicle in relation to which the offence was committed, the justices disqualified the respondent for holding or obtaining a licence for driving “five hundredweight vehicles” for twelve months. The Act contains no definition of “description” and creates no class of motor vehicles described as “five hundredweight”. On an appeal by the prosecution from the decision of the justices on the ground that there was no such class or description of vehicle as a five hundredweight vehicle,

Held: as, although the Act of 1930 contained references to descriptions of vehicles, it did not define what was meant by that term, the justices were entitled to define their own description of a motor vehicle, and, having described the vehicle in relation to which the respondent had committed the offences as a five hundredweight vehicle, the justices were entitled, under the proviso to s. 6 (1), to limit the disqualification to vehicles of that description.

Per LORD GODDARD, C.J. : in future when justices are limiting the disqualification under the terms of the proviso to s. 6 (1), they should limit it to vehicles which are dealt with under a particular description in Sch. 1 to the Act of 1930 or in the regulations (see p. 153, letter G, post).

Appeal dismissed.

[For the Road Traffic Act, 1930, s. 2, s. 6, s. 9, s. 10, s. 35, and Sch. 1, see 24 HALSBURY'S STATUTES (2nd Edn.) 572, 579, 583, 584, 602, and 664.]

Case referred to:

(1) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194; [1947] L.J.R. 234; 175 L.T. 449; 111 J.P. 1; 2nd Digest Supp.

Case Stated by Essex justices.

On Mar. 22, 1954, at a court of summary jurisdiction sitting at Grays, the respondent was charged with permitting a youth under the age of seventeen years to drive a Morris goods van on Mar. 10, 1954, contrary to s. 9 of the Road Traffic Act, 1930, and with permitting the youth to use the van on the road without there being in force in relation to the user of the van a policy of insurance in respect of third-party risks, contrary to s. 35 (1) of the Act.

The information was heard on May 5, 1954. The justices found that the van in question was a delivery van of a size or capacity sometimes known as a “five hundredweight”. The respondent pleaded guilty to the offence under s. 35 of the Act and was convicted of the offence under s. 9. The justices were of the opinion that there were no special reasons for not ordering the respondent to be disqualified for holding or obtaining a driving licence but they decided that, having regard to the fact that the respondent earned his livelihood by driving motor vehicles and having regard to the provisions of s. 6 of the Road Traffic Act, 1930, the disqualification could properly be limited to the driving of vans of a size and capacity of five hundredweight. Accordingly, they imposed a

fine on the respondent and ordered him to be disqualified for holding or obtaining a licence for driving five hundredweight vehicles for twelve months. The appellant having appealed, the question for the opinion of the High Court was whether "five hundredweight vehicles" was a "class or description" of vehicles within the meaning of s. 6 of the Act of 1930. A

F. H. Lawton for the appellant.

The respondent did not appear.

Rodger Winn as *amicus curiae*. B

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Essex before whom the respondent was charged with certain offences in connection with a motor vehicle. It is not necessary to go into the particular offences because the matter we have to decide is entirely a matter of the provisions as to disqualification of a person who has committed an offence which carries with it the penalty of disqualification. C

The justices said that the vehicle with which they were dealing was "a delivery van of a size or capacity sometimes known as a 'five hundredweight'". The case might not be so difficult if they had said that it was a vehicle well-known in the motor trade or something of that sort, but what they have said is that it is "sometimes known as a 'five hundredweight'". They decided that there was no special ground for not disqualifying the respondent, but that "having regard to the fact that the respondent earned his livelihood by driving motor vehicles"—which we have tried to point out ever since *Whittall v. Kirby* (1) is an immaterial matter— D

"and having regard to the provisions of s. 6 of the Road Traffic Act, 1930, the disqualification could properly be limited to the driving of vans of a size and capacity of five hundredweight". E

They, therefore, disqualified him from obtaining a driving licence "for driving five hundredweight vehicles".

The point raised in the case is that counsel for the appellant, the chief constable of Essex, says that there is no such description or class of vehicle as a "five hundredweight vehicle". It is curious that this point which might have arisen ever since the Road Traffic Act, 1930, came into force has never arisen until the case was before us on the last occasion when this court was sitting. We thought that the case raised such a difficult and novel point that we should ask for the assistance of the Minister of Transport as the respondent was not represented, and counsel has attended on behalf of the Minister to assist the court as *amicus curiae*. It is not counsel's fault, if I may say so with all due respect to him, that his argument has left the matter as difficult as it was before. It is an extraordinarily difficult position, and, as there is a Road Traffic Bill which has already been introduced into Parliament and had its first reading recently, is a position which the Minister ought to cause to be made clear. F

The position is this. The Road Traffic Act, 1930, Part 1, which deals with the "Regulation of Motor Vehicles", starts with the sub-heading of "Classification of Motor Vehicles", and s. 2 (1) reads: "Motor vehicles shall, for the purposes of this Act and the regulations, be divided into the following classes . . ." I pause there to point out that the words used are not "for the purposes of this Part of the Act," but "for the purposes of this Act and the regulations". The sub-section then proceeds to give the classes: heavy locomotives, light locomotives, motor tractors, heavy motor cars, motor cars—quite a long description of those—motor cycles and invalid carriages. Then, in almost every other part of the Act, one finds that, instead of the word "class", the phrase "class or description" is used. The particular section with which we are concerned is s. 6, which deals with this disqualification, and the proviso to s. 6 (1) reads: G

"Provided that, if the court thinks fit, any disqualification imposed under this section may be limited to the driving of a motor vehicle of the H I

- A same class or description as the vehicle in relation to which the offence was committed."

If the vehicle were of the same class, no difficulty would arise, but here the words "class or description" are used, and there is nothing in the Act which states what "description" means or who is to prescribe any particular description or how vehicles of a class are to be divided so far as descriptions are concerned: the Act is entirely silent about it. The words "class or description" are used in a great many sections, but another curious thing is that in Sch. 1 to the Act, which, of course, is part of the Act, and which deals with limits of speed, one finds that the limits of speed vary according to the class of vehicle. There are vehicles referred to in the schedule which do not fall exactly within any of the classes laid down in s. 2 but may be said to be, I suppose, classes or descriptions. Section 10 (1) reads:

"It shall not be lawful for any person to drive a motor vehicle of any class or description on a road at a speed greater than the speed specified in Sch. 1 to this Act . . ."

- D Then, when one turns to Sch. 1, one does not find "class or description of vehicle", one finds "class of vehicle".

At one time it seemed, at any rate to some members of the court, that the words "class or description" might be merely tautologous. We were told by counsel that such a construction terrified the Minister, because, he said, if that were so, a great many of the regulations would be completely ultra vires. They

- E may be; I do not know. Some day we may have to decide that point, because the regulations deal with descriptions of vehicles and there is nothing in the Act which, apparently, enables the Minister to prescribe the different descriptions. Section 2, as I have already said, deals with classes. That is the division of motor vehicles in the Act, but the Minister has, throughout, apparently divided motor vehicles into different descriptions and one keeps on finding in the Act the expression
- F "class or description". Somebody must be able to define "description" or, at any rate, to say whether a vehicle is of a particular description or not, and, if the Minister can do it, I cannot see any reason why the justices cannot do it. The Minister, apparently, makes his own descriptions. He has to do certain things to carry out some of the sections which refer to "class or description"; so have the justices, and, if the justices, therefore, like to say that a man shall not drive a car

- G of a particular description, we cannot say in law that they cannot do it. But I do say that it is inconvenient that they should do it in this way. The court thinks that, in this particular case, they cannot interfere with the disqualification which the justices have imposed. We do, however, strongly recommend, and, indeed, I think that we should direct the justices in future, that, where they are limiting the disqualification under the terms of the proviso to s. 6 (1), they should limit it to

- H vehicles which are dealt with under a particular class in the Act or under a particular description in the regulations, for example, goods vehicles, passenger vehicles, heavy vehicles, light vehicles, and so forth. The only way in which the limited disqualification can work satisfactorily is if the justices will take one of the descriptions which is to be found either in Sch. 1 to the Act or in the regulations* and say "We apply the disqualification to that vehicle or class of vehicle and to no other". In this extremely difficult case we are not blaming the justices in any way because the case has given the court very great difficulty. We uphold the disqualification in this case, but we do say that the justices should use another description in future.

CASSELS, J.: I agree.

* See, e.g., the descriptions of motor vehicles in, e.g., headings D to J of Part 2 of the Motor Vehicles (Construction and Use) Regulations, 1951 (S.I. 1951 No. 2101), as amended.

DEVLIN, J.: I also agree and I would only add this. The reason for the direction which my Lord has indicated and the justification for it seems to me to be this. If justices impose their own description, as we have held that under the words of the Act they are entitled to do, that description would, obviously, have to be most carefully defined, because any person driving a vehicle of that character commits an offence as a result of which he must be sent to prison unless there are special circumstances. Manifestly, therefore, any description of the vehicle would have to be most carefully defined and, therefore, by far the most convenient course is to take one of those descriptions, of which there are plenty in the Act or in the regulations, because those descriptions carry their own description and then there can be no difficulty about the enforcement of the justices' order.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellant); *Treasury Solicitor.*

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

W. L. THOMPSON, LTD. v. R. ROBINSON (GUNMAKERS), LTD. D

[CHANCERY DIVISION (Upjohn, J.), December 8, 9, 10, 13, 14, 1954.]

Contract—Breach—Damages—Measure—Sale of motor car—Repudiation by purchaser—Vendor returning motor car to suppliers—“Available market”—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (3).

On Mar. 4, 1954, the defendants agreed in writing with the plaintiffs, who were motor car suppliers, to purchase from them a Standard Vanguard motor car. On Mar. 5, 1954, the defendants intimated to the plaintiffs that they were not prepared to accept delivery of the motor car. The plaintiffs returned the motor car to their suppliers, who did not seek compensation, and the plaintiffs now claimed damages for breach of the agreement. The price at which a Standard Vanguard motor car could be sold by suppliers throughout the country was fixed by the manufacturers and the amount of profit which the plaintiffs would have realised on the sale of the motor car was £61 ls. 9d. At the time of the agreement, there was not such a demand in the locality of the plaintiffs as would absorb all Standard Vanguard motor cars available there for sale, but it was not shown that there was no available market in the broader sense which regarded the trade and marketing organisation for selling such motor cars throughout the whole country.

Held: the plaintiffs were entitled to be compensated for the loss of their bargain to the extent of the profit which they would have realised, viz., £61 ls. 9d., because the plaintiffs had, by reason of the breach of contract, sold one motor car less than they otherwise would have sold; and even if, in determining whether there was an available market within the meaning of s. 50 (3) of the Sale of Goods Act, 1893, for the car, the whole of the trade and marketing organisation must be taken into consideration, yet in the present case it would not be just to apply s. 50 (3) and accordingly that enactment did not afford to the defendants a defence to the plaintiffs' claim.

Re Vic Mill, Ltd. ([1913] 1 Ch. 465) and dictum of JAMES, L.J., in *Dunkirk Colliery Co. v. Lever* (1878) (9 Ch.D. at p. 24) applied.

[As to Damages for Non-acceptance of Goods agreed to be sold, see 29 HALSBURY'S LAWS (2nd Edn.) 191, para. 256; and for cases on the subject, see 39 DIGEST 657, 658, 2501, 2502.

As to What is an Available Market for Goods Sold, see 29 HALSBURY'S LAWS (2nd Edn.) 194, para. 260, note (m); and for cases on the subject, see 39 DIGEST 674, 2600 et. seq.

For the Sale of Goods Act, 1893, s. 50 (3), see 22 HALSBURY'S STATUTES (2nd Edn.) 1013.]

A Cases referred to:

(1) *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 39 Digest 480, 1025.

(2) *Re Vic Mill, Ltd.*, [1913] 1 Ch. 465; 82 L.J.Ch. 251; 108 L.T. 444; 39 Digest 658, 2502.

B (3) *Cameron v. Campbell & Worthington, Ltd.*, [1930] S.A.S.R. 402; Digest Supp.

(4) *Mason & Risch, Ltd. v. Christner*, (1920), 54 D.L.R. 653; 48 O.L.R. 8.

(5) *Brown v. Buck*, [1934] 2 W.W.R. 561; 4 D.L.R. 446; 42 Man. L.R. 336; Digest Supp.

C (6) *Stewart v. Hansen*, (1923), 62 Utah R. 281; 218 Pacific R. 959; 4 American L.R. 340.

(7) *Dunkirk Colliery Co. v. Lever*, (1878), 9 Ch.D. 20; *subsequent proceedings*, (1879), 41 L.T. 633; *on appeal* H.L., sub nom., *Ellis Lever & Co. v. Dunkirk Colliery Co.*, (1880), 43 L.T. 706; 17 Digest (Repl.) 108, 225.

(8) *Charrington & Co., Ltd. v. Wooder*, [1914] A.C. 71; 83 L.J.K.B. 220; 110 L.T. 548; 39 Digest 408, 430.

D (9) *Marshall & Co. v. Nicoll & Son*, 1919 S.C. 244; *affd.* H.L., 1919 S.C. (H.L.) 129; 56 Sc. L.R. 615; 39 Digest 674, 2600.

Action.

The plaintiffs, who were dealers in and suppliers of motor cars, claimed damages for breach of contract by the defendants to purchase a new Standard Vanguard motor car.

E *G. T. Aldous and D. C. Johnson-Davies* for the plaintiffs.
J. F. F. Platts-Mills for the defendants.

UPJOHN, J.: This action raises a question of some importance to the motor trade as to the true measure of damages when the buyer of a motor car, in this case a Standard Vanguard, refuses to complete his bargain and take delivery.

F The plaintiffs, W. L. Thompson, Ltd., are motor agents and dealers, i.e., their business is that of dealing in new and second-hand cars, and they carry on business in Hull. The defendants are a company, R. Robinson (Gunmakers), Ltd., who as their name would imply, are manufacturers and suppliers of guns and have no interest in the motor trade whatever, but the managing director of the defendants required a motor car for the business of his company, and it is common ground that on Mar. 4, 1954, the managing director on behalf of the defendants signed an order for the purchase of this Vanguard, an old car being taken in part exchange. On the face of it that order appeared to constitute a contract, but it is said on behalf of the defendants that there was an oral collateral arrangement or agreement whereby the contract was to be conditional in this sense, that if a Ford Zephyr motor car, which had been ordered by the defendants from another dealer, was delivered before the Vanguard, then the contract for the supply of the Vanguard was to go off. However, when the managing director of the defendants gave evidence, it appeared to be doubtful whether he would establish on his own evidence that this collateral oral contract, if proved, in fact came into operation to put an end to the written contract. Therefore, the defence to this case on the facts seemed to be in some danger. In the circumstances, which I shall mention in a moment, his cross-examination was not completed, but I desire to say that, so far as it went, he seemed a perfectly honest and candid witness. On the other hand, the plaintiffs realised that their claim, which is for loss of profit on the sale of the Vanguard, was for only £61, and but for the importance which the motor trade attaches to the point, of course, the matter would have been litigated in the county court. However, it has been brought in the High Court, and I understand that, in fact, the British Motor Trade Association, which is an association of all manufacturers and motor car dealers in the country, is assisting with the prosecution of this case.

The point is whether the plaintiffs are entitled to loss of profit on the transaction or whether damages are nominal. The defendants may, I think, be forgiven for a certain lack of enthusiasm for the point. Their representatives have sat in court for some time listening to a good deal of evidence about conditions in the motor car industry and trade generally, and they have listened to elaborate and (to me) interesting arguments, and they have heard cited reports of cases, not only in these courts but in courts in Scotland, Canada, Australia and the United States of America. To them the only point of interest is not the law; not that if they lose they will have to pay a trivial sum of £61, but that they will if they lose have to pay the whole costs of this action. That is the real point from the point of view of the defendants. A B

The plaintiffs, it is fair to say, recognise that, and with my full approval an arrangement has been made which is as follows: the defendants, for the purposes of this action, admit that there was a binding written agreement for the purchase of the motor car in question. It is conceded that it was broken the day after it was signed, when the defendants intimated that they were not prepared to accept delivery of the Vanguard motor car. It is also admitted for the purposes of the action that in the East Riding of Yorkshire, the transaction taking place actually in Hull, at the time the contract of sale took place there was no shortage of Vanguard models to meet all immediate demands, at any rate in the locality. In return for those concessions the plaintiffs are prepared to indemnify the defendants against their costs of the action. C D

In those circumstances I only need add a very few facts. It was proved first that, in common with other makes of motor car, dealers are only permitted to sell new Vanguard cars at a price fixed from time to time by the manufacturers, the Standard Motor Car Company. If a dealer breaks that rule he is soon put out of business. The dealer's profit on the transaction is also fixed. He would have received in this case a commission of ten per cent. on the list price of the Vanguard and accessories such as wireless and heaters supplied therewith. In this case, the amount of profit he would have made to be exact, I am told, is £61 1s. 9d. E

When the defendants repudiated the transaction on Mar. 5, the plaintiffs mitigated their damages by rescinding the contract with their suppliers. Their supplier was a company called George Thompson, Ltd., who were the main distributors for the East Riding, and, as the name implies, they are closely associated with the plaintiffs, but that, I think, is irrelevant. At all events, George Thompson, Ltd., took back the Vanguard car which they had already supplied to the plaintiffs, free of any claim for damages, and later sold the car on May 5, 1954, to another purchaser. It is also common ground that, at this stage, the plaintiffs lost a sale in this sense, that if another purchaser had come into the plaintiffs' premises there was available for another purchaser a Vanguard car for immediate delivery; so that the effect as a fact on the plaintiffs was that they lost their profit on a sale: they sold one Vanguard less than they would otherwise have done. The plaintiffs say that the true measure of damages in those circumstances is no more, no less, than their loss of profit, £61. The defendants say: "No, the loss is nominal, for you could have sold the car to another customer or you could do what, in fact, you did do, which was to get your suppliers to release you, and you have suffered no damage." F G H

The law is not really in doubt. It is set out in the Sale of Goods Act, 1893, s. 50, which is in these terms: I

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price

- A at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

That was declaratory of the existing law and the general principle which has been observed in all cases I take conveniently from the speech of VISCOUNT HALDANE, L.C., in *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.* (1). VISCOUNT HALDANE, L.C., said ([1912] A.C. at p. 689):

- B "Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."

- C That is the general rule.

Apart altogether from authority and statute, it would seem to me on the facts to be quite plain that the plaintiffs' loss in this case is the loss of their bargain. They have sold one Vanguard less than they otherwise would. The plaintiffs, as the defendants must have known, are in business as dealers in motor cars

- D and make their profit in buying and selling motor cars, and what they have lost is their profit on the sale of this Vanguard. There is no authority exactly in point in this country, although it seems to me that the principle to be applied is a clear one. It is to be found in *Re Vic Mill, Ltd.* (2), in which the supplier was to supply certain machines which he had to make and they were to be made to the particular specification of the purchaser although they were of a type

- E generally in common use. It was not, as the present case is, a sale by a motor dealer of a standardised product. The purchaser repudiated his order, and with a view to mitigating damages the supplier, on getting another order for somewhat similar machinery, very sensibly made such alterations as were necessary to the machinery that he had made for the original purchaser and sold the machinery so altered to the second purchaser. His costs of doing that were comparatively
- F trivial. It was said by the supplier that the measure of his damages was the loss of his bargain; by the purchaser that the measure of damages was merely the cost of the conversion of the machinery for the second purchaser and his slight loss on the re-sale. HAMILTON, L.J., after setting out the facts said ([1913] 1 Ch. at p. 473):

- G "That was a reasonable mode of mitigating the damages, but it by no means follows that the damages are confined to the cost, a trivial one, of adapting the machines to the needs of the second customer, and the loss on re-sale to him, which was only £23, making £28 in all. The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders, and both profits. In fact, what they did, acting reasonably,
- H and I think very likely more than reasonably in the interests of the Vic Mill, was to content themselves with earning the profit on the second contract at the cost of adapting the machines, which has been taken at £5; but they are still losers of the profit which they would have made on the Vic Mill contract, because they could, if they had been minded, have performed both the contracts, and have made the profit on both the
- I contracts but for the breach by the Vic Mill Company of their contract."

BUCKLEY, L.J., put the matter succinctly in this way (*ibid.*, at p. 474):

"As regards No. 1, where the goods were manufactured, the respondents are, I think, entitled to both profits, because they were not bound to give the appellants the benefit of another order that the respondents had received. The respondents were left with these goods on their hands. They altered them and sold them to another buyer, but they could have made, and would otherwise, I suppose, have made, other goods for that

buyer, and not employed these goods for that purpose. If they had done so, they would have made both profits." A

It seems to me that in principle that covers this case. True the motor car in question was not sold to another purchaser, but the plaintiffs did what was reasonable, they got out of their bargain with George Thompson, Ltd., but they sold one less Vanguard, and lost their profit on that transaction. *Re Vic Mill, Ltd.* (2), has been followed and applied to exactly the circumstances I have before me, i.e., the sale of a motor car, in a number of cases abroad to which I have been referred. There was *Cameron v. Campbell & Worthington, Ltd.* (3), which was a judgment of the Supreme Court of the State of South Australia. The headnote is short, and I will read it ([1930] S.A.S.R. 402): B

"Where a purchaser of a motor-truck chassis from a dealer refused to accept delivery of the motor-truck, which was then re-sold at a profit, there being evidence that similar motor-trucks were available for immediate delivery, and the property not having passed. Held, that the seller was entitled to retain the profit on re-sale, and also to damages for loss of profit on the original sale. *Re Vic Mill, Ltd.* (2), followed." C

Then there was *Mason & Risch, Ltd. v. Christner* (4), that being a decision of the Appellate Division of the Supreme Court of Ontario, and the court came to a similar conclusion. That case was also followed in *Brown v. Buck* (5), and the same result has been reached in the United States in a rather earlier case, that of *Stewart v. Hansen* (6), being a decision of a majority of the Supreme Court of Utah. D

The main case, however, put by the defendants is this: they submit that s. 50 (3) of the Sale of Goods Act, 1893, applies, because they say there is an available market for the goods in question, and in that available market we know that the price of the Vanguard is fixed. It is fixed by the manufacturers. Therefore, they say the measure of damages must necessarily be little more than nominal. Had the plaintiffs kept the car and sold it to another at a later stage, no doubt they would have been entitled to the costs of storage in the meantime, possibly interest on their money laid out, and so on, but, as they in fact mitigated damages by getting out of the contract, damages are nil. E

Counsel for the defendants said that the market now must not be treated as a market or fair in a limited or technical sense. It is curious that there is a comparative absence of authority on the meaning of the phrase "available market", because one would have thought there would have been many cases, but the researches of counsel have only disclosed one authority on s. 50 (3). F It is *Dunkirk Colliery Co. v. Lever* (7), a decision of the Court of Appeal. The facts were far removed from the facts before me, and I do not think that I need recite them. It will be sufficient if I read an extract from the judgment of JAMES, L.J. He said (9 Ch.D. at p. 24): G

"Under those circumstances the only thing that we can do is to send it back to the referee with an intimation that we are of opinion upon the facts (agreeing with the Master of the Rolls in that respect), that the facts do not warrant the application of the principle mentioned in the award, namely, that there was what may be properly called a market. What I understand by a market in such a case as this is, that when the defendant refused to take the three hundred tons the first week or the first month, the plaintiffs might have sent it in waggons somewhere else, where they could sell it, just as they sell corn on the Exchange, or cotton at Liverpool: that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances." H

If that be the right principle to apply, it was proved that there is nothing in the nature of a market like a Cotton Exchange or Baltic or Stock Exchange, I

A or anything of the sort, for the sale of new motor cars. But counsel for the defendants submits that the word "market" is of no fixed legal significance. That I think is so, and is so stated by LORD DUNEDIN in *Charrington & Co., Ltd. v. Wooder* (8) (see [1914] A.C. at p. 82). Counsel said that the meaning of the word must move with the time. In an interesting speech, tracing the history of the contract of sale and purchase, he pointed out that whereas originally all transactions were carried out in markets or fairs purely by barter and then later for a money consideration it was only quite recently that other forms of dealing have come to be familiar. He reminded me that as recently as 1812 LORD MANSFIELD pointed out that a sale by sample was a novel thing, and he says that one must now look on the market as the whole conspectus and complex of the selling structure of any trade and of the whole purchasing public. Every farmer, he instanced, is a part of the market in agriculture, and he says there being an available market the damages must necessarily be nominal for the reasons I have mentioned.

It is curious that in the Sale of Goods Act, 1893, s. 51 (3) (a sub-section in identical terms with s. 50 (3)) which deals with the remedies of the buyer when the seller defaults, a somewhat different view of the word "market" has been taken to that expressed by JAMES, L.J. The only case to which I have been referred is a case which started in the Court of Session, *Marshall & Co. v. Nicoll & Son* (9), but went to the House of Lords. The headnote of the report of the case in the House of Lords is as follows (1919 S.C. (H.L.) at p. 129):

"In an action of damages for failure to deliver a consignment of annealed steel sheets, the Second Division—holding that there was an 'available market' for the sheets within the meaning of the Sale of Goods Act, 1893, s. 51 (3), although they were not kept in stock and were not purchasable in the open market but were specially made to specification—awarded to the purchasers as damages for the sellers' failure to deliver the goods a sum representing the difference between the contract price and the price current at the time of the refusal to deliver. On appeal the House of Lords affirmed the award; VISCOUNT FINLAY, however, being of opinion that, on the evidence, it had not been established that there was an 'available market' for the goods, but that the sum awarded should stand as representing damages assessed on the basis of what the goods, if delivered, would have been worth to the purchasers. Observations by LORD SHAW OF DUNFERMLINE on the method of assessing damages where purchasers have failed to prove an 'available market'."

The situation seems to have been that VISCOUNT FINLAY held there was no market on the facts; VISCOUNT CAVE held that although there was not a market in the narrow sense, there were facts on which the Lord Ordinary (LORD HUNTER) could have found that there was an available market, and with that LORD DUNEDIN apparently concurred. On the other hand, LORD SHAW, when he came to deliver his speech, agreed with LORD FINLAY.

I think that in that state of affairs the decision of the Court of Appeal in *Dunkirk Colliery Co. v. Lever* (7) is binding on me, and, therefore, unless one finds something in the nature of a market in the sense used by JAMES, L.J., s. 50 (3) has no further application. However, the point seems to me of somewhat academic interest in this case, because, if one gives to the word "market" an extended meaning, in my view on the facts which I have to consider, a precisely similar result is reached.

Had the matter been *res integra*, I think I should have found that an "available market" merely means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted the goods in question could readily

be disposed of. Indeed, such was the situation in the motor trade until very recently. It was, of course, notorious that dealers all over the country had long waiting lists for new motor cars. People put their names down and had to wait five or six years, and whenever a car was spared by the manufacturer from export it was snatched at. If any purchaser fell out, there were many waiting to take his place, and it was conceded that if those circumstances were still applicable to the Vanguard motor car, the claim for damages must necessarily have been purely nominal. But on the assumed facts, circumstances had changed in relation to Vanguard motor cars, and in March, 1954, there was not a demand in the East Riding which could readily absorb all the Vanguard motor cars available for sale. If a purchaser defaulted, that sale was lost and there was no means of readily disposing of the Vanguard contracted to be sold, so that there was not, even on the extended definition, an available market. But there is this further consideration: even if I accepted the defendants' broad argument that one must now look at the market as being the whole conspectus of trade, organisation and marketing, I have to remember that s. 50 (3) provides only a prima facie rule, and, if on investigation of the facts, one finds that it is unjust to apply that rule, in the light of the general principles mentioned above it is not to be applied. In this case, as I said in the earlier part of my judgment, it seems to me plain almost beyond argument that, in fact, the loss to the plaintiffs is £61. Accordingly, however one interprets s. 50 (3), it seems to me on the facts that I have to consider one reaches the same result.

There will be judgment for the plaintiffs for £61 ls. 9d., but the order must incorporate an undertaking by the plaintiffs to indemnify the defendants against their costs of this action. There must be a mutual set-off between the costs and the sum of £61.

Judgment for the plaintiffs.

Solicitors: *Osmond, Bard & Westbrook* (for the plaintiffs); *Smith & Hudson*, agents for *Williamson, Stephenson & Hepton*, Hull (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A INSTITUTE OF FUEL v. MORLEY (VALUATION OFFICER)
AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.J.J.),
November 10, 11, December 15, 1954.]

B Rates—Exemption—Scientific society—"Purposes of science exclusively"—
Institute for the advancement of fuel technology—Object also to uphold the
status of members—Authorised purposes—Separate and distinct purposes—
Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1.

C The Institute of Fuel was incorporated by royal charter in 1946, and the
objects and purposes for which it was constituted were set out in para. 7 of
the charter. None of the objects set out in para. 7 (a) to (g) inclusive were
expressed to have any primacy over the others. Sub-paragraphs (a) and (d)
read: "(a) To promote, foster, and develop the general advancement of the
various branches of fuel technology as an end in itself, and as a means of
furthering the more scientific and economic utilisation of fuel of all kinds
for industrial, commercial, public, agricultural, domestic, transport and/or
other purposes, and to promote, assist, finance and support such industrial
D and scientific research, investigation, and experimental work in the economi-
cal treatment and application of fuel as the institute may consider likely
to conduce to those ends, and to the benefit of the community at large. . . .
(d) To uphold the status of members of the institute by holding or pre-
scribing examinations for candidates for election and by requiring standards
of knowledge and experience which can be approved . . . " Paragraph 15
E of the charter authorised the several classes of members to use distinguishing
initials after their names. Paragraph 16 provided, among other things, that
the qualifications, privileges and obligations, including liability to expulsion
or suspension of members, should be such as the bye-laws for the time being
of the institute should direct; and by para. 19 the members were empowered
to make bye-laws "for the regulation, government and advantage of the
F institute, its members and property and for the furtherance of the objects
and purposes of the institute," subject to the approval of the Privy Council.
Bye-law No. 50 dealt with the "professional conduct of corporate members
when engaged in an advisory or consultative capacity". The institute
claimed to be exempt from the payment of rates by virtue of s. 1 of the
Scientific Societies Act, 1843,* on the ground that it was a society instituted
G for purposes of science exclusively.

Held: (i) the question whether a particular society was instituted for
purposes of science exclusively, within the meaning of s. 1 of the Act of 1843,
is to be determined by reference rather to the purposes of the society as
defined by its constitution than to the purposes which it may actually
have pursued in practice.

H Principle stated by JENKINS, J., in *Battersea Metropolitan Borough v. British Iron & Steel Research Asscn.* ([1949] 1 K.B. at p. 451) applied.

(ii) (JENKINS, L.J., dissenting) the institute was not a society instituted
for the purposes of science exclusively, within the meaning of s. 1 of the
Act of 1843, because on the true construction of the charter and having
regard to the institute's bye-laws made under it (particularly bye-law 50 (e))
I the upholding of the status of members (i.e., the object stated in para.
7 (d) of the charter) was a distinct object and purpose of the institute, not
merely concomitant or incidental to a primary purpose of furthering science,
and was directed to the enhancement of the standing of members of the

* Section 1 of the Scientific Societies Act, 1843, provides that "No person . . . shall be assessed or rated, or liable to be assessed or rated, or liable to pay . . . local rates . . . in respect of any land, houses, or buildings . . . belonging to any society instituted for purposes of science . . . exclusively . . . and occupied by it for the transaction of its business, and for carrying into effect its purposes . . .".

institute as professional men, which was not a purpose of science; and, therefore, the institute was not entitled to exemption from payment of rates under the section.

PER SIR RAYMOND EVERSLED, M.R.: in my judgment it may now be taken as established that as a result of the cases, *Institution of Civil Engineers v. Inland Revenue Comrs.* ([1932] 1 K.B. 149) and *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* ([1952] 1 All E.R. 984), both the Institution of Civil Engineers and the Royal College of Surgeons should be treated as instituted for purposes of science exclusively within the meaning of s. 1 of the Scientific Societies Act, 1843, notwithstanding the decision, as regards the former institution, in *R. v. Institution of Civil Engineers* (1879) (5 Q.B.D. 48); see p. 165, letter I, post.

PER JENKINS, L.J.: paragraph 7 (a) of the charter prescribes one object only, namely, the advancement of fuel technology, and the latter part of sub-para. (a) is no more than ancillary to that object (see p. 174, letters C and E, post).

PER BIRKETT, L.J.: the second part of para. 7 (a) of the charter disclosed a separate purpose which was a commercial purpose or social purpose rather than a scientific purpose (see p. 177, letter D, post).

Appeal dismissed.

[As to the Exemption of Scientific Societies from Rates, see 21 HALSBURY'S LAWS (2nd Edn.) 12, para. 26; and for cases on the subject, see 38 DIGEST 493-499, 485-540.]

Cases referred to:

- (1) *Institution of Civil Engineers v. Inland Revenue Comrs.*, [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax. Cas. 158; Digest Supp.
- (2) *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; [1952] A.C. 631; 3rd Digest Supp.
- (3) *Inland Revenue Comrs. v. Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; affg. S.C. sub nom. *Re Duty on Estate of Civil Engineers Institution*, (1888), 20 Q.B.D. 621; 57 L.J.Q.B. 353; 59 L.T. 282; 52 J.P. 549; 38 Digest 496, 503.
- (4) *Battersea Metropolitan Borough v. British Iron & Steel Research Assocn.*, [1949] 1 K.B. 434; [1949] L.J.R. 646; 2nd Digest Supp.
- (5) *R. v. Institution of Civil Engineers*, (1879), 5 Q.B.D. 48; 49 L.J.M.C. 34; 42 L.T. 145; 44 J.P. 265; 38 Digest 497, 508.
- (6) *Art Union of London v. Savoy Overseers*, [1894] 2 Q.B. 609; 63 L.J.M.C. 253; 71 L.T. 40; 59 J.P. 20; revsd. H.L. sub nom. *Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest 498, 525.
- (7) *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; 71 L.J.Ch. 295; 86 L.T. 221; 9 Digest 83, 325.
- (8) *R. v. Cockburn*, (1852), 16 Q.B. 480; 18 L.T.O.S. 302; 117 E.R. 962; sub nom. *R. v. St. Martin-in-the-Fields (Churchwardens & Overseers)*, 21 L.J.M.C. 53; 16 J.P. 198; 38 Digest 495, 495.

Case Stated.

This was a Case Stated by the Lands Tribunal pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, for the decision of the Court of Appeal.

The appellant, the Institute of Fuel, was the occupier of offices and other premises (comprising the basement, ground, first and second floors), at 18, Devonshire Street, London, W.1. Until February, 1953, the premises had not been assessed to rates on the ground that the institute was a scientific society within the meaning of the Scientific Societies Act, 1843, s. 1. On Feb. 20, 1953, the valuation officer made a proposal for the alteration of the valuation list for the Metropolitan Borough of St. Marylebone by the insertion of the premises occupied by the appellant at a gross value of £365 and rateable value of £301. The

A institute objected, and the valuation officer appealed to a local valuation court for North-West London. On July 8, 1953, the local valuation court determined that the premises should be entered in the valuation list at the values proposed by the valuation officer. The institute thereupon appealed to the Lands Tribunal.

B The Lands Tribunal found that the premises were occupied by the institute for the transaction of its business and for carrying into effect its purposes; that the institute was constituted by royal charter and was instituted for the purposes of science within the meaning of s. 1 of the Scientific Societies Act, 1843; that a certificate had been obtained under s. 2 of the Act of 1843 that the institute was entitled to the benefits of the provisions of the Act; that the institute was supported wholly or in part by voluntary contributions, and did not, as by its charter it might not, make any dividend, gift, division or bonus in money to or between any of its members; and that bye-laws had been made under para. 19 of the charter.

C The question for the decision of the Lands Tribunal was whether or not the institute was instituted exclusively for the purposes of science within the meaning of s. 1 of the Act of 1843. It was contended on behalf of the institute (i) that all the objects set out in the charter were incidental to the main object, namely, the promotion, fostering and development of the general advancement of the various branches of fuel technology, and that, as that object was scientific, the institute was instituted exclusively for the purposes of science; and (ii) that the case was governed by *Institution of Civil Engineers v. Inland Revenue Comrs.* (1) and *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (2). It was contended on behalf of the respondents, the valuation officer and the rating authority, that the institute was instituted for purposes which included (a) the application of science in contradistinction to its advancement, (b) the purposes of its members, (c) industrial and commercial purposes, (d) technical education of persons engaged or likely to be engaged in industry or commerce; and that, therefore, the institute was not instituted exclusively for purposes of science. The tribunal was of the opinion that paras. 7 (d), 15, 16 and 19 of the institute's charter (which was annexed to and formed part of the Case) and No. 50 of the institute's bye-laws (which were also annexed to and formed part of the Case) were directed to a separate purpose, namely, that of upholding and enhancing the status of those fuel technologists who were members of the institute and affording to them advantages in their professional capacity, not merely from the point of view of technical efficiency, but also from the point of view of persons bound to pursue a high moral code in their professional capacity, and not to any purpose of science; and that this object was collateral, and not ancillary, to the main object of the institute. Having regard to the speech of LORD MACNAGHTEN in *Inland Revenue Comrs. v. Forrest* (3) (15 App. Cas. at p. 354), the tribunal came to the conclusion that the institute was not instituted exclusively for the purposes of science within the meaning of s. 1 of the Act of 1843, and dismissed the appeal, but, at the request of the institute, stated a Case for the decision of the Court of Appeal. The question for the court was whether the tribunal came to a correct decision in point of law in holding that the institute was not a "society instituted for purposes of science exclusively" within the meaning of s. 1 of the Act of 1843.

I *Michael Rowe, Q.C., and F. A. Amies* for the appellant, the Institute of Fuel.
Maurice Lyell, Q.C., and Harold Brown for the respondents, the valuation officer and the rating authority.

Cur. adv. vult.

Dec. 15. The following judgments were read.

SIR RAYMOND EVERSLED, M.R.: The Institute of Fuel is a body corporate incorporated by royal charter in 1946. It occupies certain offices and other premises at 18, Devonshire Street, in the City of Westminster, and

claims in the present proceedings to be entitled to exemption from rates as being a body "instituted for purposes of science . . . exclusively" within the meaning of s. 1 of the Scientific Societies Act, 1843. This claim was rejected both by the Local Valuation Court for North West London and by the Lands Tribunal. From the decision of the tribunal the institute now appeals to this court.

The scientific purpose for which alone, according to its case, the Institute of Fuel was "instituted" was that of the promotion of fuel technology. The exact character and scope of fuel technology were not explained to us; but, from the terms of the royal charter, it is clearly concerned with the efficient and economical use of fuel of various kinds, and it is not in dispute that fuel technology is an "applied science", and, therefore, "science" within the scope of the Act of 1843. The sole question which was debated before the Lands Tribunal and which has been debated before us is whether the Institute of Fuel was instituted exclusively for the advancement or promotion of that science.

The question must, in my judgment, depend on an ascertainment, according to the true interpretation of the charter, of the purposes of the institute. So much appears to me to have been laid down by this court in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (4). JENKINS, J., in the course of his judgment in that case, formulated the principles to be applied in answering the question posed in this case as well as in that. He said ([1949] 1 K.B. at p. 451):

"The question whether a particular society is 'instituted for purposes of science literature or the fine arts exclusively' within the meaning of the section must be determined by reference to the purposes of the society as defined by its constitution, rather than the purposes it may actually have pursued in practice."

Then, after observing that a society might forfeit its privilege under the Act of 1843 by pursuing an activity outside the terms of s. 1, even though it was unauthorised, the learned judge continued (*ibid.*, at p. 452):

"But, in general, I think a claim to exemption must stand or fall by reference simply to the society's authorised purposes, the circumstance that an authorised purpose has never in fact been pursued being irrelevant . . ."

It becomes, accordingly, necessary to refer to the charter of the institute. Paragraph 7 states the purposes of the institute, and is as follows:

"The objects and purposes for which the Institute of Fuel is hereby constituted are:—(a) To promote, foster, and develop the general advancement of the various branches of fuel technology as an end in itself, and as a means of furthering the more scientific and economic utilisation of fuel of all kinds for industrial, commercial, public, agricultural, domestic, transport and/or other purposes, and to promote, assist, finance and support such industrial and scientific research, investigation, and experimental work in the economical treatment, and application of fuel as the institute may consider likely to conduce to those ends, and to the benefit of the community at large. (b) To hold meetings in London and at established provincial centres for the reading and discussion of papers, to issue regularly a technical journal, to join with other institutions in promoting objects of mutual interest, and generally to take such a prominent and active part in the advancement of the knowledge and practice of fuel technology as its status requires. (c) To co-operate with government departments, universities, educational institutions, associations, companies, or individual persons in establishing or maintaining any investigation or research relating to any branch of fuel technology. (d) To uphold the status of members of the institute by holding or prescribing examinations for candidates for election

- A and by requiring standards of knowledge and experience which can be approved. (e) To print and publish, sell, lend and distribute any communications made to the institute or any similar society, and any reports of the proceedings or transactions of the institute or any similar society, and to produce, purchase, reproduce, print, publish and distribute any other books, papers, treatises or communications relating to fuel technology and to establish and maintain a library. (f) To invite foreign delegates to attend any meetings, conferences or functions promoted or supported by the institute and to defray or contribute to their expenses; to defray or contribute to the expenses of any duly appointed officials or representatives of the institute attending any foreign scientific meetings or conferences at the request of the council of the institute, and to translate, print, publish and distribute any books, communications, papers or proceedings or abstracts or extracts thereof which are of scientific interest. (g) To provide facilities for conferences and functions in support of the objects of the institute. (h) To do all other things incidental or conducive to the attainment of the above objects or any of them."
- D It is to be observed that, according to the terms of the paragraph, no one of the sub-para. (a) to (g) inclusive is expressed to have any primacy over the others. The final sub-para. (h), on the other hand, covers activities "incidental or conducive to the attainment of the above objects or any of them". Though, no doubt, the object or purpose stated in the first sub-para. (a), would, on a natural reading of the language, be expected to relate to the most significant of the institute's objects or purposes, it does not seem to me legitimate, as a matter of construction, to regard the contents of sub-para. (b) to (g) inclusive as not being objects or purposes at all—as constituting merely incidents of the first-named object, means towards its achievement or consequences flowing from its pursuit—unless these other objects and purposes are by their nature of such a character as to be substantially incapable of being otherwise effected. If this is a correct approach to the problem, then, in my judgment, the question will be found to turn on the arguments submitted to us on the meaning and effect, in the general context of the charter, of sub-para. (d). Does that sub-paragraph mean and have the effect that the furtherance of the interests of members of the institute, as professional men practising fuel technology, is an object or purpose of the institute distinct and collateral, even though relatively subsidiary, to the most important object or purpose specified in the first sub-paragraph? If so, then, in my judgment, according to the principles above mentioned, the institute fails to qualify for the exemption claimed. The valuation court and the Lands Tribunal so determined, and I am, for my part, not persuaded that they were wrong.

I In formulating the question as I have done, I have reflected the language used in judgments and speeches in other and similar cases, particularly in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1) and *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (2). In the former of those cases the question was of exemption from income tax, and in the latter the question was whether the appellant college was a "charity" within the scope of the preamble to the Statute of Elizabeth 1 (43 Eliz. 1 c. 4). The purposes or objects of both bodies, viz., the Institution of Civil Engineers and the Royal College of Surgeons, have more than once been under consideration in the courts. As a result of the two cases cited it may, in my judgment, now be taken as established that each body (and, in the case of the Institution of Civil Engineers, notwithstanding the earlier decision of *R. v. Institution of Civil Engineers* (5)), should be treated as instituted for purposes of science exclusively, within the meaning of the Scientific Societies Act, 1843. Counsel for the institute, in the present case, contended that the Institute of Fuel should be no less privileged. In my judgment, however, the facts relating to the Institute of Fuel are in certain essential respects different

from the facts relating to the Institution of Civil Engineers and to the Royal College of Surgeons. A

Before I expand that statement I shall make some references to the judgments in this court in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1). The passages which I desire to quote were made in reference to the question whether the Institution of Civil Engineers was "established for charitable purposes only", but they are, in my view, equally applicable (*mutatis mutandis*) to the question with which in this case we are concerned. LORD HANWORTH, M.R., said ([1932] 1 K.B. at p. 161): B

"As ROWLATT, J., has said, there may be a charitable institution for the relief of sickness, and incidental advantages can be gained by a subscriber to the funds, without the institution losing its character; but if there is an object, e.g., the promotion of the profession in addition to the promotion of science that is collateral and not merely incidental, the result is that the institution cannot be described as established for charitable purposes only." C

LAWRENCE, L.J., at the beginning of his judgment (*ibid.*, at p. 167) stated that the question was whether the institution was established for charitable purposes only, and proceeded: D

"The answer to this question depends upon whether the institution is established solely for the advancement of the science of civil engineering (an admittedly charitable purpose), or whether one of the purposes for which it is established is to benefit civil engineers in order to enable them to practise their profession to greater advantage." E

The lord justice quoted (*ibid.*, at p. 170) and proceeded to apply the well-known language of LORD MACNAGHTEN in *Inland Revenue Comrs. v. Forrest* (3) (15 App. Cas. at p. 354):

"It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?" F

Finally, ROMER, L.J., said ([1932] 1 K.B. at p. 174) of certain language which he had quoted from the judgment of A. L. SMITH, L.J. ([1894] 2 Q.B. at p. 627) in *Art Union of London v. Savoy Overseers* (6): G

"The emphasis here laid upon the difference between an object that, although subsidiary to the main object of a society, is nevertheless distinct from it, and an object that is merely a means to the end of carrying out the main object, was repeated when the case came before the House of Lords." H

After quoting the same passage from LORD MACNAGHTEN's speech in *Forrest's* case (3) which LAWRENCE, L.J., had cited, ROMER, L.J., said ([1932] 1 K.B. at p. 176):

"But if the advantage to the members is not the purpose of the society, but merely an incidental consequence of the way in which it promotes science, then it seems to me that the society was established for 'the promotion of science' only, unless I have misunderstood the meaning of the word 'only' as used in s. 37 of the Income Tax Act." I

In the *Royal College of Surgeons* case (2) the leading speech on the part of the majority of the House was that of LORD MORTON OF HENRYTON. The noble Lord referred with approval to the judgments in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1). He quoted also the passage which I have already twice mentioned from LORD MACNAGHTEN's speech in *Forrest's* case (3) which he

A treated as entirely applicable to the case which he had to determine with the necessary substitution for the Institution of Civil Engineers and the science of civil engineering of the Royal College of Surgeons and the science of surgery.

B Applying the tests so formulated and expressed, the Court of Appeal, in the one case, and the House of Lords, in the other, decided in favour of the Institution of Civil Engineers and the Royal College of Surgeons respectively. In each case, however, it was a fact, to my mind, of the highest significance that there was but one single object or purpose. In the *Civil Engineers* case (1) that single object (contained in a recital in the society's original charter) was:

C "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the act of directing the great source of power in nature for the use and convenience of man."

D There was no doubt that civil engineers derived real and material benefit from their membership of the institution, including a right (closely comparable to that possessed by members of the Institute of Fuel in the present case) to place certain initials after their names, for which specific provision was made in a supplemental charter of the institution. It was the presence of these advantages for the members that led ROWLATT, J., to hold that the institution was not established for charitable purposes only. In the view of all the members of the Court of Appeal, however, the enjoyment of these advantages was an incident and the consequence of the institution's activity. Their attainment was not an object or purpose of the institution. Its purpose remained the single purpose already quoted. Thus LAWRENCE, L.J., said ([1932] 1 K.B. at p. 171):

F "Bearing in mind that the original charter of 1828 clearly states the only purpose for which the institution was established, and that this purpose has never been added to or varied by any of the supplemental charters, and further bearing in mind that the House of Lords has decided that this purpose is for the general advancement of the science of civil engineering, it follows in my judgment that the institution is established for a charitable purpose only, notwithstanding that it is of advantage to a civil engineer in his profession to be a member of the institution, this result not being a purpose for which the institution was established but being incidental to and consequent upon the way in which the institution carries out the charitable purpose for which alone it was established."

G So in the case of the Royal College of Surgeons the sole object, according to its charters (and again it only appeared as a recital) was "... the due promotion and encouragement of the study and practice of the ... art and science" of surgery. The real question had been whether the use of the words "and practice" imported into the statement of the objects or purposes of the college that of the promotion of the professional advantage of surgeons. The majority of the House thought not, but were of opinion that the significance of the phrase "study and practice" lay in a reference to

H "... the acquisition of knowledge and skill in surgery both by abstract study and by the exercise of the art in the dissecting room and the anatomy theatre ..."

I (per LORD NORMAND, [1952] 1 All E.R. at p. 987). So the House of Lords decided, as the Court of Appeal had decided in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1), that the professional advantage of the members of the society was, in substance, not an object or purpose, but a consequence. LORD MORTON OF HENRYTON said ([1952] 1 All E.R. at p. 997):

"I think that the promotion of the interests of practising surgeons is 'an incidental, though an important and, perhaps, a necessary, consequence' of the work of the college in carrying out its main object, the promotion

and encouragement of the study and practice of the art and science of surgery." A

No doubt, because the professional advancement of surgeons was a consequence and a necessary, and also (I have no doubt) a welcome and desired, consequence of the pursuit of the stated object or purpose, so the college in pursuing the latter was in a sense pursuing also the consequential advantages. The question, however, is (in the present case), for what objects or purposes was the body corporate "instituted"? And if, on a fair construction of its charter, it appears that it was instituted with the object or purpose—that is, the distinct or direct object or purpose—of pursuing or achieving an end not within the scope of s. 1 of the Act of 1843, then, though that object or purpose be not the main object and be relatively of a subsidiary character, in my judgment the privileges of the Act cannot be had. B C

I return, then, to the appellant institute's charter and to para. 7 thereof in particular. It is, at least, clear on the face of it that the statement of objects or purposes in the present case is very widely different indeed from the corresponding statements in the *Civil Engineers* case (1) and the *Royal College of Surgeons* case (2). As I have said earlier in this judgment, each of the sub-para. (a) to (g) inclusive of para. 7 states, prima facie as a matter of construction, a distinct object or purpose. Moreover, the sub-paragraphs, after the first, do not relate to wide general matters so as, on that account, to lend themselves to interpretation as ancillary to the first or main object (see, for example, *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.* (7)). On the contrary, each of the sub-para. (b) to (g) inclusive relates to a distinct and precise subject-matter. What, then, does the paragraph mean? Counsel for the respondents submitted that the first sub-para., (a), was itself composed of two distinct parts, comprehending two distinct objects, namely, (i) the study, both on academic and empirical lines, of "fuel technology", that is, of the better and more efficient use of fuels; an object which he conceded to be "scientific"; and (ii) the persuasion of users of fuel of all kinds to put into practice the result of the studies made by the institute and its members, an object which, he contended, was altogether more mundane and commercial in character and not properly "scientific" within the meaning of the statute. D E F

The language of sub-para. (a) is, undoubtedly, elaborate and, at least, lends itself to the view that there are two distinct "ends" or objects. Having regard to the decisive significance which I attach to sub-para. (d), it is unnecessary for me to express a conclusion on counsel's submission on sub-para. (a). I am prepared to assume (without deciding) that the sub-paragraph does not, of itself, do more than indicate that the study of fuel technology is to be pursued not only as an academic matter, an "end in itself", but also with a view to the public benefit. I am prepared also to assume that sub-para. (b) and (c) are (like sub-para. (e), (f) and (g)) fairly consistent with exclusively "scientific" activities. To my mind, the real question is, as I have earlier stated, of the meaning to be given to sub-para. (d). It was on this sub-paragraph, particularly when read with other parts of the charter and the bye-laws made thereunder, that the argument of counsel for the respondents was mainly concentrated. According to that argument, sub-para. (d) contemplated and stated as a distinct object or purpose the creation of a body of persons with a recognised status as skilled advisers in the science or art of the efficient utilisation of fuel and with high professional standards—in other words, the object of enhancing the standing of, and otherwise benefiting, fuel technologists, members of the institute. G H I

I have come to the conclusion that this submission is justified. The words of the sub-paragraph are far from clear, particularly the concluding language "by requiring standards of knowledge and experience which can be approved". The question may be asked: "approved by whom and for what purpose?" Does this language intend no more than that the members of the institute should

- A be of a quality best calculated to promote the advancement of what I have assumed to be the exclusively "scientific" objectives comprehended in sub-para. (a)? I have been unable to give so restricted a meaning to sub-para. (d). In my judgment, the second part of sub-para. (a) (which, I have assumed, does not of itself point to a distinct non-scientific object in that sub-paragraph) nevertheless throws a significant light on sub-para. (d) and supports the view
- B that, by that sub-paragraph, is intended the enhancement of the standard and prestige of fuel technologists as professional men. The tribunal relied also on paras. 15, 16 and 19 of the charter as lending, in their context, further support to this view. In my judgment, para. 19 is, of these, the most significant, giving power, as it does, to the institute members to make

- C "bye-laws . . . for the regulation, government and advantage of the institute, its members and property and for the furtherance of the objects and purposes of the institute . . ."

- It is not, in my view, legitimate to dismiss the ordinary significance of this language by saying that the paragraph is merely verbose. It is, of course, true that bye-laws made by the members (and requiring the approval of the
- D Privy Council) could not enlarge the objects of the institute. The question, however, is of the meaning and intention of para. 7 (d); and para. 19 throws, to my mind, significant light on that question. The bye-laws bound up with the charter are those made as contemplated by para. 20 of the charter and may, therefore, be reasonably expected to reflect its intention. Bye-law No. 50 owes its existence and authority, in my view, to the provisions, which I have
- E quoted, in para. 19 of the charter, and it is plainly directed to the standing and prestige of members of the institute—not so as thereby to improve their contribution to scientific inquiry, but as professional men. To quote but one example, para. 50 (e) of the bye-laws reads:

- "He shall not in any circumstances improperly solicit advisory or consultative work, either directly or by an agent, nor shall he pay, by
- F commission or otherwise, any person who may introduce clients to him."

- There is one other matter to which counsel for the respondents referred, and which I think to be of some significance and to point in the same direction. "Fuel technology" as a defined branch of science is of modern origin. I do not, of course, at all say that it is the less important and valuable on that account. It would, however, be at least natural in such a case to have special regard to
- G the position of the practitioners in the art, to the new profession of fuel technologists. In the document* annexed to the Case and marked "B" it is stated that the Institute of Fuel "resulted from a merger of the Institution of Fuel Technology and the Institution of Fuel Economy Engineers." The presence of the second party to the merger may well account for the emphasis which, I think, is to be found in the charter on the position of members of the
- H chartered institute.

- I have found the case a difficult one—as those who were concerned with them found the other cases to which I have referred. My difficulties have been increased by the fact that JENKINS, L.J., whose judgment I have had the advantage of reading in advance, has reached the contrary conclusion to my own. However, for the reasons which I have attempted to state, I think that the appellant
- I institute have failed to make good their claim for exemption, and I would dismiss the appeal.

JENKINS, L.J.: This is an appeal by way of Case Stated from a decision of the Lands Tribunal (MR. ERSKINE SIMES, Q.C.), affirming a decision of the local valuation court to the effect that the appellant Institute of Fuel is not entitled in respect of its premises 18, Devonshire Street, London, W.1, to the

* This document, which is entitled "The Institute of Fuel", contains detailed information about the objects, membership, journals and activities of the institute.

exemption from rates accorded by s. 1 of the Scientific Societies Act, 1843, to "any society instituted for purposes of science, literature, or the fine arts exclusively" and fulfilling certain other conditions prescribed by the section, the purposes relevant in the present case being those of science. A

As appears from the summary contained in the Case of the facts proved or admitted before the Lands Tribunal, the institute fulfils all the conditions of exemption required by the Act of 1843 apart from the primary condition as to its purposes, and further fulfils the last-mentioned condition to the extent that it is instituted for purposes of science within the meaning of the Act. The sole question in issue in the present appeal is, therefore, whether the institute, being a society instituted for purposes of science, is instituted for such purposes "exclusively" within the meaning of the Act. B

Claims by various bodies or societies to exemption from rates under this Act, or from duty under the Customs and Inland Revenue Act, 1885, s. 11, by virtue of the exemption accorded by para. (3) of that section to C

"Property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, literature, science, or the fine arts", D

or from income tax by virtue of the exemption accorded by s. 37 (1) (b) of the Income Tax Act, 1918, to a "body of persons . . . established for charitable purposes only" have been considered in many reported cases.

It will be seen that the word "exclusively" in the exemption given by s. 1 of the Act of 1843, while matched by the synonym "only" in the exemption given by s. 37 (1) (b) of the Income Tax Act, 1918, has no counterpart in the exemption given by para. (3) of s. 11 of the Act of 1885. This suggests that a given institution might, as regards its purposes, qualify for exemption under the Act of 1885 while failing to do so under the Act of 1843, and a comparison of *R. v. Institution of Civil Engineers* (5), where the Institution of Civil Engineers was held not to qualify for exemption under the Act of 1843, with *Inland Revenue Comrs. v. Forrest* (3), where the same institution was held to qualify for exemption under the Act of 1885, might at first sight appear to support this conclusion. It must now, however, be taken as settled that *R. v. Institution of Civil Engineers* (5), so far as it proceeded on the ground that the Institution of Civil Engineers was not instituted for purposes of science exclusively, is to be considered as overruled by *Forrest's* case (3). (See *Institution of Civil Engineers v. Inland Revenue Comrs.* (1), [1932] 1 K.B. at pp. 163, 170, 177.) It is, therefore, a justifiable assumption that, if the question now arose for decision de novo, the Institution of Civil Engineers would be held to be instituted "for purposes of science exclusively," just as it was held in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1) to be "established for charitable purposes only." G

It follows that the Institution of Civil Engineers can properly be taken as affording an example of a society instituted for purposes of science exclusively, within the meaning of the Act of 1843, with which comparison may be made in considering the claim of the appellant institute in the present case to be a society so instituted. H

In the comparatively recent case of *Battersea Metropolitan Borough v. British Iron & Steel Research Asscn.* (4), an attempt was made in this court to state the principles to be applied in answering the question whether a given society is instituted for purposes of science exclusively. I will briefly recapitulate what was then said. (i) Science for the present purpose includes applied, as well as pure or speculative science. (See per LORD MACNAGHTEN in *Inland Revenue Comrs. v. Forrest* (3), 15 App. Cas. at pp. 353, 354.) Nothing turns on this in the present case, and it is not in dispute that fuel technology, the advancement of which is claimed by the appellant institute to be its exclusive object, is "science" within the meaning of the Act of 1843. (ii) The question whether a I

A particular society is "instituted for purposes of science . . . exclusively" within the meaning of s. 1 of the Act of 1843 must be determined by reference to the purposes of the society as defined by its constitution, rather than the purposes it may actually have pursued in practice. See per LORD CAMPBELL, C.J., in *R. v. Cockburn* (8), where he said (16 Q.B. at p. 490):

B "... but are the purposes so described and explained exclusively scientific? We are bound to look to all the purposes for which the society is professedly founded, and to which, without a breach of trust, its funds may be applied."

(iii) As observed by LORD WATSON in *Inland Revenue Comrs. v. Forrest* (3) (15 App. Cas. at p. 348):

C "... it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption."

D (iv) A distinction is, however, to be drawn between the purposes of a society and the means adopted to attain those purposes. Thus a society having for its purpose the promotion of science is not disqualified from exemption merely because its authorised activities include, as means of attaining that end, activities which, considered as ends in themselves, would be ends other than the promotion of science.

E A point of particular importance in the present case is the bearing of the third and fourth of these principles on the question whether provisions in the constitution or rules of a given society designed to confine membership to persons attaining suitable degrees of proficiency or distinction in the science which it is formed to promote, to impose proper standards of professional conduct on its members, or to authorise the use by its members of descriptions denoting their membership or particular category of membership, calculated as such provisions are to enhance the prestige of the society and to cause membership of it to redound to the personal credit and advantage of its members, will have the effect of defeating a claim by the society to be "instituted for purposes of science . . . exclusively" within the meaning of the Act of 1843, as distinct from being instituted partly for the promotion of science and partly for the personal advantage of its members.

G This question was discussed at length by this court in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1) in relation to the claim of that institution to exemption from income tax under s. 37 (1) (b) of the Act of 1918 as a society established for charitable purposes only. LORD HANWORTH, M.R., said this ([1932] 1 K.B. at p. 162):

H "I confess that I have a difficulty in attaching the same weight as was given to it by the commissioners and the learned judge to the fact that members of the institution can attach letters as suffixes to their names. The requirement of the institution whereby its members have to possess an adequate qualification does not appear to me to connote an advantage, amounting to a collateral purpose in the sense above. That its members should bring a certain knowledge and capacity for learning to the institution seems only to confirm its purpose of the general advancement of mechanical science and knowledge."

I LAWRENCE, L.J., said this (*ibid.*, at p. 170):

"The main contention on behalf of the Crown in the present case is that one of the purposes for which the society was established was to benefit civil engineers in their profession, and that therefore the institution was not established for charitable purposes only. The answer to this contention

is, I think, to be found in the following passages of LORD MACNAGHTEN's judgment in *Forrest's* case (3) (15 App. Cas. at p. 354): 'It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?' and the answer to the question is summed up by LORD MACNAGHTEN as follows (*ibid.*, at p. 356): 'The action of the society may incidentally benefit the profession to which its members belong—I have no doubt that is so—but I agree with the Master of the Rolls in thinking that 'that which this society does is something higher and larger than the mere education of students and others for the profession of civil engineer.'

"In view of the contention that the institution is not established for the promotion of science only, because under the supplementary charter of 1922 a civil engineer is entitled to advertise the fact that he is a member of the institution by placing the initials M.I.C.E. after his name or otherwise, the following passage in the judgment of FRY, L.J., in *Forrest's* case (3) (20 Q.B.D. at p. 631) is peculiarly apposite: 'It has been pressed upon us that the membership in this society is of pecuniary value to engineers, and I have no doubt that that is the case: but the observation does not appear to me to go far. It is obvious that membership in many bodies formed for the cultivation of science is of pecuniary value to certain classes of persons. A fellowship in the Royal Society is undoubtedly of pecuniary value to medical men, to engineers, chemists, and others; nevertheless it is plain that the object of that society is the promotion of science'."

At the conclusion of his judgment LAWRENCE, L.J., said this ([1932] 1 K.B. at p. 171):

"... it follows in my judgment that the institution is established for a charitable purpose only, notwithstanding that it is of advantage to a civil engineer in his profession to be a member of the institution, this result not being a purpose for which the institution was established but being incidental to and consequent upon the way in which the institution carries out the charitable purpose for which alone it was established."

ROMER, L.J., after referring to *R. v. Institution of Civil Engineers* (5), said this (*ibid.*, at p. 172):

"For the moment I am merely concerned with the meaning that was given to the word 'exclusively', a word, of course, that is synonymous with 'solely' or 'only'. It is clear that some such meaning must be attributed to these words. Where a society is instituted for a charitable purpose, it is obvious that the membership of the society may confer upon its holder personal advantages of considerable value to him in his profession or in his social standing. He may, for instance, have an exclusive right to affix to his name a certain designation, and will be well known to the public as a person belonging to the society. He may have to observe disciplinary rules laid down with a view to ensuring that he does not bring discredit upon other members of the society. But in such cases, although the securing of such advantages to the members may in a sense be regarded as one of the objects of the society, such object is merely concomitant or incidental to the real object of the society; and if that real object be charitable, the society is established for charitable purposes only."

ROMER, L.J., quoted (*ibid.*, at p. 174) this passage from the speech of LORD MACNAGHTEN in *Savoy Overseers v. Art Union of London* (6) ([1896] A.C. at p. 313):

"... it has been held in several cases that where a contributor derives

- A personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose 'exclusively'. This mode of construction may be admissible when the society is not incorporated, and its purpose, consequently, is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of individual members in joining it."

And ROMER, L.J., continued ([1932] 1 K.B. at p. 174):

- " This passage in LORD MACNAGHTEN's speech not only throws light upon the meaning of the word 'exclusively'. It seems to indicate that he would have been of opinion that the Institution of Civil Engineers was established exclusively for the purposes mentioned in its charter. But this is not a matter of inference to be drawn from LORD MACNAGHTEN's speech in the *Art Union* case (6). It was, in my opinion, actually so decided by the House of Lords in *Forrest's* case (3), to which I have already referred for another purpose."

- ROMER, L.J., after referring to *R. v. Institution of Civil Engineers* (5) said this (*ibid.*, at p. 175):

- " It had been argued for the appellants in that case that when the charter and the bye-laws of the institution were looked at, it appeared that the main, the primary, object of the institution was to promote the interests of the profession of engineers, and not to increase scientific knowledge. For the purpose of dealing with this argument, LORD WATSON considered in detail the charter and the by-laws, and, having done so, said this (15 App. Cas. at p. 350): 'The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence, in the profession, does not militate against the object of the institution being the advancement of engineering science; because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object'; and a little later (*ibid.*, at p. 351): 'I do not doubt that membership is accompanied with a certain amount of prestige which may prove to be of service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged.' In conclusion he said (*ibid.*, at p. 352): 'I have accordingly come to the conclusion that the income of the institution is, in fact, applied, not for the professional ends of individuals, but for "the promotion of science" in the proper sense of the words'

- Then ROMER, L.J., after quoting the passage from LORD MACNAGHTEN's speech in *Forrest's* case (3) (15 App. Cas. at p. 354) to which LAWRENCE, L.J., had already referred, said this ([1932] 1 K.B. at p. 176):

- " But if the advantage to the members is not the purpose of the society, but merely an incidental consequence of the way in which it promotes science, then it seems to me that the society was established for 'the promotion of science' only, unless I have misunderstood the meaning of the word 'only' as used in s. 37 of the Income Tax Act."

In *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (2) the House of Lords adopted and applied the reasoning in *Forrest's* case (3) and *Institution of Civil Engineers v. Inland Revenue Comrs.* (1) in holding by a majority that the Royal College of Surgeons was a charitable institution, because its main purpose was the charitable one of promoting and encouraging the study and practice of the art and science of surgery, and the advantages derived by practising surgeons from its activities were merely incidental to that main purpose.

It remains to apply the law as above stated to the objects of the appellant institute. This institute was incorporated by royal charter in 1946. Its avowed objects are set out in para. 7 of the charter. [His LORDSHIP read the paragraph and continued:] The language of these provisions is somewhat diffuse and obscure, but, given that fuel technology is a form of applied science (which is not in dispute), I cannot find in them any object that is not directed either to the advancement of this science or to purposes purely ancillary to such advancement, or, in other words, purposes which, though expressed as substantive objects, are in truth no more than means whereby the advancement of the science in question is to be brought about. Paragraph 7 (a) is, as I read it, directed to the advancement of fuel technology and nothing else. Counsel for the respondents contended that it comprised two objects, the first being the advancement of fuel technology and as such purely scientific, and the second being to persuade users of fuel to put into practice the methods evolved or perfected in pursuance of the first, which is a social or economic object as distinct from a scientific one. I cannot agree. The sub-paragraph, as a matter of construction, prescribes one object only, namely, the advancement of fuel technology, and goes on to say, in effect, that this object is to be pursued not merely as an end in itself (that is, for the purpose of increasing the sum of academic or laboratory knowledge pertaining to this science), but also in order that the fuel-using public may benefit from the new and improved methods of fuel utilisation which the advancement of the science by the institute may be expected to produce. In other words, the institute is not only to increase this department of scientific knowledge, but also to make known to the world and available for public use the knowledge thus gained. The rest of sub-para. (a), which relates to industrial and scientific research, investigation, and experimental work in the economical treatment and application of fuel, is, I think, clearly no more than ancillary to the advancement of fuel technology.

Paragraph 7 (b) provides for activities (in particular the holding of meetings and the publication of a technical journal) in which any scientific society would normally engage within the field of the particular science which it was formed to promote, and the clause introduced by the words "and generally" makes it plain that these activities are to be pursued purely as means to the end of advancing fuel technology and as ancillary to that end. There was some discussion as to the meaning of the phrase "as its status requires". Does this mean the status (that is, importance) of the science of fuel technology, or does it mean the status (that is, standing) of the institute as "the Institute of Fuel incorporated by royal charter"? I think it must mean the latter, but either way I do not think it affects the purely ancillary character of para. 7 (b).

Passing over para. 7 (c) as clearly no more than ancillary, I come to para. 7 (d), which is one of the provisions held by the Lands Tribunal to defeat the appellant institute's claim to exemption. It is true that this provision is in terms included amongst the substantive objects, but its purpose is plain, and is simply to ensure that membership of the institute shall be confined to persons who have attained a suitable degree of proficiency in the field of fuel technology. This is one of the matters classed as merely ancillary in the authorities to which I have referred, and I do not think its ancillary character is altered by the inappropriate placing of para. 7 (d) amongst the substantive objects of the institute. It does not make sense as a substantive object, which it clearly is not. I think that the various objects set out in the remaining sub-paras. (e) to (h) of para. 7 are likewise all of a purely ancillary character, and no point was raised on any of them by counsel for the respondents. Accordingly, so far as its avowed objects are concerned, that is to say, its objects as set out *eo nomine* in para. 7 of the charter, I am of opinion that the institute is entitled to succeed.

Reference was also made to para. 6 of the charter, which, by way of exception from the prohibition of the receipt of any profit by members, provided that

- A nothing therein contained should prevent the giving of privileges to members of the institute; to para. 15, which authorised the use by the several classes of members of distinguishing initials after their names; to para. 16, which provided that (inter alia) the qualifications, privileges and obligations, including liability to expulsion or suspension of members, should be such as the bye-laws for the time being of the institute should direct; and to para. 19, which provided for
- B the making of bye-laws "for the regulation, government and advantage of the institute, its members and property" with a proviso that no bye-law or alteration, revocation or amendment of any bye-law should have effect until allowed by the Privy Council.

- Paragraph 15 can be shortly disposed of by saying that this matter of the use of initials is again one of the very matters classed as merely ancillary in the
- C authorities referred to above. I attach no importance to the general references to the privileges of members in paras. 6 and 16 and to the advantage of members in para. 19. As appears from paras. 16 and 19, such privileges were to be defined by bye-laws, and, as appears from para. 19, such bye-laws require the sanction of the Privy Council in order to be effective, and while they are to be "for the regulation, government and advantage of the institute, its members and
- D property", they must not be repugnant to the charter. I cannot regard these provisions in regard to privileges as adding to the objects of the institute a distinct or collateral object in the shape of conferring privileges on members, and I think they should be construed as referring to privileges of an incidental description. As to the phrase "for the regulation, government and advantage of the institute, its members and property", I do not think it can fairly be
- E construed as authorising bye-laws for the advantage of the members as distinct from the institute of which they are members. Moreover, inasmuch as the privileges and advantage of members referred to in these paragraphs depend on the bye-laws, and bye-laws can only be made or altered with the sanction of the Privy Council, I think that the argument based on paras. 6, 16 and 19 must be judged by reference to the existing bye-laws and not by reference to the
- F possible effect of future bye-laws. Accordingly, I cannot agree with the Lands Tribunal that there is anything in any of these paragraphs of the charter to defeat the appellant institute's claim.

- I turn now to the bye-laws, with which I can deal quite briefly. Numbers 47 and 48 headed "Privileges of Members" show the modest character of the privileges enjoyed by the members under the bye-laws now in force. They are
- G (No. 47) to have notice of and attend and speak, but, unless a corporate member, not to vote, at all general and special general meetings, and (No. 48) to receive a copy of the current issue of the journal of the institute. Importance was attached by the Lands Tribunal to No. 50 headed "Professional Conduct of Corporate Members when engaged in an advisory or consultative capacity", and the tribunal held that this bye-law, in conjunction with paras. 7 (d), 15, 16
- H and 19 of the charter, defeated the claim to exemption. I have already expressed my dissent from the tribunal's views as to the effect of these paragraphs of the charter. I also dissent from the tribunal's view as to the effect of bye-law 50. I cannot see that this bye-law does anything more than require members to whom it applies to observe disciplinary rules laid down with a view to ensuring that they do not bring discredit on other members of the institute. While such
- I rules are to the advantage of members of the association, the securing of such advantage, though in a sense one of the society's objects, is to be regarded as merely ancillary to the real object of the society. (See per ROMER, L.J., in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1), [1932] 1 K.B. at p. 173.)

We were referred to a number of other provisions in the bye-laws. I do not propose to go over them in detail, but will content myself with saying that I can see nothing in any of those provisions which is in any way inconsistent

with the conclusion that the appellant institute is instituted for purposes of science exclusively within the meaning of the Act of 1843, construed in the light of the authorities to which I have referred, or which provides any material ground for distinguishing the case of this institute, so far as the scientific nature of its purposes is concerned, from that of the Institution of Civil Engineers. Accordingly, I would allow this appeal.

BIRKETT, L.J.: On July 8, 1953, a local valuation court for North-West London determined that the premises occupied by the Institute of Fuel at 18, Devonshire Street, London, should be inserted in the valuation list for the Metropolitan Borough of St. Marylebone with a gross value of £365 and a rateable value of £301. Previously, the premises of the institute had not been assessed to rates at all. The institute appealed against this determination to the Lands Tribunal on the ground that the premises in question belonged to the institute, which is a society instituted for the purposes of science exclusively, within the meaning of the Scientific Societies Act, 1843, and had been duly certified under s. 2 of that Act to be entitled to the benefits of the Act, and until July 8, 1953, had enjoyed them. The Lands Tribunal affirmed the determination of the local valuation court.

The only question in the present appeal from the decision of the Lands Tribunal is whether the Institute of Fuel is instituted exclusively for the purposes of science within the meaning of the Act of 1843. That question is to be answered in the present appeal by finding out what are the purposes of the institute as defined in its royal charter and its bye-laws made under the provisions of the charter. The decision of the Court of Appeal in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (4) makes it quite clear that in general, to use the words of JENKINS, J. ([1949] 1 K.B. at p. 452), "a claim to exemption must stand or fall by reference simply to the society's authorised purposes . . ."

The objects and purposes for which the institute was founded are set out in para. 7 of the royal charter. It has never been contended that the institute was not founded for the purposes of science at all; the contention of the respondents has been, and is, that it was not instituted for the purposes of science exclusively. To this end, counsel for the respondents examined the provisions of the charter in some detail. He submitted that para. 7 (a) of the charter disclosed two purposes, the one admittedly a purpose of science in the words "To promote, foster, and develop the general advancement of the various branches of fuel technology as an end in itself", and the other not a purpose of science in the words

"and as a means of furthering the more scientific and economic utilisation of fuel of all kinds for industrial, commercial, public, agricultural, domestic, transport and/or other purposes, and to promote, assist, finance and support such industrial and scientific research, investigation, and experimental work in the economical treatment, and application of fuel as the institute may consider likely to conduce to those ends, and to the benefit of the community at large."

It is not easy to say with precision what those last words of para. 7 (a) are designed to cover. It was submitted on behalf of the institute that the words of para. 7 (a) disclosed one object only, and that object was exclusively scientific—to advance the science of fuel technology and to make the fruits of scientific research more widely available. For the respondents it was said that an examination of the charter revealed three purposes at least for which the institute was instituted: (a) To encourage and stimulate study and research in order that fuel of all kinds should be the better adapted for public use. (b) To persuade users of fuel of all kinds to make better use of the fuel they employed in their industrial and commercial undertakings by following the advice of the Institute of Fuel given as a result of the scientific investigation. (c) To create a body of persons

A with high professional standards and recognised status to act as skilled advisers in the science of using fuel of all kinds to its maximum efficiency.

In my opinion, the second part of para. 7 (a) of the charter discloses a purpose that cannot be said to be a purpose of science exclusively. The purpose of science set out in the earlier part of the paragraph is to be applied to the means of causing fuel of all kinds to be used more widely in every kind of commercial undertaking and to be used more scientifically and economically. The industrial and scientific research, investigation and experimental work which the institute is to finance and assist is to be such as the institute may consider likely to conduce to the purpose thus expressed. No doubt this is a most laudable purpose, and the fuel-consuming public will have the benefit of it. The question in this appeal, however, is not whether the purposes of the institute are laudable, but whether they are exclusively scientific. Parliament has recently emphasised the great importance of technology in the life of the nation, and has granted very large sums of money for the scientific study of the practical and industrial arts. It is necessary, however, to observe that this appeal is not concerned with the great importance of technology (which nobody doubts), nor with the support which ought to be given to its advancement, but with the rather mundane question whether the Institute of Fuel qualifies to be relieved of the payment of rates on its premises because its purposes are exclusively scientific.

D I am of the opinion that the second part of para. 7 (a) of the charter discloses a purpose more properly described as a commercial purpose or a social purpose rather than a scientific purpose. It is quite true that by para. 5 of the charter it is provided that

E "The institute shall not carry on any trade or business or engage in any transaction with a view to the pecuniary gain or profit of the members thereof."

It is, however, quite plain from bye-law 50 that it is contemplated that members of the institute will be engaged by clients in an advisory or consultative capacity, and the more extensive use of fuel of all kinds by the public cannot fail to be of advantage to the members by increasing their opportunities of serving clients in such capacities. By para. 19 of the charter the members of the institute at a special general meeting shall have power to make bye-laws

F " . . . as to them shall seem requisite and convenient for the regulation, government and advantage of the institute, its members and property, and for the furtherance of the objects and purposes of the institute . . . "

G This paragraph, too, would seem to contemplate the advantage of the members as a distinct consideration which the members of the institute in special general meeting assembled were empowered and entitled to consider.

In these circumstances, it seems difficult to say that the objects of the institute were for purposes of science *exclusively*. The members were fuel technologists, and naturally interested in the use of fuel of all kinds by the public generally, and while, no doubt, the scientific research was essential to the production of the more economical and efficient commodity with which the institute was concerned, the wide use of the commodity by the public was a distinct object of the members.

H In document 17*, a pamphlet which explains the purposes of the institute, it is stated that the funds for acquiring the premises of the institute were raised

I "from individual and collective members and from supporting interests amongst the firms and other organisations with which members are associated . . . "

This, it seems to me, lends some colour to the view which I have stated that the second part of para. 7 (a) is in some degree, at least, a commercial purpose as distinct from a scientific one. The Lands Tribunal made no decision on the

* The document annexed to the Case and marked "B", entitled "The Institute of Fuel".

construction of para. 7 (a) of the charter which was contended for by the respondents, but, in my opinion, the paragraph does disclose a purpose that cannot be described as exclusively scientific. A

I think, however, that there is another ground on which the respondents succeed. Paragraph 7 (d) of the charter sets out a further distinct object of the institute in these words:

“To uphold the status of members of the institute by holding or prescribing examinations for candidates for election and by requiring standards of knowledge and experience which can be approved.” B

Paragraph 15 of the charter provides for the use of certain initials which certain classes of members may use and certain descriptions which they may apply to themselves. Paragraph 16 provides for the qualifications of members and for the obligations of members, including the liability to expulsion or suspension to be determined by the bye-laws which can be made by virtue of para. 19 of the charter. The only bye-law relied on by the respondents was bye-law 50, which is headed: “Professional conduct of corporate members when engaged in an advisory or consultative capacity,” and deals with the professional conduct of members and has no concern with the scientific attainments of the member at all. Reading paras. 7 (d), 15, 16 and 19, and bye-law 50 together, it seems plain that a distinct and avowed object of the institute was to establish and uphold the professional status of fuel technologists who should have become members of the institute, and cannot be classed as a purpose of science in any way whatever. C

I regard it as a matter of importance that para. 7 (d) does set out separately and distinctly this particular object of the institute. It is perfectly reasonable to suppose that the founders of the institute were well aware of the great advantages which the institute could confer on the members in their professional capacity, and were anxious to see those advantages made real. If the purpose of the founders was merely to secure that nobody should be a member of the institute unless he had reached a certain standard in the science of fuel technology, it would have been a simple thing to have said so. The founders, however, went out of their way to set out quite clearly this particular provision as a separate object, and I find it impossible to say that it was a purpose of science. D

The same point, I think, was in the mind of LORD MACNAGHTEN in his speech in *Inland Revenue Comrs. v. Forrest* (3). That was a case under s. 11 of the Customs and Inland Revenue Act, 1885, and the exemption from duty in s. 11 (3) was in favour of “property which . . . shall be legally appropriated and applied for . . . the promotion of . . . science”. LORD WATSON said (15 App. Cas. at p. 348): E

“In order to bring a society within s. 1 of the Act of 1843, two statutory requisites must concur. The society must be one instituted exclusively for purposes of science, literature, or the fine arts; and it must also be supported, in whole or in part, by annual voluntary contributions. I do not think the legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues), should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided, after some hesitation, and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due. Then it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption.” F

A LORD MACNAGHTEN said (*ibid.*, at p. 354):

“Probably the founders of the society were not insensible of the advantages which such an institution was likely to confer upon its members in their professional capacity. That would have been a formidable objection if the language of the Act of 1885 had been the same as that of the Act of 1843. But under the Act of 1885, in the case of a scientific institution, the only question is whether the property sought to be charged is legally appropriated and applied for the promotion of science. If it is, it seems to me that the exemption must hold good, although the institution to which the property belongs may serve another purpose as well.”

C In *Institution of Civil Engineers v. Inland Revenue Comrs.* (1) ROMER, L.J., said ([1932] 1 K.B. at p. 175):

“LORD MACNAGHTEN, indeed, intimated that if the language of the Act of 1885 had been the same as that of the Act of 1843, the fact that the founders of the society were not insensible of the advantages which such an institution was likely to confer upon its members in their professional capacity would have been a formidable objection. But he did not have to consider, and did not consider in fact, the question whether such an objection would have been successful. In my opinion, however, it necessarily follows, from what he and LORD WATSON did decide, that the word ‘exclusively’ or ‘solely’ would have made no difference. It had been argued for the appellants in that case that when the charter and the by-laws of the institution were looked at, it appeared that the main, the primary, object of the institution was to promote the interests of the profession of engineers, and not to increase scientific knowledge. For the purpose of dealing with this argument, LORD WATSON considered in detail the charter and the by-laws, and, having done so, said this (15 App. Cas. at p. 350): ‘The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence, in the profession, does not militate against the object of the institution being the advancement of engineering science; because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object’; and a little later (*ibid.*, at p. 351): ‘I do not doubt that membership is accompanied with a certain amount of prestige which may prove to be of service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged.’ In conclusion he said (*ibid.*, at p. 352): ‘I have accordingly come to the conclusion that the income of the institution is, in fact, applied, not for the professional ends of individuals, but for “the promotion of science” in the proper sense of the words; and in that view, I entertain no doubt that such income is “legally appropriated” within the meaning of the Act, because the purposes to which it is applied are the same with those prescribed by the charter of incorporation.’”

I It is not contended in this case that the primary purpose of the institute is to advance the interests of the members; it is not to be denied that membership of a scientific institution must necessarily add to the prestige of the members; but what is said is that the founders of the institute were careful to include in the charter a distinct and separate object, not as something concomitant or incidental to the real object of the society, not as something which would be the means to the end of carrying into effect the main object, but as an end and object in itself. The “upholding of the status” of members of the institute was not, in my opinion, an incidental consequence of the way in which the institute promoted and fostered science, but was a clearly stated object of the institute, and, although it might be regarded as a subsidiary object, it was, nevertheless,

an object which defeats the claim of the institute that it was instituted for the purposes of science exclusively. I would dismiss the appeal and uphold the decision of the Lands Tribunal. A

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *Sharpe, Pritchard & Co.* (for the respondents). B

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*] B

RUSHOLME AND BOLTON AND ROBERTS HADFIELD, LTD. v. S. G. READ & CO. (LONDON), LTD. C

[MANCHESTER ASSIZES (Pearce, J.), December 16, 17, 20, 1954.]

Sale of Goods—Contract—“Subject to confirmation and payment” by confirming house—Confirmation by confirming house—Cancellation of original orders—Whether confirming house liable as principal.

By a document, described as indent No. 14, W. Ltd., an Australian company, ordered goods from the plaintiffs through their Australian agents, subject to confirmation and payment by S. & Co., Ltd., the defendants, a confirming house carrying on business in London. Subsequently the defendants confirmed to the plaintiffs in writing by a document described as Order No. . . . /Letter . . . , which purported to be an order for the goods and contained the words “Purchase by [S. & Co., Ltd.], holders of Purchase Tax No. . . . , of goods as stock intended for exportation”. The document set out the names and addresses of the plaintiffs and defendants and gave details of quality, quantity and price, and mentioned a time and place for delivery. The document contained nothing to show that it referred to any other transaction except the words at the bottom “In confirmation of your agents’ indent No. 14”. There was a second contract in relation to which the documents were not materially different. The Australian company cancelled the orders. In an action by the plaintiffs against the defendants, who refused to accept the goods, for damages for breach of contract, D

Held: by their “confirmation” the defendants assumed the liability of a principal buyer as between themselves and the plaintiffs, and the indent was not the real contract; accordingly, the defendants were liable to the plaintiffs in damages for breach of contract. E F G

[As to Liability of an Agent as Principal, see 1 HALSBURY’S LAWS (3rd Edn.) 229, para. 517; and for cases on the subject, see 1 DIGEST 620, 2457 et seq.]

Cases referred to:

- (1) *Chapman v. Smith*, [1907] 2 Ch. 97; 76 L.J.Ch. 394; 96 L.T. 662; 1 Digest 632, 2549. H
- (2) *Brandt (H.O.) & Co. v. Morris (H.N.) & Co., Ltd.*, [1917] 2 K.B. 784; 87 L.J.K.B. 101; 117 L.T. 196; 1 Digest 631, 2542.
- (3) *Gadd v. Houghton*, (1876), 1 Ex.D. 357; 46 L.J.Q.B. 71; 35 L.T. 222; 1 Digest 631, 2546.
- (4) *Thomson v. Davenport*, (1829), 9 B. & C. 78; 7 L.J.O.S.K.B. 134; 109 E.R. 30; 1 Digest 576, 2179. I
- (5) *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.*, [1917] 2 K.B. 141; 86 L.J.K.B. 1259; 116 L.T. 753; 1 Digest 637, 2585.
- (6) *Abdul Karim Basma v. Weekes*, [1950] 2 All E.R. 146; sub nom. *Basma v. Weekes*, [1950] A.C. 441; 2nd Digest Supp.
- (7) *Higgins v. Senior*, (1841), 8 M. & W. 834; 11 L.J.Ex. 199; 151 E.R. 1278; 1 Digest 639, 2599.
- (8) *Hornby v. Lacy*, (1817), 6 M. & S. 166; 105 E.R. 1205; 1 Digest 280, 123.

A (9) *Gabriel (Thomas) & Sons v. Churchill & Sim*, [1914] 3 K.B. 1272; 84 L.J.K.B. 233; 111 L.T. 933; 1 Digest 280, 127.

Action.

The plaintiffs who were textile manufacturers sued the defendants who were a confirming house for damages for breach of two contracts.

B A document dated May 29, 1951, described as indent No. 14, purporting to be an order by Wembley Wear Proprietary, Ltd., of Sydney, Australia, for five thousand yards of shirting material was given to the plaintiffs through their Australian agents. The indent contained the following words

"Terms—confirmation and payment by [the defendants]".

C By a document, described as Order No. . . . /Letter . . . , dated June 6, 1951, the defendants purported to order five thousand yards of shirting material from the plaintiffs. The order contained the same details as indent No. 14, as respects price, quality, and quantity, and mentioned a time and place for delivery. The order contained the words

"Purchase by [the defendants], holders of Purchase Tax No. Central . . . , of goods as stock intended for exportation",

D but contained nothing to show that it was referable to any other transaction, except that towards the bottom of the document there appeared the words "In confirmation of your agents' indent No. 14". A footnote stated, *inter alia*

E "This order must be delivered within the specified time. Any extension or alteration in delivery or price must be notified for our written confirmation".

The order of June 6, 1951, was accepted by the plaintiffs who wrote on June 7, 1951, to the defendants

"We thank you for the above order for Wembley Wear, Ltd. of Sydney and have pleasure in confirming same."

F The letter then set out the terms of the order.

The documents and circumstances of the second contract, which was also for five thousand yards of shirting material, and the indent to which it referred, were not different in any material particular from those previously mentioned.

G Wembley Wear Proprietary, Ltd. cancelled the orders. The defendants refused to accept the goods and the plaintiffs brought this action. The amount of the damages was agreed. The question at issue was whether the defendants were liable in contract to the plaintiffs.

J. D. Cantley, Q.C., and *W. D. T. Hodgson* for the plaintiffs.

R. H. Maïs for the defendants.

Cur. adv. vult.

H Dec. 20. PEARCE, J., read the following judgment in which, after stating the facts, he continued: It is plain therefore that the transaction was this. The Australian company arranged with the plaintiffs' Australian agents that they should buy certain goods on certain terms "subject to confirmation and payment by" the defendants. The defendants then confirmed this arrangement in a letter in which they purported to order the goods as principals and to become liable as such on the contract. This order was accepted by the plaintiffs, who proceeded with the manufacture of the goods.

I Owing to a trade recession before the delivery date the Australian company cancelled both orders and the defendants refused to accept delivery. The parties and their solicitors have co-operated very sensibly in efforts to minimise the damage and to obtain payment from the Australian company. Unfortunately, they have been unsuccessful, and this action has been brought to decide which of two innocent parties shall bear the loss occasioned by the defaulting Australian company.

I am satisfied by the evidence of the plaintiffs' director (who seemed to be honest and reliable) that he would not have accepted this order without the interposition of an English confirming house, that he took no interest in the financial stability of the Australian company, that he made inquiries as to that of the defendants and found it satisfactory and that he relied on that fact in this transaction. Had he not had the order from the defendants he would not have agreed to supply the goods. He regarded the indent from the Australian company, not as a contract but as an expression of a desire to purchase the goods. He understood the indent to have been accepted as an indent and not as an order by his Australian agents, and the fact that the indents were signed by the respective parties to be merely an indication of a genuine desire to buy, and not to be an indication that a firm order was being made subject to conditions precedent. Where a confirming house confirms a contract, his view is that he is entitled to look to the confirming house personally to see that the contract is carried out.

The evidence of the defendants' director, Mr. Read, was in my view unreliable and I do not accept it. In spite of his denial in the witness-box I consider that his true view of the transaction is contained in two letters which he wrote to the Australian company after the cancellation. In a letter of Sept. 28, 1951, he said:

"These orders are sent to us for confirmation and they have been confirmed on our official order sheet which, of course, creates a liability as far as we are concerned, and the manufacturers can, of course, hold us responsible. Although we do not raise any particular objection to you corresponding direct we feel that it would be better if you had instructed us, and in any case we think that in your letters you should have referred to the confirmation which we sent to these various people on your behalf."

In a letter of Nov. 28, 1951, the defendants write:

"On receiving an indent from overseas we confirm the same to the manufacturer on an official order sheet, which order sheet is sent out to comply with the various regulations applying to the export of goods from the United Kingdom, including purchase tax certificate number which permits us to handle the goods without having to pay British purchase tax and obtain a refund on shipment. The terms with overseas clients are arranged previously and we would point out that in reference to your good selves the terms are . . . payment against irrevocable letter of credit opened in our favour. Normally such credits should be opened when the indent is sent, but it is our usual procedure with established accounts to cable for the credit when the goods are ready for shipment, and by so doing avoid clients establishing several credits and the necessary expense involved."

The view of the parties themselves as to what liability they were incurring is not a deciding factor where, as here, the transaction was in documents. In cases of ambiguity, however, some weight may properly be given to it as part of the surrounding circumstances.

In *Chapman v. Smith* (1), PARKER, J., said ([1907] 2 Ch. at p. 103):

"My attention was called to a great many authorities bearing on the question whether a person expressed to contract as agent, either for a named or an unnamed principal, can himself be personally liable on the contract. Having come to the conclusion that this question is in each case a question of construction having regard to the surrounding circumstances, I need not consider these authorities in detail."

There is no authority that deals with the position and liability of a confirming house. Both from the documents and the surrounding circumstances it appears to me that its functions are wider than those of a bank which has an irrevocable

A credit and pays against a delivery (after delivery has been properly checked for quantity) but has no liability on the contract.

The fact that a person is agent and is so known to be does not itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears. The same presumption arises when he signs in his own name without qualification.

In *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (2), SCRUTTON, L.J., said ([1917] 2 K.B. at p. 796):

C “Later, in *Gadd v. Houghton* (3), which may perhaps be called the leading case, MELLISH, L.J., states the same principle (1 Ex.D. at p. 360)—‘As is said in the note to *Thomson v. Davenport* (4), when a man signs a contract in his own name he is prima facie a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him’. When I find in this contract the words ‘We have this day bought from you’ and the signature ‘H. O. Brandt & Co.’, in my view something very strong is needed to show that D Brandt & Co. have not contracted personally.”

And later in the same case, SCRUTTON, L.J., adds ([1917] 2 K.B. at p. 797):

E “The other fact which I take into account is that Messrs. Sayles Bleacheries are foreigners, and while I think that one cannot at the present day attach the importance which used to be attached forty or fifty years ago to the fact that the supposed principal is a foreigner, it is still a matter to be taken into account in deciding whether the person said to be an English agent has or has not made himself personally liable.”

Counsel for the defendants stresses the dissenting judgment of NEVILLE, J., in that case, and the case of *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.* (5). The latter case, however, was cited to the court in *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (2), and it appears to me that the judgment of SCRUTTON, L.J., F which I have quoted, correctly sets out the law.

In *Abdul Karim Basma v. Weekes* (6), LORD REID, delivering the judgment of the Board, clearly affirms *Higgins v. Senior* (7), and says ([1950] 2 All E.R. at p. 152):

G “An agent who contracts in his own name does not cease to be contractually bound because it is proved that the other party knew, when the contract was made, that he was acting as agent.”

Counsel for the defendants in his careful and ingenious argument contends as follows. The contract sued on is not the real contract. The real contract was the contract (sometimes called the indent) directly between the plaintiffs H and the Australian company. The contract sued on incorporates the indent by reference. When one regards both those documents one sees that there was a firm contract of sale in the indent (which was headed as an order and of which copies were signed by both parties to it) made between the Australian company and the plaintiffs through their Australian agents subject to two conditions precedent, namely, confirmation and payment by the defendants. Those I conditions precedent were fulfilled by the confirmation and the defendants’ agreement to pay. But this was only an agreement to pay on delivery. It imports no other liability and if goods are refused even at the last moment, so that there is no delivery, the defendants have no obligation to pay. At most the defendants, like a del credere agent, guarantee the solvency of the buyer. A del credere agent is only liable in respect of an ascertained sum or certain sum due as a debt from the buyer to the seller; he is not the person with whom the seller is entitled to litigate disputes arising out of the contract and ascertain what is due on it. At best, therefore, the defendants have no liability at all;

at worst they are not liable until judgment has been obtained against the Australian company. A

I do not think the analogy of a *del credere* agent helps. The exact limits of his liability have not been defined. LORD MANSFIELD took the view that he was liable to the seller in the first instance, but this view was corrected later, and as the law now stands the agent is a guarantor of the buyer's solvency. It would seem that he is a guarantor to the seller of any mischief arising from the buyer's insolvency once that mischief has been quantified (see *Hornby v. Lacy* (8) and *Thomas Gabriel & Sons v. Churchill & Sim* (9)). If the defendants' liability were similar to that of a *del credere* agent, they would not be liable until the plaintiffs had litigated with the defendants and quantified their damages in such litigation, and this action would not now lie. B

I do not think, however, that the defendants' liability is limited to that of a *del credere* agent. I do not accept the view that the real contract is the indent between the Australian company and the plaintiffs through their agent. If that were so the Australian company would have had a contractual duty to do all in their power to procure the performance of the condition precedent, namely, that a confirming house should confirm and make arrangements to pay. On the view that I take of the documents and surrounding circumstances there was no such contractual duty. I think that if either party had taken no steps to implement the indent, the other party might well have considered himself to have been badly treated. But I think that either party to the indent would have been surprised to be told that it constituted a breach of contract. D

In my opinion the words "confirmation and payment by [the defendants]" meant that a confirmation such as the order now sued on was to be issued by the defendants and that financial liability was to be assumed by the defendants. E

I see no reason why "payment" should be restricted to payment on delivery and should exclude other payments such as payments due for breach of contract. Such a restriction would make the defendants' intervention less onerous, but also far less valuable. It would leave the English merchant completely unprotected against cancellation at the last moment. It would be less than the protection given by a *del credere* agent. I do not believe that was the commercial intention of the parties. F

I see no reason to doubt that the document means what it says, namely, that the defendants are assuming the liability of a principal buyer as between themselves and the plaintiffs. It would have been easy for the defendants to put a different wording in the document had the intention been otherwise. The defendants at first claimed that their wording "Purchase by S. G. Read & Co. (London) Ltd." was inserted on the compulsion of the Board of Trade as a condition of the holding by the defendants of a purchase tax certificate, but in cross-examination Mr. Read had to admit that this was not so. He could have set out in terms that they were purchasing only as agents, but he said that that was omitted because it was obvious. I do not accept that explanation. G H

In my opinion the document on which the plaintiffs sue was the true contract between the parties. It was intended by the parties to impose and by its terms does impose a liability on the defendants in respect of the performance of the contract.

I find nothing to counteract the presumption that the defendants incurred personal liability. The documents and the surrounding circumstances support the presumption. I

The plaintiffs are entitled to judgment for £1,110 and costs.

Judgment for the plaintiffs.

Solicitors: *Knott & Castle*, Manchester (for the plaintiffs); *H. A. Crowe & Co.* (for the defendants).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

A

Re HARRISON'S SHARE UNDER A SETTLEMENT.

HARRISON *v.* HARRISON AND OTHERS.Re ROPNER'S SETTLEMENT TRUSTS. ROPNER *v.* ROPNER
AND OTHERS.B [COURT OF APPEAL (Jenkins and Hodson, L.J.J., and Vaisey, J.), December 1,
21, 1954.]*Judgment—Order—Recall by judge—Chancery Division.*

Although the order of a judge dates from the day of its being pronounced, it can always be withdrawn, or altered or modified by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it and the right of withdrawal will not be prevented or prejudiced thereby.

C

An application was made to the Chancery Division of the High Court for approval of a scheme varying the trusts of a settlement on behalf of infants and unborn and unascertained persons. Following a decision of the Court of Appeal in a similar case, a judge in chambers made an order approving the scheme. Before the order was perfected, the House of Lords reversed the decision of the Court of Appeal and held that the court had no jurisdiction to make an order sanctioning variations in trusts in such cases. The judge thereupon recalled his order, adjourned the case into court for further argument and there dismissed the summons. On appeal,

D

E

Held: a judge was entitled so to recall the order on his own initiative, whether the order was originally made in chambers or in open court, and notwithstanding any consequential inequality in relation to other similar orders already perfected, and in the present case it was right that the order should have been recalled.

Re Thomas ([1911] 2 Ch. 389) approved.

F

Millensted v. Grosvenor House (Park Lane), Ltd. ([1937] 1 All E.R. 736) followed.

Dictum of LORD WESTBURY, L.C., in *Re Risca Coal & Iron Co., Ex p. Hookey* (1862) (4 De G. F. & J. at p. 458) distinguished.

Decision of ROXBURGH, J. ([1954] 2 All E.R. 453) affirmed.

G Cases referred to:

(1) *Re Downshire's Settled Estates, Re Chapman's Settlement Trusts, Re Blackwell's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218; on appeal, H.L. sub nom. *Chapman v. Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429; 3rd Digest Supp.

(2) *Chapman v. Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429.

H

(3) *Re Yates' Settlement Trusts*, [1954] 1 All E.R. 619.

(4) *Re Thomas*, [1911] 2 Ch. 389, 396; 105 L.T. 59; Digest (Practice) 736, 3176.

(5) *Re Risca Coal & Iron Co., Ex p. Hookey*, (1862), 4 De G. F. & J. 456; 31 L.J.Ch. 429; 6 L.T. 567; 45 E.R. 1261; Digest (Practice) 709, 3039.

I

(6) *Re Australian Direct Steam Navigation Co., Miller's Case*, (1876), 3 Ch.D. 661; *affd.*, (1877), 5 Ch.D. 70; 9 Digest 453, 2943.

(7) *Re St. Nazaire Co.*, (1879), 12 Ch.D. 88, 91; 41 L.T. 110; Digest (Practice) 815, 3759.

(8) *Re Roberts*, [1887] W.N. 231; Digest (Practice) 815, 3761.

(9) *Re Eyton (Adam), Ltd., Ex p. Charlesworth*, (1887), 36 Ch.D. 299; 57 L.J.Ch. 127; Digest (Practice) 815, 3760.

(10) *Re Suffield & Watts, Ex p. Brown*, (1888), 20 Q.B.D. 693, 697; 58 L.T. 911; Digest (Practice) 815, 3762.

- (11) *Preston Banking Co. v. Allsup (William) & Sons*, [1895] 1 Ch. 141, 144; 64 L.J.Ch. 196; 71 L.T. 708; Digest (Practice) 815, 3764. A
- (12) *Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 All E.R. 736; [1937] 1 K.B. 717; 106 L.J.K.B. 221; 156 L.T. 383; Digest Supp.
- (13) *Moon Motors, Ltd. v. Kiuan Wou*, [1952] 2 Lloyd's Rep. 80.

Appeal.

The plaintiffs in two causes commenced by originating summons appealed against orders of ROXBURGH, J., dated May 28, 1954, and reported [1954] 2 All E.R. 453, recalling orders approving schemes varying the trusts of two settlements on behalf of infants and unborn and unascertained persons. After the orders had been made but before they had been drawn up and entered the House of Lords held in a similar case, *Chapman v. Chapman* (2), that the court had no jurisdiction to make such orders. ROXBURGH, J., held that he had power on his own initiative to recall the orders and, as persons not parties to the application were affected, that it was his duty to do so, and he dismissed the originating summonses on which the orders had been made.

Sir Hartley Shawcross, Q.C., *Raymond Jennings, Q.C.*, and *L. M. Jopling* for the appellant tenant for life in the first appeal.

J. M. Price for the trustees in the first appeal.

F. G. King for the respondents interested in the income in the first appeal.

Sir Hartley Shawcross, Q.C., and *D. A. Ziegler* for the appellant tenant for life in the second appeal.

B. S. Tatham for certain infant beneficiaries in the second appeal.

Cur. adv. vult.

Dec. 21. **JENKINS, L.J.**, read the following judgment of the court: In each of these two cases an application by originating summons for sanction on behalf of infant, and unborn, and unascertained persons of a scheme making variations in the trusts of a settlement came before ROXBURGH, J., in chambers on Mar. 1, 1954. According to the decisions of this court in *Re Downshire's Settled Estates* and *Re Blackwell's Settlement Trusts* (1), the variations sought were such as the court would have jurisdiction to sanction if satisfied that they were for the benefit of the infant unborn and unascertained persons interested or potentially interested under the trusts.

There was, however, then pending before the House of Lords the case of *Chapman v. Chapman* (2), and, as it appeared to ROXBURGH, J., that the decision in that case might impair or destroy the authority of the *Downshire* and *Blackwell* cases (1), he adjourned the two summonses with a view to dealing with them after and in the light of the expected decision in *Chapman v. Chapman* (2). On the following day, however, ROXBURGH, J., saw a report of the case of *Re Yates' Settlement Trusts* (3) in which this court had held (though in somewhat special circumstances) that a similar application should not have been adjourned, as *HARMAN, J.*, had adjourned it, pending the decision of the House of Lords in *Chapman v. Chapman* (2), but should have been heard and determined in the ordinary course.

ROXBURGH, J., regarded the decision in *Re Yates' Settlement Trusts* (3) as applicable to the two summonses now in question. He accordingly caused them to be restored to his list and sanctioned both schemes by orders orally pronounced in chambers on Mar. 15 and Mar. 17 respectively. On the assumption that the *Downshire* and *Blackwell* cases (1) were authoritative these orders were, at the dates on which he pronounced them, orders which he could properly make.

On Mar. 25, 1954, the House of Lords pronounced their decision in *Chapman v. Chapman* (2), and the effect of that decision was to destroy the authority of the *Downshire* and *Blackwell* cases (1) and to make it clear that the court's jurisdiction over trusts did not extend to the sanctioning of variations in trusts such as those which ROXBURGH, J., had orally sanctioned on Mar. 15 and Mar. 17, 1954. At the date of the House of Lords' decision, these orders had not yet

A been entered, or in other words had not been perfected as formal acts of the court. In these circumstances ROXBURGH, J., directed the registrar not to proceed further with the perfecting of the orders, and caused the summonses to be restored to his list and adjourned into court for further argument.

At this further hearing the parties found it impossible to contend that the schemes could properly be sanctioned by fresh orders then made, in view of the House of Lords' decision in *Chapman v. Chapman* (2). But all parties joined in contending that the learned judge ought not to recall or vary the orders of Mar. 15 and Mar. 17, and that these orders should be perfected in the terms in which they were orally pronounced as orders bearing the dates on which they were respectively so pronounced. ROXBURGH, J., rejected this contention, recalled the two unperfected orders, and by two further orders both dated May 28, 1954, dismissed the summonses. From such dismissal the plaintiffs in both cases now appeal to this court, with the support of all other parties, and they ask for relief by way of declaration or direction to lead to the perfecting of the orders as orally pronounced by ROXBURGH, J., in the first instance.

The submissions in support of the appeals are to the effect:—First, that in general an order is made once and for all at the time when it is orally pronounced, and cannot thereafter be discharged or varied otherwise than on appeal. Secondly, that by way of exception to this general rule a judge may have a limited discretionary power of varying or discharging an order orally pronounced by him at any time before it is perfected by entry, but any such power is confined to cases of manifest error or omission or, in other words, cases broadly speaking comparable to those in which an order can be corrected after entry under R.S.C., Ord. 28, r. 11. Thirdly, that in any case a judge should not vary or discharge an order between oral pronouncement and entry on his own initiative, as distinct from doing so on the application of one or other of the parties. Fourthly, that, if and so far as there is any such discretionary power, the learned judge should not have exercised it as he did in these two cases. Fifthly, that for the purposes of the foregoing submissions there is no valid distinction between an order orally pronounced in chambers (as were the two orders now under consideration) and one so pronounced in open court.

We accept the last of these submissions, and agree that nothing turns on the fact that the two orally pronounced orders with which we are concerned were pronounced in chambers, while those substituted for them were made in open court. But we reject the limitations sought to be placed by the first three submissions on the power of a judge to recall his own order at any time before it has been perfected by entry. So far as the limitations involved in the first and second submissions are concerned, these seem to us to be plainly inconsistent with practice and the weight of authority, but it has been argued that, if the practice is wrong, it is not too late for the court to say so, and that the authorities are founded on obiter dicta which are later in date than an authority which ought to be followed and which was not brought to the notice of the court in the later cases.

We take the first three submissions together, for in our opinion it can make no difference to the answer to the question whether a judge can recall his own order before it can be perfected that in one case his attention has been drawn to some relevant consideration of law or fact by one of the parties to the matter under consideration, whereas in another case he has made the discovery for himself by his own diligence or even by accident. It is true that the cases cited to the court have all been cases in which a judge has varied his order after application had been made by one of the parties either for that purpose or at any rate in such a way as to give an incidental opportunity for revision, but those cases would naturally be more common than cases in which a judge might act on his own initiative. In the cases under consideration there was no opposition and it was in the interest of no one to ask the judge to recall his order. These three

submissions would, we think, if accepted, produce an unworkable result. Few judgments are reversed and it would be unfortunate if once the words of a judgment were pronounced there were no *locus poenitentiae*. The appellants make a nominal concession to meet this difficulty by saying that the judge retains seisin of the matter so long as the parties are before him, but that, once the parties have left the court and the next case has been called, it is too late because the parties may have already acted on his oral judgment. Our answer to this is that, although the judgment dates from the day of its pronouncement, it is not perfected until drawn up, passed and entered, and anyone who acts on it beforehand must take such risk as there is that it will not be drawn in the form in which it was heard to be pronounced.

We think that an order pronounced by the judge can always be withdrawn, or altered or modified, by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced. For example, the granting of an injunction, though open to review, would generally operate immediately, i.e., as soon as the relevant words are spoken. But an order which could only be treated as operative at the expense of making it, in effect, irrevocable, e.g., an order for the payment of money, cannot be treated as operative until it has been passed and entered. Where the nature of the case requires it, the process of passing and entering can be accelerated by the judge's direction, and this is often done in the Chancery Division.

A reported example is the case of *Re Thomas* (4). In that case a contract for the sale of land required the approval of the court, and it was argued that all that was required by the contract was that the receiver should apply for and endeavour to obtain the approbation of the court to the contract. That requirement, it was contended, was satisfied when the master expressed his approbation and, from that moment, the purchaser's rights crystallised and the contract became binding.

This argument was rejected in no uncertain terms by WARRINGTON, J., who said ([1911] 2 Ch. at p. 395):

"Now, is the matter open? The purchaser says that all that was provided for by this contract was that the receiver should apply for, and endeavour to obtain, the approbation of the Chancery Division to this contract, and in case such approbation could not ultimately be obtained the agreement should be void; and he says that that provision is satisfied when the master has said 'I approve of this contract', whether that approval is recorded in the form of a note, or whether it is made in the form of an order or not. As a matter of fact the master here purported to make an order, and I think it was necessary that he should make an order, because at that moment the order for sale with the approbation of the judge was a conditional order. He could make it because he had jurisdiction to do so under R.S.C., Ord. 51, r. 1. He intended to make an order. What is it that renders an order finally effective so that there is no longer any possibility of going back from it? It seems to me that it is the passing and entering of the order. It is the every-day practice that, until an order is passed and entered, the matter can be brought before the judge, and if a mistake has been made it can be put right. But the matter does not rest there. This was an order made by the judge in chambers, that is to say, in this particular case made by the master as the deputy of the judge. It is the right of any party interested to adjourn a question from the judge's deputy to the judge himself."

Then after some further discussion of the question of adjournment to the judge, the learned judge said this (*ibid.*, at p. 396):

"I think that is the correct way of dealing with the matter for the reason

A that, until the order is finally passed and entered, it leaves open an opportunity of reviewing and re-considering what has been done."

The authority mainly relied on by the appellants is the decision of LORD WESTBURY, L.C., sitting in the Chancery Division in *Re Risca Coal & Iron Co., Ex p. Hookey* (5). No doubt a literal reading of the language used by the Lord Chancellor supports the appellants' contention that no order can be varied
B by the judge who pronounced it, even before it has been passed and entered. In that case LORD WESTBURY said at the beginning of his judgment (4 De G. F. & J. at p. 457):

"I have very little doubt how this question ought to be determined. It has been urged upon me that I must construe the word 'made' as it occurs
C in the particular section of this Act of Parliament as equivalent to 'orally pronounced'."

Then a little further on he said (*ibid.*, at p. 458):

"But I am willing to take the question which I have to determine without any special regard to the policy of this particular statute, and it is fairer
D to the appellant himself so to take it, than to pray in aid the general intent of the Act. I regard it as a question of very considerable importance. If I permitted any doubt to be entertained upon it, the extent of that doubt it is scarcely possible to foresee. It might bring the whole of the computation of the periods of time defined by the orders or by the statutes into a great degree of inconvenient uncertainty. It is better, therefore, to abide by one
E certain and positive rule, and I have not the least doubt that that rule is to be derived from the uniform principle and practice of the court that has been abided by without any variation, and which has always determined the date of its orders. An order of the Court of Chancery, however long a time may elapse in the ministerial duty of drawing up that order and committing it to paper, is made to bear date on the day when it is pronounced
F by the court. That date appears in the document in which the order is recorded, and the principle, therefore, involves of necessity this consequence, that the order must be accepted for all purposes as having been made on the day on which it is dated . . . The greatest possible confusion would arise were it otherwise. In fact, all persons dating their rights from the time of the order being pronounced would be thrown into a state of most inconvenient uncertainty, if they could not exhibit to another court, or produce
G for the purpose of any legal inquiry the order containing the directions of the court with the date, in the certainty that that date will be accepted as the time when the order is made . . . The principle which makes the order, whenever drawn up and entered, to bear date on the date when it is pronounced by the court, I hold to be one in perfect conformity with the
H whole theory of judicial procedure. The theory of judicial procedure is that the cogent and binding effect of the order begins immediately from the time when the order is pronounced by the lips of the judge, and if that could be done physically which legally is supposed to be done, and which one would desire to be done if it were possible, every order would be completed on the spot, written out by the judicial officer and in curia before the court rises, and delivered to the parties. That is the unquestionable theory of judicial
I procedure, and in conformity with that theory that is the time when the order is 'made', for the two words must be considered as equivalent and capable of being substituted the one for the other. The mere defining of the words of the court by writing and reducing them into a form in which they can be evidence is a ministerial operation which, according to the true theory, succeeds the delivery of the order by the judge, and must be in point of fact nothing in the world more than the physical embodiment on the spot by the court of the words which the judge has used."

It must be remembered, however, that the only decision in the case was that, for the purpose of computing the time allowed for appealing, an order was "made" at the time when it was pronounced, and although the Lord Chancellor based this conclusion on the principle that an order took effect from the date of its pronouncement, and was at pains to point out that in an ideal system every order would be completed on the spot, it does not seem to us to involve the proposition contended for, that, after the words have passed his lips and before the order is perfected, a judge who has in his belief delivered an erroneous judgment has no power to recall it.

This course was taken by SIR GEORGE JESSEL, M.R., in *Re Australian Direct Steam Navigation Co.*, *Miller's Case* (6). It is said that this might well have been by consent of the parties but if jurisdiction was in question this would not affect the validity of the authority. It is to be observed that in this case the learned Master of the Rolls, after he had given an oral judgment and before the final order was made and perfected, considered other material to which his attention had not previously been drawn. The same learned judge later referred to *Miller's Case* (6) in *Re St. Nazaire Co.* (7), in these words (12 Ch.D. at p. 91):

"In *Miller's Case* (6) no order had been drawn up. A judge can always re-consider his decision until the order has been drawn up."

In *Re Roberts* (8) KAY, J., regarded himself as free where an order had not been drawn up, whether it were an order made in chambers or in court, to stay the drawing up of the order and re-hear the matter before making a final order. He acted accordingly.

The case of *Re Adam Eyton, Ltd.*, *Ex p. Charlesworth* (9), contains conflicting dicta of FRY, L.J. (36 Ch.D. at p. 301), and COTTON, L.J. (*ibid.*), on this topic, but the appellant is entitled to say that the judgment of the Court of Appeal treated as an effective order an earlier order than the one on appeal although the earlier one had not been drawn up. This case, therefore, lends some support to the argument of the appellants. In *Re Suffield & Watts, Ex p. Brown* (10) the order had been perfected but FRY, L.J., repeating his earlier dictum in *Re Adam Eyton's case* (9), said (20 Q.B.D. at p. 697):

"*Re St. Nazaire Co.* (7) shows that, when an order or judgment of the High Court has once been perfected, the court has no jurisdiction to alter it. So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end."

In *Preston Banking Co. v. William Allsup & Sons* (11) A. L. SMITH, L.J. ([1895] 1 Ch. at p. 144) expressly assented to what FRY, L.J., had said in *Re Suffield & Watts* (10), and also referred to the *St. Nazaire case* (7) in support of the proposition. In *Millensted v. Grosvenor House (Park Lane), Ltd.* (12), the trial judge, after delivering his oral judgment and before it had been drawn up, reduced the amount of damages awarded from £50 to £35. The Court of Appeal upheld the order. FARWELL, J., said ([1937] 1 All E.R. at p. 740):

"It is now well settled that, until an order made by a judge has been perfected, by being passed and entered, there is no final order, and, consequently, the judge may, at any time until the order is so perfected, vary or alter the order which he had intended to make: *Re Suffield & Watts, Ex p. Brown* (10)."

In the more recent case of *Moon Motors, Ltd. v. Kiwan Wou* (13) ([1952] 2 Lloyd's Rep. at p. 85) the same principle was applied by the Court of Appeal on appeal from a county court judge.

The appellants' fourth submission, to the effect that, if there is a discretionary power to recall an unperfected order, the learned judge was wrong in exercising

- A that discretion in these two cases, is based mainly on the contention that inequality of treatment between litigants is likely to result in cases such as this, owing to the variation in time between the pronouncement of orders and the "ministerial duty" of drawing them up and "committing them to paper". We were told that other orders in similar cases orally pronounced before the decision of the House of Lords but not perfected by the time that decision was made known have nevertheless been allowed to proceed to completion by entry, and to take effect accordingly. It was also submitted that, as the orders orally pronounced in the present two cases were at the time of their pronouncement orders proper to be made according to the authorities as they then stood, and the learned judge was then well aware of the possibility that these authorities might be displaced by the expected decision of the House of Lords in *Chapman v. Chapman* (2), the subsequent realisation of that possibility did not suffice to justify the learned judge in going back on the decision he had previously reached and orally pronounced without any misapprehension of fact or law.
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- As to the argument based on inequality in the treatment of litigants, the question for this court is whether ROXBURGH, J., was justified in recalling the two orders with which we are concerned, and not whether some other judge ought to have recalled other similar orders. Inequality is, moreover, inevitable in all cases falling within a given field of law where the House of Lords arrives at a decision to the effect that the law in that field is not as hitherto understood. Cases determined before the House of Lords' decision go one way, and cases determined after it go the other, whether the date of determination is taken as being the date when the order is orally pronounced or the date when the order is perfected. Whichever date is taken, the result must necessarily depend on circumstances purely accidental, whether they relate to the state of the lists or the state of business in the Scrivenery Department, or the length of time for which the House of Lords find it necessary to reserve their decision.
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- Moreover, while it so happened that, in the two cases now before the court, it was claimed to be in the interests of all parties that the orders should go in the form in which they were orally pronounced, there might equally well be a case in which the interests of all parties demanded that a fresh order should be made on the basis of the law as declared by some supervening decision of the House of Lords before the original order was perfected. To take by way of example an imaginary inversion of the two instant cases, if the decisions of this court in the *Downshire* and *Blackwell* cases (1) had imposed some restriction on the jurisdiction of the court to vary trusts, and if ROXBURGH, J., following these cases, had by his orders as orally pronounced refused to sanction the schemes proposed in the two cases now under appeal on the ground that he had no jurisdiction to do so, and if before those orders were perfected the House of Lords' decision in *Chapman v. Chapman* (2) had supervened with a pronouncement to the effect that there was no jurisdiction in law for any such restriction, we find it difficult to suppose that it would not have been contended on behalf of all parties that ROXBURGH, J., should recall his two unperfected orders, and proceed to consider the two applications on their merits in accordance with the law as laid down by the House of Lords. But if the appellants are right, it must follow that, in the hypothetical circumstances, ROXBURGH, J., would have been constrained to say in effect: "It is true that the House of Lords' decision shows me to have been wrong in refusing these applications in limine, and that the orders which I orally pronounced before that decision was made known will, when drawn up, passed and entered in accordance with the language I then used, be plainly at variance with that decision. Nevertheless, I am irretrievably bound by what I then said. The orders must therefore proceed to completion, wrong as they are now known to be, and you must be put to the expense of taking them to the Court of Appeal, who will certainly reverse them, and either proceed to hear you on the merits, or, more probably, remit the applications to me in
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order that I may do so." We venture to think that, in the hypothetical circumstances we have stated, it would be more reasonable, and better for the parties, if the learned judge could say: "The orders which I orally pronounced are now shown by the House of Lords' decision to have been wrong. But they are not yet perfected. I will therefore recall them and re-hear the two applications on their merits." It is also pertinent to consider the position which would arise in a contested case in which a decision of the House of Lords, made known after the oral pronouncement of the judge's order but before its completion by entry, showed the order as orally pronounced to have been founded on a misconception as to the law. If the appellants are right, then, no matter how clearly it might appear from the House of Lords' decision that the judge's order as orally pronounced was erroneous, such order would have to proceed to completion and the dissatisfied party would be faced with the necessity of appealing as the only means, short of agreement, which might or might not be possible, of putting the matter right. We cannot think that this would be a desirable state of affairs.

It is important to remember that, in the ordinary way, the recall of an unperfected order results in a re-hearing at which all parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced. But in the present cases the parties found it impossible to contend that the schemes were such as could properly be sanctioned by the court since the decision of the House of Lords in *Chapman v. Chapman* (2), and accordingly did not avail themselves of the re-hearing offered by ROXBURGH, J. This appears from the last paragraph of his judgment, where he said ([1954] 2 All E.R. at p. 457):

"I should have proceeded to re-hear the cases, but nobody wishes me to do so, because the result is a foregone conclusion."

As to the argument to the effect that the orders orally pronounced by the learned judge were proper orders at the time of their pronouncement and should therefore be allowed to stand, this seems to us to be based on the erroneous supposition that *Chapman v. Chapman* (2) altered the law, whereas in truth that decision merely declared the law as it always was, and showed it to have been theretofore misapprehended in the courts below.

The law having been declared by the House of Lords in *Chapman v. Chapman* (2), before ROXBURGH, J.'s orders were perfected, in terms which clearly indicated that those orders ought not to have been made, and this having come to the learned judge's knowledge, it was in our opinion right that he should recall the orders orally pronounced by him notwithstanding the fact that, at the time when they were pronounced, they appeared to be correct according to the authorities as they then stood. When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously. The learned judge in these two cases exercised his discretion judicially in recalling his original orders, and there is in our opinion no ground for disturbing the orders finally made. These appeals, therefore, should be dismissed.

Appeals dismissed.

Solicitors: *Theodore Goddard & Co.* (in the first appeal); *Tamplin, Joseph & Flux*, agents for *Darling, Heslop & Forster*, Darlington (in the second appeal).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

A

NOTE.

SCAPPATICCI v. ATTORNEY-GENERAL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), December 13, 1954.]

B

Legitimation—Legitimatio per subsequens matrimonium—Domicil of father at date of marriage—Domicil of choice—Death of father—Statements made by father to petitioner—Admissibility—Legitimacy Act, 1926 (16 & 17 Geo. 5 c. 60), s. 1 (1).

C

Domicil—Change of domicil—Declarations as to intention—Petition for declaration of legitimacy—Legitimatio per subsequens matrimonium—Domicil of father at date of marriage—Death of father—Statements made by father to petitioner—Admissibility.

[As to Legitimation by Subsequent Marriage, see 3 HALSBURY'S LAWS (3rd Edn.) 93, para. 147; and for cases on the subject, see 3 DIGEST 372-374, 131-142; and as to the Admission of Evidence of Declarations by a Deceased on

D

Legitimacy Petitions, see 3 HALSBURY'S LAWS (3rd Edn.) 101, para. 157 note (i).

As to Evidence of Intention as to Change of Domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 20, para. 36; and for cases on the subject, see 11 DIGEST (Repl.) 337, 95, 96.

For the Legitimacy Act, 1926, s. 1 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 493.

E

For the Matrimonial Causes Act, 1950, s. 17 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 404.]

Cases referred to:

(1) *Re Davy*, [1935] P. 1; sub nom. *Davy v. A.-G.*, 103 L.J.P. 115; 151 L.T. 562; Digest Supp.

F

(2) *Battle v. A.-G.*, [1949] P. 358; [1949] L.J.R. 1015; 2nd Digest Supp.

Petition under the Matrimonial Causes Act, 1950, s. 17 (2), for a declaration of legitimacy.

In 1900 Gaetano Scappaticci came from Italy to England. He thereafter lived and worked in London continuously (except for certain holidays which he spent in Italy) until 1910. The petitioner was born on July 18, 1910, and his birth was recorded by an entry in the register of births in the sub-district of Shoreditch Northwest made on July 26, 1910, in which his name was entered as John Antonio and that of his mother as Mary Cabella. The mother did not sign her name in the entry but made her mark.

G

On Oct. 22, 1910, an entry was made in the register of marriages of a marriage solemnised at St. Peters Italian Church in the district of Holborn between one Gaetano Scappaticci and Maria Cabrelli. The wife did not sign her name but made her mark at the foot of the entry. In 1910 or 1911, Gaetano Scappaticci returned to Italy with his wife and the petitioner.

H

The wife died on Nov. 12, 1936, in Italy. Gaetano Scappaticci never returned to England, except for a holiday in 1949, and died on June 2, 1950, in Italy.

By his petition dated Apr. 10, 1952, the petitioner alleged:

I

"3. That the petitioner is the natural child of Maria Scappaticci who at the time of his said birth was Maria Cabrelli, spinster, and who in the . . . birth certificate is described as Mary Cabella, and of Gaetano Scappaticci, a bachelor. That neither the said Maria Cabrelli nor the said Gaetano Scappaticci was lawfully married at the date of birth of the petitioner.

"4. That the said Maria Cabrelli and the said Gaetano Scappaticci were lawfully married on Oct. 22, 1910, at St. Peters Italian Church in the district of Holborn in the county of London.

" 5. That the said Gaetano Scappaticci was at the date of the said marriage domiciled in England. A

" 6. That in the alternative at that date the said Gaetano Scappaticci was domiciled in Italy and that by the law of Italy an illegitimate person is legitimated by the subsequent marriage of his parents.

" 8. That the said Maria Scappaticci died on Nov. 12, 1936, and the said Gaetano Scappaticci died on June 2, 1950. B

" The petitioner therefore prays that the court will decree and declare (i) that the said Gaetano Scappaticci and the said Maria Scappaticci were lawfully married on Oct. 22, 1910 . . . (ii) that by the said marriage the petitioner became legitimated as from Jan. 1, 1927, for the purposes of the Legitimacy Act, 1926 . . . "

On Sept. 15, 1952, an appearance was entered on behalf of the Attorney-General. On Oct. 2, 1952, Mr. Registrar PEREIRA ordered that the petition should be served on the brother and three sisters, all resident in Italy, of Gaetano Scappaticci. C

The petitioner abandoned his claim based on para. 6 of his petition since Italian law required, for legitimation by subsequent marriage, certain formalities, such as registration, which had not been carried out in the present case. D

The petitioner sought to establish that Mary Cabella and Maria Cabrelli were one and the same person, and that Gaetano Scappaticci had at the date of the marriage on Oct. 22, 1910, acquired a domicile of choice in England, so that the petitioner had become thereby legitimated in accordance with the provisions of the Legitimacy Act, 1926, s. 1 (1). The only evidence available on the question of domicile was certain statements made to the petitioner by Gaetano Scappaticci to the effect that he greatly admired England and but for his aged parents he would never have returned to Italy. The petitioner now sought to give oral evidence of these statements. Counsel for the Attorney-General raised the question of the admissibility of this evidence. The case is reported only on this question. E

H. E. L. McCreery for the petitioner. The issue of domicile is ancillary to the question of establishing legitimacy, and the question whether a petitioner's father had acquired a domicile of choice in England involves considering what was his state of mind at the relevant time. Statements made by him are after his death the best evidence of his state of mind. Counsel referred to and cited passages from the judgments in *Re Davy* (1) ([1935] P. at p. 15) and *Battle v. A.-G.* (2) ([1949] P. at p. 360). F

Colin Duncan for the Attorney-General. Although there is authority for admitting on a question of paternity evidence which would otherwise be inadmissible as hearsay, there is no authority for admitting it on an issue of domicile. The admission of evidence of statements made by the deceased in his lifetime in support of his having acquired a domicile of choice was not covered by authority, and there might be other evidence, such as the length of time the deceased had been in the country, what property he had in the country he was said to have adopted and how far he had severed his connections with the country of his domicile of origin. Nevertheless, although the admission of hearsay evidence of this character has so far been limited to declarations bearing on the question whether one man was the father of another, the Attorney-General does not object to the admission of the evidence in this case, if the court thinks fit to receive it. G

WILLMER, J.: I propose to admit the evidence. It seems to me that on a matter such as domicile, where the state of mind of the deceased person is the crucial question, that which he may have said in his lifetime is certainly excellent, if not the best, evidence, as to what his state of mind was. There is authority in the cases which have been cited to me for a relaxation of the rules relating H I

A to hearsay in cases of this character, though the authority is not, it is true, direct authority for the admissibility of this particular type of evidence. I think, as this question has now arisen in relation to an issue of domicile, that the relaxation of the rule allowed in *Re Davy* (1) and in *Battle v. A.-G.* (2) ought to be extended sufficiently to enable the evidence in the present case to be received.

Evidence admitted accordingly.

B [At the conclusion of the hearing His LORDSHIP held that the petitioner had failed to establish that Gaetano Scappaticci had acquired a domicile of choice in England at the date of the marriage, and dismissed the petition.]

Solicitors: *Cunliffe & Airy* (for the petitioner); *Treasury Solicitor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

C

D

CHELSEA ESTATES INVESTMENT TRUST CO., LTD. v. MARCHE AND OTHERS.

E [CHANCERY DIVISION (Upjohn, J.), December 15, 16, 17, 21, 1954.]

Mortgage—Redemption—Lease mortgaged by legal charge—Mortgagee obtained relief against forfeiture of lease on default of mortgagor—Order giving relief granted new lease for full residue of term—Whether new lease subject to mortgagor's right of redemption—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 146 (4).

F *Landlord and Tenant—Lease—Forfeiture—Relief—Relief to mortgagee—Whether new lease subject to mortgagor's right to redeem.*

G By a lease dated Apr. 18, 1952, the landlords granted premises to M. for a term of years expiring on June 24, 2010. By a deed dated Jan. 27, 1953, M. assigned the residue of the term to the plaintiffs who on the same day executed a registered legal charge of that date in favour of M. to secure repayment of a principal sum and payment of interest. The plaintiffs failed to pay the rent, and the landlords obtained an order for possession against them in default of appearance. The plaintiffs obtained an order granting them on conditions relief against forfeiture, but they did not fulfil the conditions and their application for relief was ultimately dismissed. Subsequently M. applied for relief under s. 146 (4) of the Law of Property Act, 1925, and on Apr. 29, 1954, it was ordered that "the premises . . . do vest in [M.] for all the residue of the term expiring on June 24, 2010 . . ." The plaintiffs brought an action against M. to redeem the premises comprised in the legal charge.

H

I **Held:** (i) the order of Apr. 29, 1954, operated as a grant of a new lease to M. for a term of years expiring on June 24, 2010, on the same terms as the original lease dated Apr. 18, 1952, and did not constitute an assignment of the original term.

(ii) the new lease so vested in M. must be regarded as a substituted security in his hands, and was subject to any right to redeem the registered charge dated Jan. 27, 1953, subsisting in the plaintiffs.

* Dicta of SIR RICHARD HENN COLLINS, M.R., and ROMER, L.J., in *Re Biss* ([1903] 2 Ch. at pp. 56, 62) and dictum of VAUGHAN WILLIAMS, L.J., in *Ewart v. Fryer* ([1901] 1 Ch. at p. 512) applied.

[As to the Equity of Redemption, see 23 HALSBURY'S LAWS (2nd Edn.) A 300, para. 452; and for cases on the subject, see 35 DIGEST 343, 852 et seq.]

As to Relief against Forfeiture for Non-payment of Rent, see 20 HALSBURY'S LAWS (2nd Edn.) 264-267, paras. 297-299; and for cases on the subject, see 31 DIGEST (Repl.) 534-537, 6592-6612.]

Cases referred to:

- (1) *Ewart v. Fryer*, [1901] 1 Ch. 499; 70 L.J.Ch. 138; 83 L.T. 551; *affd.* H.L. sub nom. *Fryer v. Ewart*, [1902] A.C. 187; 71 L.J.Ch. 433; sub nom. *Watney, Combe, Reid & Co. v. Ewart*, 86 L.T. 242; 31 Digest (Repl.) 552, 6724. B
- (2) *Serjeant v. Nash, Field & Co.*, [1903] 2 K.B. 304; 72 L.J.K.B. 630; 89 L.T. 112; 31 Digest (Repl.) 553, 6733. C
- (3) *Nelson v. Hannam*, [1942] 2 All E.R. 680; [1943] Ch. 59; 112 L.J.Ch. 57; 168 L.T. 146; 2nd Digest Supp.
- (4) *Re Biss*, [1903] 2 Ch. 40; 72 L.J.Ch. 473; 88 L.T. 403; 35 Digest 311, 573.
- (5) *Rushworth's Case*, (1676), Freem. Ch. 13; 22 E.R. 1026; 35 Digest 310, 571.
- (6) *Palmer v. Young*, (1684), 1 Vern. 276 (23 E.R. 468); 1 Eq. Cas. Abr. 380 (21 E.R. 1116); 43 Digest 632, 709. D
- (7) *Featherstonhaugh v. Fenwick*, (1810), 17 Ves. 298; 34 E.R. 115; 30 Digest (Repl.) 436, 791.
- (8) *Nesbitt v. Tredennick*, (1808), 1 Ball. & B. 29; 43 Digest 635, 733 *i.*
- (9) *Rakestraw v. Brewer*, (1729), 2 P. Wms. 511 (24 E.R. 839); Mos. 189 (25 E.R. 342); 2 Eq. Cas. Abr. 162, 601 (22 E.R. 138, 505); 35 Digest 311, 572. E
- (10) *Grand Junction Canal v. Bates*, [1954] 2 All E.R. 385; [1954] 2 Q.B. 160.

Action.

Chelsea Estates Investment Trust Co., Ltd., brought an action commenced by writ in which they claimed to redeem premises comprised in a legal charge dated Jan. 27, 1953. F

By a lease dated Apr. 18, 1952, the Prudential Assurance Co., Ltd., as landlords, demised to Peter Marche, the first defendant, the premises known as Nos. 35 and 36 Princes Square, Bayswater, in the county of London from Apr. 15, 1952, to June 24, 1952, and thereafter for a term of fifty-eight years (expiring on June 24, 2010) at a rent after June 24, 1952, of £400 per annum. The lease contained the usual proviso for forfeiture for non-payment of rent, and user of the premises was restricted to the carrying on of the business of a high-class hotel or boarding-house. The lease was registered as a good leasehold title in H.M. Land Registry on May 29, 1952. G

On Jan. 27, 1953, the first defendant assigned the residue of the term of the lease to the plaintiffs, and Anthony Edward Coles, the principal shareholder in the plaintiff company, was joined as guarantor for the performance by the plaintiffs of the covenants in the lease. On the same day, the plaintiffs executed a deed of registered legal charge of even date whereby the premises were charged in favour of the first defendant to secure repayment of £4,500 together with interest. Both the assignment and legal charge were registered at the Land Registry on Mar. 11, 1953. The plaintiffs entered into possession, but never paid any rent, and on May 13, 1953, the landlords issued a writ against the plaintiffs and the said Anthony Edward Coles for possession. On May 29, 1953, the landlords obtained in the Queen's Bench Division judgment in default of appearance for possession of the premises, but never went into possession. H

On May 20, 1953, the first defendant issued a writ against the plaintiffs and the guarantor, the said Anthony Edward Coles, for repayment of the principal sum due under the legal charge and on July 17, 1953, obtained judgment in the Chancery Division against the said Anthony Edward Coles. I

A On Mar. 16, 1954, the plaintiffs applied in the landlords' action for relief against forfeiture, and on Mar. 23, 1954, an order was made setting aside the judgment of May 29, 1953, and granting relief against forfeiture to the plaintiffs on conditions as to the payment of costs, payment of arrears of rent and other matters. The plaintiffs did not fulfil the conditions of the order, and the application was dismissed.

B On Apr. 14, 1954, the first defendant made an application in the landlords' action for relief against forfeiture, under s. 146 (4) of the Law of Property Act, 1925, and on Apr. 29, 1954, an order was made in these terms:

C "The court doth pursuant to s. 146 of the Law of Property Act, 1925, order that the two messuages and premises . . . comprised in a lease dated Apr. 18, 1952 . . . do vest in [the first defendant] for all the residue of the term expiring on June 24, 2010, granted by the said lease . . .",

the first defendant to pay the costs and arrears of rent. On July 10, 1954, the plaintiffs delivered up possession to the first defendant, who entered into possession. On Oct. 4, 1954, the first defendant, as beneficial owner, entered into a contract with the second, third and fourth defendants to sell the property D to them for a price in excess of the amount of the mortgage. By an order dated Oct. 6, 1954, the Chief Land Registrar ordered the register to be amended to give effect to the order dated Apr. 29, 1954, and that a caution be registered to safeguard the interest of the plaintiffs until disposal of the action. The first defendant was registered as proprietor of the premises and the registration of the plaintiffs as proprietors and the registration of the legal charge were cancelled. E On Aug. 9, 1954, the plaintiffs issued a writ against the first defendant claiming a declaration that they were entitled to redeem the premises comprised in the legal charge and redemption and other relief, and by amendment the other defendants, who were purchasers from the first defendant, were later added.

P. Ingress Bell, Q.C., and *I. C. Duthie* for the plaintiffs.

F *Lionel Edwards, Q.C.*, *Elson Rees*, and *T. I. Payne* for the first defendant.
D. A. Thomas for the remaining defendants.

UPJOHN, J. (having stated the facts, continued): The real question which I have to determine is, first, does the first defendant hold the demised premises free from mortgage or as a substituted security? If he holds them free from the mortgage, *cadit quaestio*. If not, the question arises what are the G rights and liabilities of the parties, having regard to the fact that the first defendant has entered into a contract of sale with the second, third and fourth defendants.

With regard to the first point, it is put in two ways. It is said, first of all, that the order of Apr. 29, 1954, operates as a reassignment to the first defendant of the lease previously vested in the plaintiffs, and, of course, if that be right, H it is the same lease throughout and must necessarily, therefore, be subject to the mortgage. On the other hand, it is said that the order was not an assignment of the original lease, but that it created a new lease between the Prudential Assurance Co., Ltd., as landlords, and the first defendant as lessee.

It is to be noted that the order was made pursuant to the Law of Property Act, 1925, s. 146, and the only sub-section of that section which is applicable I to the case of an under-lessee is sub-s. (4). It is common ground that the proper way of giving effect to s. 146 (4) is by creating a new term in the under-lessee. That, I think, is plain from the whole framework of sub-s. (4), particularly the concluding words,

" . . . but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease ",

and that view is confirmed by *Ewart v. Fryer* (1), and *Serjeant v. Nash*,

Field & Co. (2). If in fact the court ordered the lease to be assigned, then, there having been no appeal, that would I think bind me, even if made without jurisdiction; but at all events one approaches the construction of the order with this in mind, that the proper way of granting relief to an under-lessee is by way of new lease rather than under-lease. I do not read the relevant part of the order again. It is not happily expressed. In the first place, the term granted to the under-lessee is not the term which he had, viz., a term for one day less than the original term, but the whole of the original term. He was entitled to no more than one day less, but he did get the whole term. That is perhaps not very important; but it is also to be observed that nothing is said as to the terms on which the property is to be vested in him, but I think the words "on the terms and conditions of the lease" must be implied. Looking at this order and approaching it in the manner I have mentioned, I think it is reasonably clear that the order did not operate as an assignment, but operated as a grant of a lease expiring on June 24, 2010, on the terms and conditions of the original lease, so that the first defendant thereby again became in direct contractual relationship with the Prudential Assurance Company, the original lease having expired. Therefore, it seems to me that the first defendant must be treated as holding under a lease created by the order of Apr. 29, 1954. The question then is whether he holds that new lease free from the mortgage or subject to it.

The law is, I think, not really in dispute. Where a lease which is in mortgage contains a right to renew it or an option to purchase a freehold reversion and those rights or options are exercised by the mortgagee, it is quite clear that the renewed term or the freehold reversion is held by the mortgagee as part of his security. That was made clear by the Court of Appeal in *Nelson v. Hannam* (3). In that case, LORD GREENE, M.R., said ([1942] 2 All E.R. at p. 685):

"The real truth of the matter, in my opinion, is this: a mortgagee who takes as part of his security an option to purchase the freehold is in principle in the same position as a mortgagee of a lease which contains an option to the lessee to renew. It is established by a number of old authorities, and, indeed, if I may say so at this time of day, at any rate, it would not require authority to establish the proposition, that, where pursuant to such a right to renew the mortgagee obtains the renewal, he must hold the renewed lease subject to the same equity of redemption as existed in relation to the original lease."

That does not directly cover this case.

The general law is conveniently summed up in *Re Biss* (4). That case was not dealing with mortgages, but with the renewal of a lease which formed part of a trust estate; but both SIR RICHARD HENN COLLINS, M.R., and ROMER, L.J., dealt with the position of mortgagees.

SIR RICHARD HENN COLLINS, M.R., said ([1903] 2 Ch. at p. 56):

"But there is another class of cases in which, as it seems to me, there is no presumption of law, but at most a rebuttable presumption of fact. In this class apparently are mortgagees; *Rushworth's* case (5); joint tenants, *Palmer v. Young* (6); and partners, *Featherstonhaugh v. Fenwick* (7). Prima facie, a mortgagee cannot renew for himself: he cannot hold the accretion, any more than he can hold the term itself, free from the right to redeem; the reason here is analogous to that which governs the rights of tenants for life. But in this case the presumption is apparently rebuttable; and in *Nesbitt v. Tredennick* (8) LORD MANNERS held it was rebutted. He said (1 Ball. & B. at p. 47): 'Here no part of Nesbitt's conduct shows a contrivance, nor was he in possession: all that Nesbitt or Tredennick treated for, was a new lease, giving full opportunity to the plaintiffs, to dispose of their interests or to renew if they were enabled so to do'."

A ROMER, L.J., said ([1903] 2 Ch. at p. 62):

B "I will next deal with the cases decided as between mortgagor and mortgagee. Each of these owes a duty to the other in respect of the mortgaged property; and in case of one being able, by virtue of his position, to obtain a renewal of a mortgaged lease, there are obvious grounds why it should be held against him, at any rate as a rule, that the renewed lease should be treated as engrafted on the old and as forming part of the mortgage security. In the case of a mortgagee renewing it was put as follows by the court in the case of *Rakestraw v. Brewer* (9) (2 P. Wms. at p. 513): 'This additional term comes from the old root, and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagees getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor'."

D In both those passages the court was dealing with the case where a mortgagee is able to renew not as of right, but where, on the expiry of the old lease, the mortgagee by virtue of his position was or might be favourably placed to obtain a renewal from the landlord. As SIR RICHARD HENN COLLINS pointed out, however, where the mortgagee is guilty of no contrivance, where he is not in possession and where, in the words of the old case of *Nesbitt v. Tredennick* (8), he has not "amused" the mortgagor, "with hopes of his redeeming", the mortgagee may be in a position to keep the new lease for himself; but one starts with this, that prima facie the mortgagee holds a new term as part of the old stock and subject of the mortgage.

E Counsel for the first defendant has forcibly pointed out here that the plaintiffs have never paid any rent or any interest. They did at one time repay £750 of capital, but that is all that they have ever done in the way of payment under the lease and under the mortgage. They had every opportunity of getting relief from forfeiture. On Mar. 23, 1954, an order was made in their favour which could not be described as unduly onerous in any way, but they entirely failed to take advantage of that order. The first defendant only obtained the order of Apr. 29, 1954, vesting the premises in him when the plaintiffs had wholly failed to take advantage of the order which they had obtained and it stood dismissed. It is admitted by the plaintiffs here that there is no question of the first defendant having in any way abused his position or gone behind the backs of the plaintiffs in any way. He has behaved with perfect propriety; and gave every opportunity to the plaintiffs themselves to get relief, and it was only when they failed that he took steps. He was not, of course, at the relevant time in possession of the mortgaged premises. Counsel for the first defendant submits that really the matter rests on conscience and there is nothing whatever unconscionable in the first defendant claiming the lease for his own. He claimed it in the presence of the plaintiffs, who were parties to his application, and, indeed, they appealed to the judge in chambers. They had had their chance, and then it was open to the first defendant to step in and get a lease, and, therefore, it is said with much force that the lease granted to the first defendant ought to be treated as his own and not subject to the mortgage.

I Now whichever be the right view, certain anomalies, it seems to me, necessarily arise. If this new lease is not treated as part of the mortgage security, then I can see no reason in law why the first defendant should not keep his new lease and at the same time sue the plaintiffs for the whole mortgage money under the covenants in the mortgage, for the position in law can be no different from the case where the leasehold security has expired not by forfeiture, but by effluxion of time; that would seem to be a hardship on the plaintiffs. On the other hand, the anomalies certainly arise the other way if the plaintiffs are right. It is clear that the mortgagee receiving a new lease will remain liable on his covenants throughout the residue of the term, although he may be redeemed

by the mortgagor next day. If the mortgagor applied for relief, but was found to be quite unsuitable, because, for instance, he has used the demised premises as a brothel, and relief is refused on that ground, but a new lease is granted to the mortgagee, as happened in the recent case before me, *Grand Junction Canal v. Bates* (10), then, if the plaintiffs are right, the mortgagor being in a position to redeem the mortgage, the landlord, who has been compelled to grant a new lease to the mortgagee, finds that the wholly unsuitable mortgagor is again in possession of the demised premises. That would seem strange. Hardship arises whichever way one looks at the matter, and the question of hardship seldom affords a true guide as to the proper principles to be applied. A B

I think the matter is to be looked at in this way. At common law, if a lease was forfeited, that necessarily brought down with it all under-leases and much hardship to innocent persons was thereby caused. Thus it became the practice of the Court of Chancery to relieve against forfeiture for non-payment of rent, because the lease was looked on as mere security for the payment of rent; and statute carried that principle further*. I need not review the history of the statutes, which is too well known to require it. The relevant statutory provision is now embodied in the Law of Property Act, 1925, s. 146 (4). The whole object of the enactments was to relieve from the hardship of the common law. Looked at in that way, it seems to me that in principle, where the lessee defaults and the under-lessee comes forward, he comes forward to protect his position and to protect what in substance is his under-lease. It is quite true that he gets a new lease, but the whole essence of the matter is that he is to be protected in substance in respect of his under-lease, as VAUGHAN WILLIAMS, L.J., said in *Ewart v. Fryer* (1) ([1901] 1 Ch. at p. 512): C D E

"Now, in my judgment, s. 4 of the Conveyancing Act, 1892, was intended to protect a vested interest which the legislature thought ought to be protected. At law there is no privity between the under-lessee and the original lessor. The object of the statute was that protection should be given to the under-lessee." F

So here, it seems to me, in substance the legislature intends that the mortgagee shall be protected, and he is protected by his being given a new lease, but it must necessarily be a lease substituted for the old, and, therefore, in the case of a mortgagor, it must be in my judgment a substituted security.

Another way of regarding the matter is this. It seems to me that the position is closely analogous to cases of the right to renew a lease or to purchase the freehold reversion. Here, of course, there is no absolute and unqualified right, but everyone entering into a lease and an under-lease knows that there will be available to them the right of applying to the court to exercise a discretion in their favour on suitable terms where the lessee defaults. Accordingly, in my judgment, the lease created by the order of Apr. 29, 1954, must be treated as subject to the mortgage. G H

That gives rise to the second point. As I have already mentioned, on Oct. 4, 1954, the first defendant entered into a contract to sell the demised premises to the remaining defendants, and he contracted confessedly not in the exercise

* See the Landlord and Tenant Act, 1730, s. 4, superseded by ss. 210, 211 of the Common Law Procedure Act, 1852, 18 HALSBURY'S STATUTES (2nd Edn.) 412, 415, and s. 1 of the Common Law Procedure Act, 1860, replaced by s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, 18 HALSBURY'S STATUTES (2nd Edn.) 483, which now mainly governs relief against forfeiture for non-payment of rent. Relief against forfeiture for breaches of other covenants in leases than the covenants for payment of rent was governed principally by s. 14 of the Conveyancing Act, 1881, as modified by the Conveyancing and Law of Property Act, 1892, s. 4, now replaced by s. 146 of the Law of Property Act, 1925, 20 HALSBURY'S STATUTES (2nd Edn.) 739; sub-s. (4) of the section last-mentioned extends expressly to relief against forfeiture for non-payment of rent, but in general s. 146 does not so extend (*ibid.*, sub-s. (11)). I

A of his power of sale, which he could have done, notwithstanding the issue of the writ, but as absolute owner, he maintaining perfectly fairly, though in my judgment wrongly, that he was the absolute owner of the new lease granted to him. There was some argument before me, but, of course, counsel for the first defendant fairly admitted that, if he was wrong on the main point, as I have now held him to be, he could not resist an accounting of the proceeds of sale,

B having sold at a substantial profit. There was some discussion this morning, and it seemed to me possible that there might be some ground for restraining him from proceeding with this particular contract, because he had entered into it not rightfully in exercise of his power of sale but wrongfully purporting to deny the plaintiffs' title and to exercise his rights as absolute owner. The matter, however, does not call for decision, for counsel for the plaintiffs elected not to

C ask for any injunction to restrain the first defendant from proceeding with his contract. I shall make a declaration that the substituted lease is subject to the mortgage without prejudice to the question whether there is having regard to the contract a subsisting right to redeem and the register must be rectified in the appropriate manner.

Declaration accordingly.

D Solicitors: *Mark Lemon* (for the plaintiffs); *Scadding & Bodkin* (for all defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

E BROOME v. BROOME (EDMUNDSON cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), December 6, 7, 8, 15, 1954.]

Discovery—Production of documents—Privilege—Production contrary to the public interest—Oral evidence of witness under subpoena—Application by Crown to set aside subpoena.

F In a defended suit for divorce the wife caused a subpoena ad testificandum to be served on a representative of the Soldiers', Sailors', and Airmen's Families Association, and a subpoena duces tecum to be served on the Secretary of State for War to bring "All letters received by, copies of letters sent by, and memoranda and records made by, the . . . Association,"

G concerning the parties. The Secretary of State issued a certificate in which he stated that in his opinion it was not in the public interest that the documents should be produced or the evidence of the representative given orally. At the hearing of the suit application was made on behalf of the Crown to set aside the subpoenas.

H **Held:** (i) Crown privilege from disclosure could attach to all documents, irrespective of where they originated or in whose custody they reposed, provided that they had properly either emanated from, or come into the possession of, some servant or agent of the Crown; physical possession of a document by the Crown normally enabled the Crown to claim privilege; accordingly, Crown privilege attached to the documents in the present case (*Duncan v. Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587 and *Ellis v. Home Office*, [1953] 2 All E.R. 149 applied).

I (ii) even if it were within the competence of a Minister of the Crown to prevent a witness giving evidence on some set or class of facts, it was wrong to adopt a procedure which would prevent the witness giving any evidence of any sort; and, since the evidence of the S.S.A.F.A. representative might be of facts which it was not against the public interest to disclose and since to set aside the subpoena ad testificandum would have prevented the witness giving evidence of any fact, the application to set aside that subpoena failed.

(iii) as it was not possible to ascertain from the wording of the certificate the nature of the evidence for which privilege was claimed, it would not be right to allow counsel for the Crown to listen to each question and to take objection if he desired (observations of JENKINS, L.J., in *Ellis v. Home Office*, [1953] 2 All E.R. at p. 161, distinguished).

[**Editorial Note.** The claim of the Crown against the giving of evidence under the subpoena ad testificandum in the present case failed on a procedural question, but SACHS, J., referred to a passage in the opinion of VISCOUNT SIMON in *Duncan v. Cammell Laird & Co., Ltd.* ([1942] 1 All E.R. at p. 595, letter H) where it was said that the principle of Crown privilege (i.e., the rule that the interests of the state must not be put in jeopardy by the production of documents whose publication would be contrary to the public interest) must also apply to exclude verbal evidence (see p. 205, letter C, post). The present case leaves open the question of substantive law whether this dictum ought to be applied either to the type of fact with which the court was concerned in the case of *Duncan v. Cammell Laird & Co., Ltd.*, or to wider sets of fact such as those with which the court was concerned in the present case.

As to Discovery by or against the Crown, see 10 HALSBURY'S LAWS (2nd Edn.) 352, para. 423; and for cases on the subject, see 18 DIGEST 59-61, 161-176.

As to Public Policy as a ground for Resisting Production of Documents, see 10 HALSBURY'S LAWS (2nd Edn.) 397, para. 479; and for cases on the subject, see 18 DIGEST 166-169, 1202-1223.]

Cases referred to:

- (1) *Duncan v. Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587; [1942] A.C. 624; 111 L.J.K.B. 406; 166 L.T. 366; 2nd Digest Supp.
- (2) *Ellis v. Home Office*, [1953] 2 All E.R. 149; [1953] 2 Q.B. 135; 3rd Digest Supp.
- (3) *Ankin v. London & North Eastern Ry. Co.*, [1930] 1 K.B. 527; 99 L.J.K.B. 293; 142 L.T. 368; Digest Supp.
- (4) *Moss v. Chesham U.D.C.* (Jan. 16, 1945), Unreported.
- (5) *McTaggart v. McTaggart*, [1948] 2 All E.R. 754; [1949] P. 94; [1949] L.J.R. 82; 27 Digest (Repl.) 368, 3044.
- (6) *Mole v. Mole*, [1950] 2 All E.R. 328; [1951] P. 21; 27 Digest (Repl.) 368, 3046.
- (7) *R. v. Baines*, [1909] 1 K.B. 258; 78 L.J.K.B. 119; 100 L.T. 78; 72 J.P. 524; 11 Digest (Repl.) 575, 108.

Petition for divorce.

The wife, by petition dated Aug. 12, 1953, prayed that her marriage to the respondent might be dissolved. The parties were married in March, 1945, and there were two children of the marriage. The husband was a sergeant in the army and in 1949 was posted abroad. In March, 1951, the wife and the children joined the husband in Hong Kong, but returned to England in September, 1951. By her petition the wife alleged that the husband had treated her with cruelty and alleged, among other allegations:

"That on her arrival [in Hong Kong] the [wife] found that the [husband] had not applied for married quarters, and he took her to a filthy apartment of a standard far below his means; the [husband] failed to provide the [wife] with any help or assistance; kept her short of money and behaved disgracefully towards her."

The wife prayed, accordingly, that the marriage might be dissolved. The husband by his answer dated Nov. 19, 1953, denied the charge of cruelty. The wife caused a subpoena ad testificandum dated Dec. 10, 1953, to be served on one Mrs. Allsop, who was at the material time the sole representative of the Soldiers', Sailors', and Airmen's Families Association in Hong Kong. On Oct. 4, 1954, the husband amended his answer by adding an allegation that the wife

A had committed adultery and cross-praying for a divorce. The wife caused a subpoena duces tecum, dated Nov. 12, 1954, to be served on the Secretary of State for War, to bring

“All letters received by, copies of letters sent by, and memoranda and records made by, the Soldiers', Sailors', and Airmen's Families Association, concerning the [wife] and the [husband].”

B By a certificate dated Nov. 29, 1954, the Secretary of State for War stated:

C “I have read the correspondence and notes covered by the subpoena issued to me dated Nov. 12, 1954, and I have considered the evidence which Mrs. . . . Allsop could give, as set out in a statement taken from her and submitted to the Treasury Solicitor by [the wife's solicitors], and I am of opinion that it is not in the public interest that the documents should be produced or the evidence of Mrs. Allsop given orally.”

D When the suit came on for hearing counsel instructed by the Treasury Solicitor applied, before the opening of the case, to set aside both subpoenas, but at the request of SACHS, J., the argument was deferred until Mrs. Allsop was called to the witness-box. The report deals solely with the rulings of SACHS, J., on the claim of privilege made before the witness was sworn.

P. R. Hollins for the wife.

T. Dewar for the husband.

Rodger Winn for the Treasury Solicitor.

Cur. adv. vult.

E Dec. 15. SACHS, J., read a judgment in the course of which he said: It is convenient first to refer to the subpoena duces tecum. It was explained to me that the Soldiers', Sailors', and Airmen's Families Association, which I will call by its usual abbreviation S.S.A.F.A., is an association to which had been granted a charter of incorporation—and copies were in due course produced to me of its charter together with its rules, and its “duties of office bearers”. F Further, there was put before me, by consent of all concerned, the S.S.A.F.A. handbook of May, 1952, which details the work and administration of the association, a pamphlet of January, 1953, entitled “Welfare Notes for S.S.A.F.A. Overseas”, and pp. 75 to 80 of the Manual of Pay Duties—which has a section entitled “Separation or estrangement between the soldier and his wife”. G It being an integral part of the argument as put forward to me that S.S.A.F.A. was an independent body, and that neither the association itself nor its staff were employees of the Crown, it is convenient to state at the outset that the association's independence is made clear by its charter. Its work is, of course, well known to be of magnificent assistance to members and ex-members of the armed forces of the Crown and their families; and on pp. 21 to 22 of the handbook there is to be found a list of some twenty or thirty examples of the H work of the association. Amongst these many examples figure “family welfare and problems” and “service family problems”. Other examples range from “apprenticeship fees” to “widows, grants to”. In connection with “family welfare and problems” S.S.A.F.A.'s function as regards matrimonial cases, which has the special object of effecting reconciliations, is set out at p. 15 of the I handbook.

With the aid of this background information counsel for the Treasury Solicitor referred to the certificate by the Secretary of State for War dated Nov. 29, 1954, which stated, inter alia, that having read the correspondence and notes covered by the subpoena duces tecum addressed to him he was of the opinion that it was not in the public interest that the documents should be produced. In support of the claim for privilege counsel referred me to the well-known authorities *Duncan v. Cammell Laird & Co., Ltd.* (1), *Ellis v. Home Office* (2) and *Ankin v. London & North Eastern Ry. Co.* (3). In addition he assisted me by reading

considerable extracts from the argument of Mr. Comyns Carr, K.C., and Sir Valentine Holmes, K.C. respectively before LYNKEY, J., in *Moss v. Chesham U.D.C.* (4), together with the dicta of LYNKEY, J., in the course of those arguments. The above decisions seem to make it clear that where documents are concerned the Crown privilege can attach irrespective of where a document originates or in whose custody it reposes—subject, however, to the points that all the decided cases relate to documents which have either emanated from or have come into the possession of some servant or agent of the Crown properly, and that physical possession of a document by the Crown normally of itself enables the Crown to claim privilege. Although it was not made entirely clear how the documents came into the possession of the War Office, it has of course been assumed by me that they had not been lodged with the Secretary of State for War solely for the purpose of a claim for Crown privilege being made, and on that footing I accordingly ruled that Crown privilege attached to them—and, indeed, counsel for the wife did not in the upshot argue to the contrary.

Counsel for the Treasury Solicitor further argued that secondary evidence of the contents of the documents was not admissible on the ground that where it is contrary to the public interest for the document to be produced, then the privilege applies to secondary evidence, whether that evidence consists of a copy of the document or of oral evidence as to its contents. That point, however, did not arise in the present case, as no such secondary evidence was tendered. The authorities, however, appeared to support counsel's argument in relation to documents sent in the normal course of communication by or to servants of the Crown or their agents: but I am not sure (in the absence of full information as to precisely how the Crown came to possess these particular documents) whether the rule as to secondary evidence would necessarily have applied here. The position where the Crown is a mere bailee may need further examination. One point, however, I should make plain—that counsel for the Treasury Solicitor disclaimed (as indeed was clearly right) any suggestion that a fact stated in a privileged document could not be put in evidence aliunde merely because it had been stated in a privileged document.

Then came the argument on the application to set aside the subpoena ad testificandum addressed to Mrs. Allsop. Counsel for the Treasury Solicitor adduced arguments of a far-reaching nature to support first the Secretary of State for War's certificate which was in the following terms:

"I have read the correspondence and notes covered by the subpoena issued to me dated Nov. 12, 1954, and I have considered the evidence which Mrs. . . . Allsop could give, as set out in a statement taken from her and submitted to the Treasury Solicitor by [the wife's solicitors], and I am of opinion that it is not in the public interest that the documents should be produced or the evidence of Mrs. Allsop given orally,"

and, secondly, his argument that a correct method of attaining the object aimed at by the certificate was to have the subpoena set aside. The substance of his argument was that Crown privilege attached not merely to documents, to secondary evidence as to the contents of those documents, and to evidence as to what occurred at any government-instigated inquiries (other than public inquiries) that might have resulted in the compilation of the documents (e.g., if they happened to consist of reports), but also to any facts whatsoever, whether or not mentioned in documents to which Crown privilege attached. He submitted that a Minister of the Crown could give a certificate that the giving of evidence by any specified witness (whether or not a servant or agent of the Crown) as to any set of facts or class of facts would be contrary to the public interest, and that once that certificate was given those facts could not be given in evidence in court by the witness. Counsel submitted that if, for example, the issue in a civil action was whether A stole money or goods from B, it would be competent for a Minister of the Crown to certify that it was contrary to the public interest

- A for a witness who saw the theft to give evidence to that effect. According to counsel the sole test whether the privilege attached was the opinion of a Minister that for the witness to give that piece of evidence was contrary to the public interest, an opinion into which, he submitted, the court could make no inquiry. What may be compendiously described as "privilege by unexaminable certificate" was thus asserted to be all-embracing. That being counsel's submission
- B as to the state of the law, he went on to submit that the correct procedure when a Minister of the Crown had given a certificate in the general form used in the present case was for the Crown to apply for the subpoena addressed to the witness to be set aside.

- As regards the law relating to the powers of the Crown to prevent any and every witness giving evidence of facts which that witness had seen, counsel stated that
- C he was unable to produce any authority as to a court acting after full argument (or even without full argument) on such a broad claim by the Crown. He relied, however, on a dictum in the speech of VISCOUNT SIMON, L.C., in *Duncan v. Cammell Laird & Co., Ltd.* (1), a case relating to the specification and other documents held by agents of the Crown touching the construction of, and the condition of, a ship of war—the submarine *Thetis*. There it was stated ([1942] 1 All E.R. at p. 595):

"The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of verbal evidence which, if given, would jeopardise the interests of the community."

- As regards the evidence of Mrs. Allsop, counsel stated that the desire of the Crown
- E was to ensure that those works of S.S.A.F.A. which were concerned with maintaining good relations between husband and wife, and which often took the form of attempts to reconcile them after troubles had arisen, should be given the same sort of protection from disclosure in court as the efforts of probation officers and others who come within the Court of Appeal decisions of *McTaggart v. McTaggart* (5) and *Mole v. Mole* (6). For the S.S.A.F.A. organisation it was,
- F however, desired by the Minister of War that the protection from its efforts being the subject of evidence should apply whether or not the parties desired such protection, or even if both parties desired that the evidence be given. Counsel's point was that the privilege in cases like *Mole v. Mole* (6) could be waived by the parties, whereas the Minister of War desired that there should be no chance of such a waiver. The head of public interest put forward was that
- G of the maintenance of the morale of the armed forces.

- When, however, one had regard to the issues which were being contested in the present case, it was obvious that the case had so developed that the evidence of Mrs. Allsop might well be relevant to points which had arisen before there was any occasion for reconciliation between the parties. Thus there were disputes both as to what accommodation could have been secured by the husband at the time when
- H his wife arrived in Hong Kong; as to whether or not the accommodation he in fact secured was reasonable accommodation in the circumstances; and as to matters relating to general conditions in Hong Kong. Until questions were put to the witness it was obviously impossible to tell whether or not they came within that area of S.S.A.F.A. activities for which the Minister of War was stated to desire protection. An application to set aside the subpoena would,
- I if granted, have prevented the witness even being sworn, and would certainly have prevented her having given evidence on any fact, whether or not it was one against the public interest to disclose. Further, any certificate in a "blanket form" which stopped a witness going into the witness-box seems contrary in principle to those portions of the decided cases which enjoin Ministers before giving a certificate as regards documents to examine each in turn in the light of the issues arising in the case.*

* See, e.g., per JENKINS, L.J., in *Ellis v. Home Office*, [1953] 2 All E.R. at p. 160, letter H.

In those circumstances it seemed to me that even if it was within the competence of a Minister of the Crown to prevent a witness giving evidence on some set of facts or class of facts, it was surely wrong to adopt a procedure which would prevent the witness giving any evidence whatsoever of any sort. Certainly nothing in *R. v. Baines* (7) assisted counsel, as the present subpoena did not refer to a witness who could give no relevant evidence, nor was the subpoena oppressive in any way. Accordingly, I ruled that the application to set aside the subpoena failed.

Counsel then suggested that it might be left open to him to listen to each question in turn and take on that question such objection as might seem right. In that behalf he relied on a suggestion made by JENKINS, L.J., in his judgment in *Ellis v. Home Office* (2) ([1953] 2 All E.R. at p. 161). That suggestion, however, relates to the waiver of privilege after that privilege has been established. In the present case the form of the certificate was not such as to enable the court to ascertain from its wording what really was the nature of the evidence for which privilege was being claimed, and I declined to allow counsel to adopt the suggested course unless he obtained some further certificate on which I could consider better whether the privilege arose and what it attached to. I offered him an adjournment for that purpose, or in case he wished to test my ruling on the subpoena by going to the Court of Appeal, but in all the circumstances he preferred not to be granted such an adjournment for either purpose. The result was that he ceased to have a *locus standi* in the case, but helpfully volunteered to and did remain as *amicus curiae*.

As the claim to Crown privilege thus failed on an issue of procedure, it is not necessary for me to decide whether the privilege claimed exists or what is the correct procedure for claiming it; but the points having been developed in lucid and cogent argument on behalf of the Crown it seems right to say that at the stage when my ruling was given I had not been persuaded of the existence of the privilege in the terms in which it was submitted to me.

No case having been found in the reports of such privilege having been thus successfully asserted by the Crown, and no text-book vouching for its existence having been cited, I feel that any court would consider carefully before conceding to the Crown what would be in effect a general power wholly to suppress evidence from every source of facts merely on the unexaminable opinion of a Minister as to what that Minister regarded as the public interest. Whatever may be the position in other countries it would seem that this country has progressed for some considerable period without such a wide power having been thus asserted. In relation to the present case the claim involved the extension or development of Crown privilege in three separate directions, viz., (i) as to the all-embracing nature of the evidence privileged (for previous claims in this form have related only to documents) (ii) as to the persons affected (the claim referred to all witnesses, as opposed to classes of witnesses) and (iii) as to the heads of public interest (the head here asserted being maintenance of the morale of the forces). Before the claim of the Crown to such wide privilege were held to be valid in law, my inclination would have been to call for argument on certain further points. First, whether the development of Crown privilege on the grounds of public interest might not now be regarded by the courts in the same light as development of new heads of public policy invalidating contracts, and new heads of criminal charges against individuals of acting to the public mischief; the tendency in each of these matters being for the courts not to develop fresh heads but to leave that to the legislature. Secondly, if there is to be development it might be considered whether the development might not be circumscribed by reference to certain specific heads of public interest, such as the safety of the realm, international relations, and the prevention and detection of crime. (One cannot help noting that the steps which would extend the heads of public interest from "maintaining the morale of the forces" to "maintaining general

- A public morale " and thence to " maintaining the faith of the public in specific institutions serving it " are neither very large nor unduly illogical.) Thirdly, whether the present method for claiming privilege in relation to specific documents is necessarily apt for claiming privilege in relation to a witness who may be asked in the box to answer questions, the precise form of which cannot be ascertained until counsel has put those questions in the light of the course the case takes at the trial. Whilst the courts have never been slow to prevent improper disclosure of matters truly injurious to the vital interests of the realm, I doubt whether it can rightly be said that they in the past have found themselves unable or are now unable to prevent such improper disclosure of matters (at any rate in relation to the reasonably circumscribed matters indicated above) without the Crown being held to have so wide an area of privilege by unexaminable certificate as it now seeks to assert.

- It is of obvious importance to ensure generally that claims of Crown privilege are not used unnecessarily to the detriment of the vital need of the courts to have the truth put before them; and the facts of the present case well illustrate how easily it can be sought unnecessarily, albeit in the utmost good faith, to make such a claim. When Mrs. Allsop was called she spoke of the way in which the wife was received at the quay at Hong Kong, of the sort of accommodation which was available for wives, of the suitability of certain accommodation which the husband had secured, and of the wife having a certain disability which made it the harder for her to bear intensely hot weather. On all those points her evidence was of assistance to the court; on none of them was there any apparent cause for any intervention in the name of Crown privilege. When the witness's evidence began to verge on later matters which had been her concern in her capacity as conciliator it was easy to ensure that the principles laid down in *Mole v. Mole* (6) were applied. Indeed, counsel for the Treasury Solicitor in the upshot appeared readily to concede that nothing had happened which really called for intervention by the Crown, even if the privilege existed. The effect of the evidence which thus became available was as follows: that the husband and wife on their meeting on the quay were in tears of joy, and that there was nothing unfriendly in the reception of the wife on the part of the husband. Next, that the wife was taken to accommodation which had been approved as suitable by the commanding officer—although the accommodation to which she was taken was not Lytton House to which most of the other wives on the transport had gone. Lytton House it so happened had been one of the places where the husband tried to get accommodation, but he had been told that it was full.

Rule accordingly.

Solicitors: *Barton & Hanning* (for the wife); *Rowley, Ashworth & Co.*, agents for *Nash, Howett, Cocks & Clapp*, Plymouth (for the husband); *Treasury Solicitor*.

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

H

WRIGHT v. WALFORD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), December 14, 15, 16, 1954.]

- Rent Restriction—Possession—House required by landlord—“ Not being a landlord who has become landlord by purchasing the dwelling-house after Sept. 1, 1939 ”—Purchase by sub-tenant in 1952—Surrender of tenancy of the whole house against grant of new tenancy of the part of the house occupied by tenant—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5 c. 32), Sch. 1, para. (h), as amended by Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 Geo. 6 c. 71), s. 3 (1) and Sch. 1.*

I

In 1940 the then landlord let to the defendant a dwelling-house consisting of a basement and three floors at a weekly rent of £1. In 1948 the defendant sub-let the two top floors to the plaintiff. In January, 1952, the plaintiff purchased the freehold of the dwelling-house, but continued to occupy

the two top floors as sub-tenant of the defendant. In July, 1952, the plaintiff gave to the defendant notice to quit the whole house, offering as alternative accommodation the part in fact occupied by the defendant, namely, the basement and ground floor. By an agreement made in September, 1952, the defendant surrendered his tenancy of the whole house to the plaintiff and became a contractual tenant of the basement and the ground floor. In May, 1954, the plaintiff served on the defendant notice to quit the basement and ground floor. The plaintiff now claimed possession of the basement and the ground floor under Sch. 1, para. (h), to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, alleging that he, not being a landlord who had become landlord by purchasing the dwelling-house after Sept. 1, 1939, reasonably required the same for occupation as a residence for himself.

Held: since the plaintiff had become the landlord of the defendant as result of purchasing the dwelling-house and had so remained without a break ever since, even though the incidents of the relationship between the plaintiff and the defendant had been varied by negotiation, the plaintiff was a landlord who had become a landlord by purchasing the dwelling-house within the meaning of para. (h) of Sch. 1 to the Act of 1933, and, therefore, was not entitled to recover possession under that paragraph.

Dictum of SCOTT, L.J., in *Fowle v. Bell* ([1946] 2 All E.R. at p. 669) considered and the dictum of DENNING, L.J., in *Littlechild v. Holt* ([1949] 1 All E.R. at p. 937) distinguished and not applied.

Appeal dismissed.

[As to Landlord's Right to Possession of a Dwelling-House for His Own Occupation under the Rent Restrictions Acts, see 20 HALSBURY'S LAWS (2nd Edn.) 332, para. 396; and for cases on the subject, see 31 DIGEST (Repl.) 705, 706, 7937-7948.]

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (h), and the Rent and Mortgage Interest Restrictions Act, 1939, Sch. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 1019, 1060 and 1081.]

Cases referred to:

- (1) *Epps v. Rothnie*, [1946] 1 All E.R. 146; [1945] K.B. 562; 114 L.J.K.B. 511; 173 L.T. 353; 31 Digest (Repl.) 705, 7938.
- (2) *Fowle v. Bell*, [1946] 2 All E.R. 668; [1947] K.B. 242; [1947] L.J.R. 115; 31 Digest (Repl.) 708, 7957.
- (3) *Littlechild v. Holt*, [1949] 1 All E.R. 933; [1950] 1 K.B. 1; [1949] L.J.R. 1299; 31 Digest 707, 7953.
- (4) *Cairns v. Piper*, [1954] 2 All E.R. 611; [1954] 2 Q.B. 210.

Appeal.

The plaintiff appealed against an order of His Honour JUDGE GLAZEBOOK, sitting at Gravesend County Court, dated July 19, 1954.

In 1940, premises at 11 Darnley Street, Gravesend, were let to the defendant. The premises consisted of the basement and ground floor (having together five rooms) and the first and second floors (having together three rooms). In 1948 the defendant sub-let the first and second floors to the plaintiff, but remained in occupation of the basement and ground floor. In January, 1952, the plaintiff bought the premises from the then landlord, the defendant being unable or unwilling to make the purchase. On July 16, 1952, the plaintiff sent to the defendant a notice to quit the premises, and by letter of the same day offered as alternative accommodation the two floors which the defendant then in fact occupied, namely, the basement and ground floor. The defendant accepted that offer and by an agreement made on Sept. 30, 1952, the defendant surrendered his tenancy of the premises and entered into a new contract of tenancy with the plaintiff in respect of the basement and ground floor. By a

- A notice to quit dated May 11, 1954, the plaintiff determined that tenancy. On May 26, 1954, the plaintiff instituted proceedings in the county court claiming against the defendant possession of the basement and ground floor and offering as alternative accommodation the two rooms and kitchen in the basement, alternatively alleging that the basement and ground floor were reasonably required for occupation as a residence for himself, the plaintiff, and his family.
- B At the hearing the plaintiff stated that he would be satisfied if he obtained possession of only one room on the ground floor and not the two rooms which he had claimed.

The county court judge found (i) that the alternative accommodation offered was not reasonably suitable to the needs of the defendant and his family as regards extent and (ii) that the plaintiff had become landlord by purchasing the dwelling-house after Sept. 1, 1939, within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (h), and that, therefore, the plaintiff's claim failed.

- C On the merits of the second issue, the county court judge found that the plaintiff would have been entitled to recover possession of one room on the ground floor, and that it would have been reasonable to have made such an order under s. 3 (1) of the Act of 1933. The plaintiff now appealed.
- D

R. E. Megarry for the plaintiff.

G. Avgherinos for the defendant.

- SIR RAYMOND EVERSLED, M.R.:** The question in this difficult case is whether or not the plaintiff is entitled to an order for possession against the defendant (the county court judge having intimated that he would exercise all the discretions which are relevant in the plaintiff's favour), having regard to the provisions in the parenthesis in para. (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The parenthesis is well known, and reads:
- E
- F “not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [a particular date which may vary with the particular house].”

- Although on a first reading those few words in the parenthesis would not appear abstruse or involved, they have, none the less, given rise from time to time to questions which have been decided in this court. For example, it was held in *Epps v. Rothnie* (1) that the words did not apply where the tenant being sued had been granted his tenancy after the landlord had purchased the house, which had been vacant when the previous owner sold. In *Fowle v. Bell* (2) it was held in somewhat similar circumstances that, where at the date of the purchase the house was tenanted, but by a different tenant from the tenant who was the defendant in the suit, the parenthesis did not apply so as to give an added measure of protection to the tenant. A third case, *Littlechild v. Holt* (3) was more complicated. At the date of the hearing the person in the position of landlord was not the landlord who had acquired the premises; for the latter had died, and his position had been taken by his wife as his personal representative. Similarly, the tenant who was in fact in occupation at the date of the purchase, had also died, but his position had been taken by a relative in pursuance of the special privileges conferred on a certain class of relatives by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g). In the peculiar circumstances of that case, this court came to the conclusion that the protection which had belonged originally to the tenant at the time of the purchase persisted in the person of that tenant's relative and availed against the former landlord's widow. The last case in point of time was *Cairns v. Piper* (4) where the problem posed was: If the person being sued as tenant at the date of the writ had been a sub-tenant at the date of the purchase, how did that person stand as
- G
- H
- I

regards this parenthesis? And this court said: That person does not get the protection of the parenthesis. A

It is not uncommon in regard to questions arising under the Rent Acts to find that that which appears at first sight plain, when applied to particular facts, gives rise to problems which are far from easy. The facts of the present case are different from any of those which I have mentioned.

[HIS LORDSHIP stated the facts and continued:] In 1952 the plaintiff was, without doubt, vis-à-vis the defendant subject to the disability of para. (h), and when he gave the defendant notice to quit in July, 1952, he offered alternative accommodation to the defendant. On a first reading of this legislation no one would think that a landlord could offer as alternative accommodation the same accommodation which the tenant was then occupying; but that that can be done is now accepted. The plaintiff, therefore, offered to the defendant the two floors which he then in fact occupied. The defendant thought that, having regard to the threat of proceedings, it was better for him to accept that offer. I have no doubt that he came to that conclusion on good advice and thereby avoided the expensive luxury of litigation. By agreement between the parties there was, therefore, an agreement on the defendant's part to surrender the original tenancy of the whole house. That was followed by a new contractual tenancy between the plaintiff and the defendant limited to the ground floor and basement. The plaintiff's original sub-tenancy determined, of course, with the surrender of the head tenancy. The present proceedings were then started, the plaintiff seeking possession, having first validly determined the contractual tenancy, of the ground floor and basement. He is really asking for no more than one room only, but he says: "I am now no longer in this matter subject to the special prohibition of the parenthesis, because our relationship is something quite new which has come into being by the voluntary act or acts of the parties since I, the landlord, purchased this house. Therefore, it is no more true to say of me that I have become your landlord by purchasing the dwelling-house than it would be if you, the defendant, had gone away altogether and I had granted a new tenancy to an entirely different person who had never been there before." That is the problem, and it is plain that it is really in a small compass, although, having regard to the decided cases, it is not easy to keep it in its right perspective. I am bound, indeed, to make some references to those earlier cases. B C D E F

I preface my references to those cases with this observation, an observation which in other contexts has been made before. After a matter has come before the courts on the meaning of a phrase in an Act of Parliament there is a certain danger that the courts thereafter will be construing not the Act of Parliament and the words in it, but expositions of the Act of Parliament which find their place in judgments of the court. That is apt to be a dangerous process, because the expositions were made in reference to, and in a sense so as to be necessarily limited to, the particular facts of the particular cases in which they were pronounced. I need say no more than I have done about *Epps v. Rothnie* (1). In *Fowle v. Bell* (2), the argument, having regard to the facts which I have already stated, resolved itself into this question: Did the phrase "not being a landlord who has become landlord" mean merely "become landlord of the premises"? If it meant that, then any tenant could pray in aid the restriction of the parenthesis against a landlord who, in fact, had become landlord of the premises since the relevant date, even though the tenant came into possession much later than the purchase. That view, put forward by the tenant, was rejected by this court. In the course of his judgment SCOTT, L.J., used this language, and having regard to the later citations of this passage it is obviously most important ([1946] 2 All E.R. at p. 669): G H I

"In considering the bracketed exception to para. (h), we must bear in mind that it is found in an enabling provision which confers jurisdiction on

A the judge to order possession to be given to the landlord, and, therefore, if there be ambiguity in the exception, it ought to be construed in favour of the landlord and not against him. The phraseology seems to me necessarily to mean this, 'not being a landlord who, in relation to the tenant before the court, has become that tenant's landlord by purchasing the dwelling-house or any interest therein after' the given date. The exception so read would
B achieve what I cannot help thinking was the object of enacting it, namely, to prevent an outsider buying a house occupied by a tenant, giving the tenant notice to quit, and coming to the court for an order to get rid of him."

SCOTT, L.J., also made reference (*ibid.*, at p. 670) to the language of MacKINNON, L.J., in *Epps v. Rothnie* (1) ([1946] 1 All E.R. at p. 148) to this effect, that if the
C contrary view prevailed, that is, if "the landlord" meant "the landlord of premises", then it was a mere waste of words to put in the long formula "not being a landlord who has become landlord."

The statement which I have read sufficed to decide the case of *Fowle v. Bell* (2). It need hardly be said, however, that such a case as the present was not in the mind of the learned lord justice, and when he said: "The phraseology seems
D to me necessarily to mean this . . ." I do not think he was intending to give an exhaustive exposition of the exact scope and significance of this phrase for all purposes. If he was, it will be seen at once that a problem of some difficulty arises. What happens if the "sitting" tenant at the date of the purchase subsequently goes away, returns years later and then claims under a new contractual tenancy? The question would then be whether or not he would have
E attached to him the privilege of para. (h). If the answer to that question were "yes", it would, I think, be a very strange result, and would appear to have no sort of relation to what, agreeing with SCOTT, L.J., I assume has been the plain intention of the Act. But the exegesis of SCOTT, L.J., does not decide that point:

F "The phraseology seems to me necessarily to mean this, 'not being a landlord who, in relation to the tenant before the court, has become that tenant's landlord by purchasing the dwelling-house . . .'."

It is impossible, I think, to read that phrase as conferring this exemption on a particular individual, however long might be his absence from the premises. That point impressed me so much in the plaintiff's favour that I thought at
G first that the argument for the defendant would have to concede this rather peculiar anomaly: that if you said that "the landlord" must mean either the landlord of the premises or the landlord of a particular tenant, then if you chose the latter, you gave to a particular individual a special and quite irrational privilege. Counsel for the defendant did not accept that he was in that difficult position. Indeed, it was so clearly an irrational result that counsel for the
H plaintiff himself suggested that the word "landlord" should not in any case be defined as meaning "the landlord of a particular tenant" (that is, the tenant before the court) but as the landlord of the tenant by virtue of a particular contractual or other relationship; the landlord, that is to say, who became landlord of the tenant before the court *holding under his present title*. That suggestion involves undoubtedly inserting words into the statute. It may sometimes be
I that the words inserted are in truth inherent in the word actually used, in this case the word "landlord". But on the whole I have come to the conclusion that the insertion suggested by counsel for the plaintiff is not justified. I cannot find that we ought to put so elaborate a character on this simple phrase—even for the purpose of avoiding the anomalous consequence which follows from interpreting the word "landlord" as meaning "landlord of the tenant".

I will now refer to *Littlechild v. Holt* (3). Plainly, as I read the judgments in that case (and I am fortified in that view by the circumstance that BIRKETT, J., one of the judges then sitting, has his own recollection of the matter) the most

important question was:—did the widow of Mr. Littlechild stand in any better position than her deceased husband, she having acquired the premises not by purchase, but because she was the widow, the administratrix, and the beneficiary of her late husband? The court answered that question negatively by saying that she could be in no better position than Mr. Littlechild; putting it conversely, that Mr. Littlechild could not confer on his widow any greater right or title than he himself possessed. The judgments of LORD GODDARD, C.J., who presided over the court, and BIRKETT, J., are, indeed, confined to that matter. There was, of course, a second point. Mrs. Holt, the defendant, as I have said, had succeeded to the occupation of the house because she was the daughter of her late father, Mr. Mills, and, therefore, the court also had to decide how she stood in relation to this matter. Naturally enough *Fowle v. Bell* (2) and the language of SCOTT, L.J., were cited. It was said that Mrs. Holt was outside this formula of SCOTT, L.J.'s language. That formula "not being a landlord who, in relation to the tenant before the court, has become that tenant's landlord", had no application in Mrs. Holt's case, since when Mr. Littlechild purchased Mrs. Holt was not the tenant at all. My own view of *Littlechild v. Holt* (3) is that that second question was resolved in Mrs. Holt's favour in this fashion. It was said that if you look at the operative part of the Act of 1933 and the opening paragraph of Sch. 1, you find that it is there provided that "A court shall . . . make . . . an order for the ejectment of a tenant" if certain things happen; and it was said that the particular right which s. 12 (1) (g) of the Act of 1920 confers on certain relatives is done by an oblique method, since it merely provides something in the way of a definition.

Section 12 (1) (g)*, says:

" . . . the expressions 'tenant' and 'tenancy' include sub-tenant and sub-tenancy, and the expression 'let' includes sub-let; and the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

The result of that somewhat unusual method of enactment is not to confer affirmatively by statute a particular right on a named relative, but by definition to extend the meaning of the word "tenant" to persons other than the one individual; in other words, for the purpose of *Littlechild v. Holt* (3) the court proceeded, as I think, on the view that Mr. Mills and his daughter Mrs. Holt were indivisible and indistinguishable for all relevant purposes. Both were comprehended in the words "the tenant" for those purposes. But DENNING, L.J., went a good deal further, and alone of the members of the court dealt generally with the situation of a tenant claiming the protection of this parenthesis. He said ([1949] 1 All E.R. at p. 937): "For a landlord to be under the disability, three requisites are necessary." I leave out the first, because nothing turns on that in the present case, and he continues:

"Secondly, there must have been a contractual or statutory tenancy in existence at the time of the purchase which is still in existence today, but there need not be the same tenant there. It is the tenancy which is protected, whether it is a contractual tenancy which since the purchase has become a statutory tenancy, or whether it has been a statutory tenancy all the time. The protection is not lost by a contractual tenant assigning his interest to another, or by a member of the tenant's family succeeding to a statutory tenancy, but it is lost when the tenancy expires and a new one is voluntarily created."

* Printed as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1. The paragraph has recently been amended also by the Housing Repairs and Rents Act, 1954, s. 42 (2).

- A Counsel for the plaintiff, naturally enough, fastened on that passage in the judgment of DENNING, L.J., and said that if that were to be treated as an exhaustive exposition of the relevant provisions of the Act, then the plaintiff must win the present case, because beyond a peradventure the "tenancy" which existed and which related the plaintiff to the defendant when the premises were purchased has since expired, and has given place to a new one voluntarily created. But once more, with all respect to DENNING, L.J., I do not think he was intending to propound an exhaustive exposition of this parenthesis, and it was quite unnecessary for him to do so. Equally clear is it to my mind that he had not a case like the present in mind, for the cases he cited in support of his last and vital sentence were *Epps v. Rothnie* (1) and *Fowle v. Bell* (2). Therefore, just as SCOTT, L.J.'s statement is not to be regarded as more than an exposition of the Act for the purposes of *Fowle v. Bell* (2), so I take the exposition of DENNING, L.J., as no more than one equally appropriate for dealing with, but only with, *Littlechild v. Holt* (3). If it went further, I, for my part, as at present advised, should not agree with it. I do not myself find it easy to accept the notion that when Parliament speaks of a landlord it means a landlord not of premises, not of a tenant, but of a "tenancy". It seems (if I may say so with all respect to those who have in other places used the phrase) an unnatural use of language. If DENNING, L.J., is right, according to the literal sense of his language, it seems to me that very curious results are produced. For, according to DENNING, L.J.'s phrase, if the tenant in possession under a contractual tenancy when the landlord purchased later assigned for value to someone else, then that someone else would get the protection of this paragraph. That seems to me to be no less irrational and contrary to the real intention of the statute than the other imaginary case put forward by counsel for the plaintiff.

- Having referred, therefore, to those two passages, the one of SCOTT, L.J., and the other of DENNING, L.J., and finding neither is sufficient in terms to decide this case, or ought to be regarded by this court as binding us to decide it in a particular way, I now return to the facts of the present case and to the language of the Act of 1933 as it stands. I ask myself the question: Having regard to the facts which I have stated, is the plaintiff here a landlord who has become landlord (and that must mean here the tenant's landlord) by purchasing the dwelling-house? According to the common sense of the matter, I think the answer is that he is. As a result of his purchase he became in truth, as to the ground floor and the basement, the landlord of the defendant, and so he has remained without a break ever since. It is true that the precise character and incidents of the relationship have varied. There was a period when the defendant was a statutory tenant and when his tenancy comprehended other rooms, though he was not in personal enjoyment of those other rooms; and now a new tenancy has been created. But as regards the dwelling-house of which those two floors consist, the plaintiff became, as a result of the purchase, the defendant's landlord of that dwelling-house, and so he has remained consistently ever since. I think I am helped towards that conclusion by referring again to the Act of 1933. Paragraph (h) of Sch. 1 is to be read in conjunction with the opening words of the schedule which refer to the ejectment of a tenant. I begin by noting in para. (h) the words "the dwelling-house is reasonably required by the landlord", and I ask—Who is that? Obviously the tenant's landlord, the landlord of the tenant against whom the landlord has proceeded. Then comes the parenthesis " (not being a landlord who has become . . .) ", and I interpret that as meaning "not being one who has become such by purchasing . . . ". I notice the phrase is "has become", not "became". Applying the standards of common sense to the facts in the present case, I think, as I have said, that the plaintiff cannot avoid the result that he is a person who "has become" the defendant's landlord by purchasing; for that is how it is that he both became, and also has remained, his landlord, although he has since by negotiation altered somewhat the precise incidents to the relationship between them.

Confining myself, therefore, to the limited circumstances of the present case, I conclude that the answer is that which the county court judge gave. I realise (and I mention it because counsel for the plaintiff very naturally and properly emphasised it) that the decision does create something of an anomaly between the case where a landlord, admittedly restricted by the parenthesis, proceeds for possession and provides alternative accommodation elsewhere on the one hand, and the case where the landlord's alternative accommodation consists of the precise accommodation which the tenant was in fact enjoying at the time of the proceedings. I have said that the idea that the latter is, or was regarded by Parliament as being, alternative accommodation seems to me to be, perhaps, one of the most surprising results of the legislation; but I think that somewhat remarkable result being now accepted, the anomaly has in consequence been created. I am not, however, dismayed by it, because, so far as I can see, whatever attempts one makes to answer this problem, it is impossible to avoid some peculiar results. Nor, secondly, do I forget the passage in SCOTT, L.J.'s judgment that where there is ambiguity the court should tend to favour the landlord, since para. (h) of Sch. 1 was a provision for a landlord's benefit. But the first thing is to try to see what the words mean when applied to the facts of the case, and having reached my conclusion on that process, I find no room for another view which would favour the landlord, particularly since, as I think, the alternative would inevitably involve considerable interpolations into the words Parliament has used of further words of explanation or definition. I desire, lastly, to make it clear that I have not forgotten the importance of the point that the defendant in any case has the protection of the county court judge's discretion on the matter of reasonableness.* That, I think, is a highly impressive point, and I feel, if I may say so, that the result in the present case is rather hard for the landlord. A more reasonable sharing of this house, according to the judge, would have resulted from a yielding on the defendant's part of one room to the plaintiff. Having regard to the changes in the families of both the parties, it may be that a certain amount of good neighbourliness and consideration can now be brought to bear so as to overcome the present difficulty. That, however, is another matter.

It seems to me that, if a person was in occupation of a dwelling-house when the reversion of his tenancy was acquired by another, and if he has never ceased to occupy that dwelling-house as the tenant of that other, then it would offend against the sense and intention of Sch. 1, para. (h), and of the plain words used, to say: "Since the precise relationship which governs the relationship of landlord and tenant has undergone a voluntary change, therefore you, the tenant, can no longer allege against the landlord that he has become your landlord by purchasing the dwelling-house." I have done little more than follow and expand the reasoning of the county court judge. He said, after reading the passage from DENNING, L.J.'s judgment:

"If the words of the second requisite ["that there must have been a contractual or statutory tenancy which is still in existence today"] are accepted literally, the landlord here must succeed. But in *Littlechild v. Holt* (3) the tenant seeking protection was a person who had succeeded to the tenancy under s. 12 (1) (g) of the Act of 1920, and the reference to *Epps v. Rothnie* (1) and *Fowle v. Bell* (2) seems to me to indicate that the lord justice did not have in mind the circumstances that have arisen in the present case. Further, the lord justice says 'voluntarily created', and, as I have already indicated, I do not think the agreement of Sept. 30, 1952, was in a true sense voluntary. It would be strange if a tenant could put himself in a better position by incurring the costs of unnecessary litigation and

* I.e., in relation to the claim for possession based on the offer of alternative accommodation; see p. 209, letter B, ante.

A submitting to an order of the court. My conclusion is that it is the policy of the Acts to protect a tenant in the position of the defendant; that the words of the disabling phrase [in para. (h)] are clearly capable of being construed to protect him and that they ought to be construed accordingly."

My conclusion is the same. I would dismiss the appeal.

B **BIRKETT, L.J.:** I agree. The only question with which we are concerned is whether or not, on the special facts of the present case, the plaintiff is a landlord who has become landlord by purchasing the dwelling-house after Sept. 1, 1939, so as to place him under the disability of para. (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. I agree with SIR RAYMOND EVERSLED, M.R., that the county court judge dealt with this topic

C in the words which he has quoted, and in particular in words which I desire to emphasise:

"My conclusion is that it is the policy of the Acts to protect a tenant in the position of the defendant; that the words of the disabling phrase [in para. (h)] are clearly capable of being construed to protect him, and that they ought to be construed accordingly."

D In my experience no point arising under the Rent Acts is ever simple or easy; on the contrary, some of the most complicated and thorny problems arise under the provisions of these Acts, and one must simply do the best one can. [His LORDSHIP stated the facts and continued:] It appears to have been conceded that so far as the defendant's contractual tenancy in the first instance was

E concerned, the disability that attached to para. (h) of Sch. 1 to the Act of 1933 was binding on the plaintiff. Similarly, the same disability attached to the statutory tenancy which arose in consequence of the notice to quit served in July, 1952; but it is said, "Because of the agreement made on Sept. 30, 1952, which is set out in the correspondence in detail, whereby the defendant surrendered the tenancy which was subsisting in July, 1952, and entered into this

F new tenancy for different rooms in the same house, the old disability under para. (h) of Sch. 1 thereby departed." I gathered that counsel for the plaintiff's sole point on this matter was that whilst the disability clearly attached before the moment when the defendant's tenancy had been surrendered, and the new agreement had been entered into, yet the disability ceased from that moment and the plaintiff was no longer restricted by the disability. He relied strongly,

G as SIR RAYMOND EVERSLED, M.R., said, on *Littlechild v. Holt* (3). It is idle to say five years afterwards that I, as a member of that court, remember that case in great detail, but I do remember the case well.

It is clear that there were two points in that case, a major and a minor point. The minor point concerned the position of Mrs. Holt. Was she a tenant, and was she protected, or was she not? I think her counsel said that, by reason of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended*, she stood in the shoes of her father as the sitting tenant and was similarly protected; that is to say, that she could not be evicted because of the disabling provision in para. (h) of Sch. 1 to the Act of 1933. In reply, counsel for Mrs. Littlechild said that Mr. Littlechild was within the exception of that paragraph as against Mr. Mills, the original tenant, but that Mrs. Holt's tenancy was a separate tenancy. On that point LORD GODDARD, C.J., who

H delivered the leading judgment, said ([1949] 1 All E.R. at p. 935):

I

"The question then arises whether or not Mrs. Holt was in the position of a protected person holding over after her father's death. I think there is no doubt that she was. By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g)* . . . ' . . . the expression "tenant"

* Amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1. The paragraph has recently been amended also by the Housing Repairs and Rents Act, 1954, s. 42 (2).

includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court.' Mrs. Holt has been found by the learned judge to be a member of the tenant's family residing with him at the time of his death, and it is necessary that she should have resided there for six months. That also, we must assume, was found in her favour by the learned judge."

For the moment I pass over the judgment of DENNING, L.J. I said (*ibid.*, at p. 937):

"My Lord, in his judgment, stated clearly the position of Mrs. Holt, and came to the conclusion, both on the construction of the Acts of Parliament and on the findings of the learned county court judge, that she was a protected tenant."

DENNING, L.J., who dealt first of all in his judgment with the major question, referred to the matter of Mrs. Holt's position in these words (*ibid.*, at p. 937):

"There was then a statutory tenancy in existence in the hands of Mr. Mills. That tenancy is still in existence today in the hands of his daughter, Mrs. Holt, who, as a member of his family, succeeded to the tenancy. Mr. Littlechild was, therefore, subject to the disability, and his wife, as his successor, is in no better position than he. Therefore, the disability applies, and the landlord cannot get possession without giving alternative accommodation."

The learned county court judge in *Littlechild v. Holt* (3) had taken the words in para. (h) literally and said that whatever might have been the position of Mr. Littlechild, who did undoubtedly purchase the premises, Mrs. Littlechild never bought the premises, and, therefore, she was not, and could not be, a landlord who had become landlord by purchase, and the court, dealing, as I have said, with the major problem, unanimously reversed that decision.

The only difficulty about that case arises from the words in the judgment of DENNING, L.J., on which, naturally, counsel for the plaintiff placed great reliance. It is difficult, of course, for anyone to say what exactly was in the mind of a judge dealing with particular facts in a particular case when he gave utterance to certain words, but I speak with some confidence when I say for my own part I am sure DENNING, L.J., did not have in mind at that time the situation with which we have been confronted in the present case. Indeed, if the words on which counsel for the plaintiff relied are looked at for a moment, I think that becomes plain (*ibid.*, at p. 937):

"Secondly, there must have been a contractual or statutory tenancy in existence at the time of the purchase which is still in existence today, but there need not be the same tenant there."

That was to apply to Mrs. Holt. We were dealing with a case where it had been contended, on the one hand, that Mrs. Holt was a separate person altogether, and that hers was quite a separate tenancy, and, on the other hand, that she stood in the shoes of her father under s. 12 (1) (g) of the Act of 1920. Then DENNING, L.J., proceeded (*ibid.*, at p. 937):

"It is the tenancy which is protected, whether it is a contractual tenancy which since the purchase has become a statutory tenancy, or whether it has been a statutory tenancy all the time."

The learned lord justice went on in this rather, if I may say so with great respect, controversial sentence:

"The protection is not lost by a contractual tenant assigning his interest to another, or by a member of the tenant's family succeeding to a statutory tenancy, but it is lost when the tenancy expires and a new one is voluntarily created."

- A Then, as SIR RAYMOND EVERSHED, M.R., has pointed out, the learned lord justice in support of that contention referred to *Epps v. Rothnie* (1), where it was held that the disability does not apply to a person who buys with vacant possession and subsequently lets the house, and to *Fowle v. Bell* (2), where a landlord, when the house became vacant, re-let to a new tenant. I cannot think the very special facts of the present case were present to DENNING, L.J.'s
- B mind when he made those observations.

- I think it must be clearly faced, as counsel for the plaintiff said, that there was in the present case a surrender of the existing tenancy, and the creation of a new tenancy in the terms of the letter of Sept. 30, 1952; but I am by no means satisfied on the facts that, therefore, the disabling provision of para. (h) is removed, and I think myself I would like to adopt exactly what SIR RAYMOND
- C EVERSHED, M.R., said with regard to that matter. If on the facts of the present case anyone was to ask how this plaintiff became the landlord of this defendant the answer is that he obviously became the landlord because he bought the premises. It is true there has been an adjustment which has been the subject of agreement, and it is true that the defendant surrendered the tenancy which formerly existed between them with regard to certain rooms and took on other
- D rooms in the same building which had been purchased by the landlord. I think if the question is asked: Did the plaintiff become landlord by purchase? the answer is "yes". I think the words "has become" refer to a past event. The words "who has become the landlord" relate to the present. The plaintiff may have purchased two years ago, but he is the landlord today in consequence of that purchase; thus he has become the landlord by purchase. I see clearly
- E the strength of counsel for the plaintiff's contention, namely, that though the plaintiff certainly was the landlord by purchase with regard to the original contractual tenancy, and certainly was the landlord by purchase in the case of the statutory tenancy which came into existence after the notice to quit in July, 1952, the moment that statutory tenancy was ended, and the new contractual tenancy was brought into being between the parties in September, 1952, a new
- F state of affairs was created and the disabling provision of para. (h) no longer applied. I still take the view, however, that the county court judge was right in his decision. After examining all the facts in the present case, and bearing in mind what DENNING, L.J., had said ([1949] 2 All E.R. at p. 937), the county court judge expressed the view which I think has much to support it:

- G "that the lord justice did not have in mind the circumstances that have arisen in the present case . . . My conclusion is that it is the policy of the Acts to protect a tenant in the position of the defendant; that the words of the disabling phrase [in para. (h)] are clearly capable of being construed to protect him, and they ought to be construed accordingly."

- It clearly was the intention of Parliament when the rent restrictions legislation
- H was first introduced, and as it was later developed, to say: "In certain circumstances the landlord may obtain possession if he can show that the premises are reasonably required by him, but we will absolutely bar a man from saying: 'I am the landlord, and I do want the premises for my own possession, but I have only recently bought the premises and put myself in the position so that I can turn that tenant out'." Paragraph (h) provided an additional protection
- I to tenants, and I think, on the special facts in the present case, the protection ought to be given to the defendant, as the county court judge decided. In answer to the question—Is the plaintiff a landlord who has become landlord by purchase since 1939?—I would say—"In my opinion, he is"—and I would dismiss the appeal.

ROMER, L.J.: I agree. I am satisfied, after the elaborate and able argument which has been addressed to us, that the word "landlord" which appears in parenthesis in para. (h) of Sch. 1 to the Rent and Mortgage Interest

Restrictions (Amendment) Act, 1933, is related to "tenant" and not to "tenancy". In the first place, I think the conception of "landlord of a tenancy" is extremely unusual, and I, personally, have never met it in practice. That being so, one would assume that the word was intended to be used in its ordinary meaning and that it should be read as meaning either "landlord of premises" or "landlord of a tenant". "Landlord of premises" is not the construction it has received from the courts, and that leaves, therefore, only "landlord of a tenant"; and that that is what is meant is plain, I think, from the words which introduce Sch. 1 to the Act of 1933 and which refer to the ejection of a tenant. So I conclude that "not being a landlord who has become landlord" means who has become "landlord of the tenant". That is the view of the matter which was taken by SCOTT, L.J., in *Fowle v. Bell* (2) in the passage ([1946] 2 All E.R. at p. 669) to which SIR RAYMOND EVERSHED, M.R., has referred, and also by BUCKNILL, L.J., who said in the course of his judgment in that case ([1946] 2 All E.R. at p. 670):

"I think there are two possible interpretations of these words. One is 'not being a landlord who has become landlord of the dwelling-house,' and the other 'not being a landlord who has become landlord of the present tenant by purchasing the dwelling-house'."

SOMERVELL, L.J. (*ibid.*, at p. 671), placed this construction on the phrase, saying that it was restricted to cases in which the tenant sought to be evicted was a sitting tenant at the time of the purchase.

Those ways of looking at the matter are fatal to the plaintiff, and his counsel sought to add to the definition given by BUCKNILL, L.J. (which was approved and adopted by SINGLETON, L.J., in *Cairns v. Piper* (4) [1954] 2 All E.R. at p. 614) the words "who has become landlord of the present tenant *holding under his present title*". Counsel sought to introduce that addition to BUCKNILL, L.J.'s definition in order, as he said, to avoid certain anomalies which he pointed out might arise out of the alternative accommodation provision. For my part, I do not think there is any justification for adding those words, and I am not prepared to do so. I think that the definition which has been given and which, if applied to the present case, affords protection to the defendant should be adopted, and that the appeal consequently fails.

Appeal dismissed.

Solicitors: *Harold Tuffee & Son*, Gravesend (for the plaintiff); *Hatten, Winnett & Holland*, Gravesend (for the defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

DANIELS v. FORD MOTOR CO., LTD.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), December 17, 20, 1954.]

Factory—Protection of eyes—Obligation to provide goggles—Extent of statutory duty—Suitable goggles provided but liable to misting—Eye injured while cleaning misty goggles—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 49.

The plaintiff was employed by the defendants in a process to which s. 49 of the Factories Act, 1937, applied. That section requires that "suitable goggles . . . shall . . . be provided to protect the eyes of the persons employed". Goggles of the types best adapted to the process at which the plaintiff worked were made available by the defendants for their employees. The goggles selected and worn by the plaintiff had a tendency to mist over while being worn. At the material time the goggles worn by the plaintiff did mist over and he pulled them away from his eyes sufficiently far to enable him to clear away the misting; at that moment a fragment of metal hit his right eye and caused injury. The plaintiff claimed damages for breach of statutory duty under s. 49 of the Factories Act, 1937.

A **Held:** the obligation on the defendants under s. 49 of the Act of 1937 was to provide goggles which were suitable and would protect the wearer's eyes, but was not an absolute obligation to protect the wearer's eyes; on the facts, the defendants had provided the plaintiff with suitable goggles and were not in breach of their duty under the section, and, therefore, the plaintiff was not entitled to recover damages.

B Appeal allowed.

[For the Factories Act, 1937, s. 49, see 9 HALSBURY'S STATUTES (2nd Edn.) 1039.

For a note of cases on the Protection of Eyes Regulations, 1938 (S.R. & O. 1938 No. 654), see 8 HALSBURY'S STATUTORY INSTRUMENTS 187.]

C Case referred to:

(1) *Galashiels Gas Co., Ltd. v. O'Donnell or Millar*, [1949] 1 All E.R. 319; [1949] A.C. 275; 1949 S.C. (H.L.) 31; [1949] L.J.R. 540; 113 J.P. 144; 2nd Digest Supp.

Appeal.

D The defendants appealed against an order of FINNEMORE, J., dated Oct. 28, 1954, whereby he gave judgment for the plaintiff and awarded him damages on the ground of a breach by the defendants of their statutory duty under s. 49 of the Factories Act, 1937.

The facts appear in the judgment of PARKER, L.J.

F. W. Beney, Q.C., and *B. Caulfield* for the defendants.

E *Marven Everett, Q.C.*, and *D. P. Croom-Johnson* for the plaintiff.

PARKER, L.J.: This is an appeal by the defendants, the Ford Motor Co., Ltd., from a judgment of FINNEMORE, J., given on Oct. 28, 1954, awarding the plaintiff, Mr. Daniels, who was employed by the defendants, damages for an eye injury which he suffered while at work. He was working at the time in what is called the "knockout" department of the defendants' factory at Dagenham where castings are brought along conveyor belts in moulds and have to be knocked out. The plaintiff and the others working in that department were engaged in the process of fettling, a process in which there is a well-known risk of injury to the eye, not merely from sand and dust but from fragments of metal flying. It is one of the processes to which s. 49 of the Factories Act, 1937, applies*, and accordingly it was the duty of the defendants to provide the plaintiff (to use the words of the statute) with "suitable goggles . . . to protect the eyes". On the day of the accident the plaintiff was wearing goggles of a type which were referred to throughout the evidence as the "red" goggles and which were attached by an elastic band to the back of the head. They were apt (as indeed all goggles are, to a greater or less extent) to mist over, either from perspiration from the wearer or from condensation of the outside atmosphere, or, indeed, as one of the witnesses said, from the wearer's breath. While he was at work on this day the plaintiff's goggles misted over, he pulled them an inch or two away from the nose sufficiently to insert a finger and thumb and clean the lenses. On this occasion, although the goggles at the time they were pulled away must still have afforded some ninety per cent. protection and although the plaintiff's hands were holding the goggles and cleaning the lenses, a bit of metal, presumably knocked off by a fellow worker, most unfortunately hit the plaintiff's right eye, causing injury, which happily proved not to be serious.

The position as to these goggles is stated by the learned judge in this way, and is abundantly borne out by the evidence,

* The fettling of metal castings involving the removal of metal when carried out by means of hand tools or other portable tools is one of the processes to which the Factories Act, 1937, s. 49, is applied by the Protection of Eyes Regulations, 1938 (S.R. & O. 1938 No. 654).

"I think the fair result of the evidence, first of all, is this—and I think it ought to be said—that there is no doubt at all that the defendants have given very careful consideration to this problem. They have considered all kinds of goggles. They have had various kinds on display. They offer to their workmen different sorts, so that each man, within reasonable limits, can make his own choice. Everybody knows that men can be extremely fussy about goggles. Not only have the men had a measure of choice, but obviously from the evidence of Mr. Thomas—nobody challenged it, or wished to challenge it—inquiries have been made and tests have been made and a considerable amount of attention and experiment has been given to this matter by the defendants to try to produce a perfect set of goggles. The result of it all is that so far nobody has produced, so far as I can see, a perfect set of goggles."

Mr. Thomas, who had been the safety officer of the defendants for some eleven years, was a witness who clearly impressed the learned judge, and the learned judge went on to say this:

"Mr. Thomas summarised admirably all the points which had to be considered, whether you should use Triplex safety glass or whether you should use Perspex, whether the sides should be opaque, such as aluminium with holes in it or gauze, or Perspex again, and points for and against these goggles were paraded before me. I think the result is that whatever pair of goggles in fact you adopt there are advantages and there are disadvantages. It may well be that, in the result, the red pair of goggles, which the defendants say are still preferred, in spite of the other models they have had produced, by the great majority of their men who work in the foundry, are as good and as useful a pair as has been produced."

As I have said, one of the disadvantages of these red goggles is that they are apt to mist over rather more than other goggles. On the other hand, they have marked advantages over other goggles which can be obtained, certainly for fettling. One of the matters, apparently, that weighed with the defendants was that if there were only gauze at the sides or openings which would allow considerable ventilation, there would be a grave disadvantage in that it would not afford adequate protection from flying metal. The learned judge, however, while at pains to point out that no sort of blame attached to the defendants, held that they were in breach of their statutory duty in that these goggles had to be rubbed clean from time to time and when this was being done they did not (as, indeed, this accident shows) afford full protection to the eyes. In other words, he has decided this case quite irrespective of any negligence or blame on the part of the defendants but merely on the basis that the duty imposed by s. 49 is an absolute duty.

It would indeed be a surprising result if employers who provided the most well-adapted goggles which the wit of man has so far produced should be guilty not only of a criminal offence but of a breach of a statutory duty. However, counsel for the plaintiff, quite rightly, does not shrink from that and points out that in many cases that result follows in dealing with other sections of the Act, and he instances in particular the case of *Galashiels Gas Co., Ltd. v. O'Donnell or Millar* (1). Speaking for myself, I do not think that the words of s. 49 drive one to such a drastic conclusion. The word "suitable" in that section, as counsel for the defendants has pointed out, cannot mean "perfect". "Suitable" is not apt to mean any such thing. It is a matter that can be comparative; something may be more suitable than something else. I think that in its context it must mean, well-adapted for the process under consideration (because there are a number of different processes, involving different risks, albeit all to the eyes) and well-adapted for the wearer in that they must fit him. If one stops there, I think that the argument would be quite untenable; but the words that follow must be read: the goggles are to be "suitable . . . to protect the eyes".

- A It has been urged (and I think this is what influenced the learned judge) that that phrase is equivalent to and should be read as "suitable goggles to ensure the protection of the eyes", or "suitable goggles that will protect the eyes". Again I see no reason to read the phrase as a whole in any such sense. It seems to me that the words "to protect the eyes" are merely describing the end which is sought to be achieved by the provision of the goggles and are not to be read as equivalent to ensuring protection. In other words, while the obligation to provide suitable goggles is quite clearly an absolute obligation, there is no absolute obligation that the goggles so provided shall ensure protection. In that respect the words are quite different from the words used in other sections of the Act which have been used to impose an absolute obligation—words such as "shall be securely fenced", in s. 14.
- C Counsel for the plaintiff raised before this court a second point. He said that if he is wrong and the section should be read as meaning that the duty is complied with if goggles which are well adapted for the process in question are provided, yet even so the defendants failed to provide such goggles in this case. It seems to me that the difficulty in his way there is the finding of the learned judge to which I have referred, which can be abundantly supported by the evidence,
- D that in this case no blame at all attached to the defendants. The argument was really to this effect, that the fettering process on which the plaintiff was engaged was, in this case, of such a nature that the work was particularly strenuous and that in those circumstances goggles should be provided, whatever other disadvantages they had, which were properly ventilated. As I have said, it seems to me that the learned judge has in fact found in this case that the
- E defendants were in no way to blame, and I see no reason for interfering with that finding. In those circumstances, I would allow this appeal.

MORRIS, L.J.: I have reached the same conclusion; but as I have formed a view different from that entertained by the learned judge I would just state my reasons in a few sentences.

- F The question involves a consideration of the words that have been used in s. 49 of the Factories Act, 1937, and in particular the words

"suitable goggles . . . shall . . . be provided to protect the eyes of the persons employed in the process."

- That is the only wording which we have to consider and not any alternative wording that might possibly have been used, such as that "goggles shall be provided which will protect the eyes of the persons employed in the process". It seems clear from the evidence in this case that it does on occasion happen that there is either condensation caused by the atmosphere or that, as a result of the perspiration of the wearer of goggles, there may be misting of the goggles. To that extent there may be a criticism of the goggles which the defendants provided, but a criticism only in this limited sense, that, as the defendants themselves acknowledge, the goggles are not perfect goggles for the reason that such misting does at times occur. The learned judge summarised the way in which the matter was put by the defendants in these sentences:
- G
- H

- I "On the other side it is said 'Well, in the sense that suitable goggles mean perfect goggles, then these goggles are not perfect, because there are times when the wearer has to do this cleaning. It is a very short time indeed. If he does it carefully with a piece of rag and uses his hands sensibly he can still protect his eyes, because at that moment, of course, he has got two hands and he has not got to look at his work or carry out any operation, and you ought to construe the word "suitable" in a reasonable sense as meaning goggles which are suited to this kind of work, which are suited to the man who wears them, and the mere fact that from time to time he removes them altogether is something which does not prevent them being still described as "suitable"'. "

In that passage various points are indicated. It has been said by the defendants that the occurrence that gave rise to this litigation was an extraordinary mischance. It has further been said that when somebody finds occasion to wipe goggles because of misting, it could be done merely by withdrawing the goggles a short distance from the brow, by pulling the elastic, and that the clearing could be done while protecting the eyes completely with the two hands which are then free for that operation.

The learned judge at a later part of his judgment said this:

"Now, can it be said—this is the whole point—that if goggles are provided, however excellently they are designed (and I say not a word against them) which, owing to the particular kind of work which was being done by the plaintiff, had to be removed sometimes, thereby leaving the eyes unprotected, could those goggles be said, within the meaning of s. 49, to be suitable goggles to protect the eyes of the person, in this case the plaintiff, employed in the process to which the section has been applied by the regulations* ?".

I quote that sentence because the learned judge is saying that he has not a word against the design of these goggles. He uses the words

"however excellently they are designed (and I say not a word against them)".

It seems to me that on the learned judge's finding the goggles, if remaining over the wearer's eyes after misting, were still goggles that would protect the eyes of the wearer although he could not continue to do his work as he would wish to do it while that misting remained. Because of the lay-out and planning of the work there might in this case have been some difficulties in withdrawing some distance from the work in order to clear the goggles, but the goggles as goggles, according to the learned judge's finding, remained goggles that would protect the eyes. The learned judge really held that the goggles supplied to the plaintiff were goggles that fitted him; they were goggles that were suitable when worn to protect the eyes; and, subject only to the question of misting, they were goggles that were suited to the kind of work. It seems to me that the question becomes ultimately a question of fact whether in this case the goggles supplied to the plaintiff were goggles that were suitable to protect the eyes in the process on which he was employed; and, on the learned judge's findings, notwithstanding that some misting could and did occur, I do not think it was shown that there was a breach of this section. I would allow the appeal.

DENNING, L.J.: I agree with both the judgments of my Lords and have nothing to add. *Appeal allowed.*

Solicitors: *A. E. Wyeth & Co.* (for the defendants); *Pattinson & Brewer* (for the plaintiff). [Reported by **PHILIPPA PRICE**, Barrister-at-Law.]

Re COCHRANE'S SETTLEMENT TRUSTS. SHAW v. COCHRANE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), December 16, 17, 1954.]

Settlement—Construction—Beneficial interests—Gap in limitations—No provision for events that happened—Whether gap remediable by construction.

By a post-nuptial settlement dated Aug. 17, 1898, certain assets called "the wife's part" and further assets called "the husband's part" were vested in trustees on trust to invest the same and pay the income thereof to the wife for life "so long as she shall continue to reside with the husband" and after her death "or the prior determination of the trust in her favour" to the husband for life if then living and from and after the decease of the survivor of them in trust for their issue as they should jointly appoint and in

* Protection of Eyes Regulations, 1938 (S.R. & O. 1938 No. 654).

A default of such appointment as the survivor should appoint and in default of such appointment for all their children who should attain the age of twenty-one in equal shares. There was issue of the marriage two daughters who attained the age of twenty-one. The wife, during the subsistence of the marriage, ceased to reside with the husband and her interest thereupon ceased. The husband died in January, 1953, his wife surviving him. On a summons to determine whether on the husband's death the children of the marriage became entitled to the income during the life of the wife,

B **Held:** although there was clearly an omission by the draftsman of the settlement in that there was no limitation to cover the events that had happened, viz., the cesser of both interests during the life of the survivor of the spouses, it was impossible to fill the gap by reading in a trust in favour of the children because it could not be said with certainty what was the trust which had been omitted, having regard particularly to the fact that during the life of the wife her power of appointment as the survivor still remained and she could by the exercise of that power alter the beneficial interests in remainder: during the remainder of her life there were resulting trusts in favour of the estate of the husband and in favour of the wife of the income of their respective parts of the trust fund.

D *Re Akeroyd's Settlement* ([1893] 3 Ch. 363) distinguished.

[**Editorial Note.** This case may be contrasted with two recent cases, each of which related to a will: *Re Smith* ([1947] 2 All E.R. 708), and *Re Follett* ([1954] 3 All E.R. 478). In both those cases, the court found that it was a necessary implication from the context that certain trusts were intended to have been included by the testator. The obstacle to a similar implication in the present case is that there is no sufficient indication what should be implied, however much it may be thought that, had the matter been considered, the settlor would have provided that the children should take equally. The interests of the children in remainder could not be accelerated as in *Re Akeroyd's Settlement* ([1893] 3 Ch. 363), because those interests were subject to the exercise of the widow's power of appointment.

F As to the Implication of Beneficial Interests in Settlements, see 29 HALSBURY'S LAWS (2nd Edn.) 600, para. 871; and for cases on the subject, see 40 DIGEST 562, 1010 et seq.]

Cases referred to:

- G (1) *Re Akeroyd's Settlement*, [1893] 3 Ch. 363; 63 L.J.Ch. 32; 69 L.T. 474; 5 Digest 670, 5941.
- (2) *Re Tredwell*, [1891] 2 Ch. 640; 60 L.J.Ch. 657; 65 L.T. 399; 44 Digest 1175, 10,162.
- (3) *Lill v. Lill*, (1857), as reported in 23 Beav. 446; 53 E.R. 175; 44 Digest 776, 6336.
- H (4) *Re Master's Settlement*, [1911] 1 Ch. 321; 80 L.J.Ch. 190; 103 L.T. 899; 37 Digest 476, 749.
- (5) *Re Sassoon*, [1933] Ch. 858; 102 L.J.Ch. 374; 149 L.T. 217; *affd.* H.L., (1934), 104 L.J.Ch. 24; 152 L.T. 217; sub nom. *Inland Revenue Comrs. v. Raphael*, [1935] A.C. 96; Digest Supp.
- I (6) *Re Laing*, [1912] 2 Ch. 386; 81 L.J.Ch. 686; 107 L.T. 822; 44 Digest 507, 3259.

Adjourned Summons.

The sole surviving trustee of the post-nuptial settlement hereinafter mentioned applied to the court by originating summons to determine whether following the death of Walter John Basil Cochrane ("the husband") on Jan. 29, 1953, the income of the trust fund subject to his marriage settlement dated Aug. 17, 1898, vested during the life of the wife, Emily Maude Cochrane, in the children of the marriage, or whether after the death of the husband and until the death of the wife, there was a resulting trust in favour of each spouse of the income

of his or her part of the fund. By a post-nuptial settlement dated Aug. 17, 1898, and made between the husband of the first part, the wife of the second part and the husband and John Franklin, as trustees, of the third part, assets amounting in value to £1,150, known as "the wife's part" and further assets valued at £4,100, known as "the husband's part" were vested in the trustees on trust to invest the same and pay the income thereof

"to the wife during her life so long as she shall continue to reside with the husband and shall remain faithful to him, and from and after the decease of the wife or the prior determination of the trust in her favour as hereinbefore mentioned upon trust to pay the income"

to the husband (if then living) during his life, "and from and after the decease of the survivor of them," the husband and wife, in trust for their issue

"as they shall by deed or will jointly appoint and in default of such appointment as the survivor of them shall by deed or will appoint and in default of such appointment for all the children who being male shall attain the age of twenty-one or being female shall attain that age or marry under it, in equal shares . . ."

There was issue of the marriage two daughters, the first defendant, Elaine Emily Cochrane, who attained the age of twenty-one, and Eleanor Cochrane who died a spinster and intestate in April, 1942, also having attained the age of twenty-one. The wife, after the birth of the two children of the marriage, ceased to reside with the husband, who died on Jan. 29, 1953. The wife then re-married and was, as Emily Maude Theobald, the fourth defendant to the summons. The plaintiff, Herbert Alfred Shaw, was, at the date of the summons, the sole trustee of the settlement. The second and third defendants, together with the first defendant, were the personal representatives of the husband.

J. A. Plowman, Q.C., for the plaintiff.

P. W. E. Taylor for the first defendant.

T. J. R. Barnes (with him *I. L. R. Romer*) for the second and third defendants.
M. Browne for the fourth defendant.

HARMAN, J.: This is a summons arising out of a post-nuptial settlement dated Aug. 17, 1898, the parties to which were Walter John Basil Cochrane of the first part, his wife, now Emily Maude Theobald, the fourth defendant, of the second part, and the husband and John Franklin of the third part as trustees. The plaintiff is now the sole trustee of that settlement, and the settled property now consists of certain freeholds and leaseholds which stand in his name. The first defendant, Elaine Emily Cochrane, is the only surviving child of the marriage; the second and third defendants are, together with the first defendant, the personal representatives of the husband. There was issue of the marriage one other daughter, Eleanor, who died a spinster and intestate in 1942 having attained the age of twenty-one. She has no personal representatives, and any property falling to her would go as to half to her father and half to her mother.

The settlement was in an unusual form. It recited pre-nuptial articles under which certain property had been put into the hands of the wife, although still an infant. It further recited that she had now attained the age of twenty-one and had asked her husband to make the settlement, and that in consideration of that settlement by him she brought in certain assets amounting to £1,150 which were called the wife's part. The husband's settled property amounting to £4,100 was called the husband's part. Both parts were vested in the trustees on certain trusts to invest, and to pay the income to the wife during her life so long as she should continue to reside with the husband and should remain faithful to him. That is a very curious limitation. Then, after the decease of the wife

A "or the prior determination of the trusts in her favour as hereinbefore mentioned upon trust to pay the income"

to the husband (if then living) during his life. The wife, many years ago, did cease to reside with the husband, the limitation in her favour thereupon came to an end, and until his death in January, 1953, the husband received the income.

B The question I have to determine is, what happens to the trust fund, or the income thereof on the death of the husband? The settlement is silent on that matter: after the limitation to the husband during his life it provides that from and after the decease of the survivor of the husband and wife the fund should be held in trust for their issue as they should jointly appoint, and in default as the survivor should by deed or will appoint, and in default of

C appointment for all the children who should attain the age of twenty-one equally. On the face of the deed there is no further limitation until after the death of the survivor of the husband and wife. The draftsman has omitted to provide, as is usual in a marriage settlement, for life interests successively to the spouses with remainders over after the death of the survivor, but has limited the period of the wife's interest to that during which she should reside with the husband. She has forfeited her interest by leaving him, and, he having died and she still being alive, there is a gap in the limitations. On the one hand, it is said that that gap can be filled by construction, because one can see on looking at the deed what limitation ought to be there and, that if that is sufficiently clear, then without rectification it can be inserted. The other view is that this is an oversight, that no provision has been made and, therefore, until the wife's death there is a resulting trust for each spouse of his or her part.

E It is a rather startling proposition that one can by construction fill up a gap of this sort, but there is the authority of the Court of Appeal for it in *Re Akeroyd's Settlement* (1). In that case there was a marriage settlement in which the income was limited to the wife for life with remainder to her husband until he should become bankrupt with a limitation over to their issue after the decease of the survivor. The husband became bankrupt and his wife pre-deceased him. The question was: Was there a gap? It was held that the limitation over had taken effect, and that the income of the trust fund between the death of the wife and the death of the husband belonged to the children. LINDLEY, L.J., after reciting the limitations for the husband and wife, said ([1893] 3 Ch. at p. 366):

F "That is intelligible enough. Then there is a trust in remainder which does not fit all the events upon which his interest [i.e., the husband's interest] is to cease. The gift over is confined to his death, and after the decease of the survivor of the husband and wife . . . then to the children. Then there are clauses of advancement by the trustee with the consent of the husband. I confess that, without knowing anything at all about the events which have happened, about the date of his liquidation, the circumstances of his discharge, and when these interests fell into possession, but looking only at the recitals and at the operative part of the deed, it does appear to me to be as plain as can be, that the real intention of the parties was that this property was to go to the children upon the determination of the life interest of their parents. I cannot doubt that for a moment. I do not call that guessing. The intention is plain; but by a piece of bad drafting the draftsman has failed to give full effect to that plain intention, because in the gift over he has confined it to one of the events instead of putting in some general words which would cover the whole; but that particular kind of flaw does not require a suit to rectify the instrument. The mistake can be corrected by construction provided the intention is clear and plain from the document itself."

I LOPES, L.J. (*ibid.*, at p. 367) also thought it was plain that the settlor intended

"... to make a gift over on the determination by death or by bankruptcy.

I cannot help thinking that this is the clear intention which is to be found upon this particular clause." A

Then he said it could be tested by seeing what would happen if there were a resulting trust, the husband being bankrupt. The income would all go to his creditors, which was the very thing the settlement was intended to prevent. A. L. SMITH, L.J., concurred and cited LINDLEY, L.J. [in *Re Tredwell* (2) [1891] 2 Ch. at p. 655] in these terms ([1893] 3 Ch. at p. 368): B

"... it is necessary 'to see something in the will [and the same is true of a settlement,] which convinces the mind that the testator must have meant that these legacies', the equivalent to the gift over in this case, 'should be paid at some time or other different from what he has said'".

So then I am to be convinced that the draftsman on the face of it clearly intended the interests of the children to come into operation on the cesser of the interests of their parents. In other words, I am to read the words "from and after the decease of the survivor of them", the husband and wife, as "subject to the several interests of them", the husband and wife, and there is no doubt that "after the death of A." has in a good many circumstances been construed as meaning "subject to A.'s interest". The case of *Lill v. Lill* (3) is a good instance of that. C D

Is it clear here not only that something has been left out but also what it is that ought to be supplied? The second is much the more difficult matter to decide. One can see that the limitations over do not marry with the prior trusts, and that it should have been obvious to the draftsman that the event which in fact has happened might happen. But is it clear that the gift over should, so to speak, be accelerated? I do not think it is clear on this particular settlement, and I base my decision on this, that I cannot see clearly what it is that would have been written in. There is a power for the spouses jointly to appoint to issue and there is a power for the survivor to appoint. It is clear and conceded that the fourth defendant, notwithstanding that she forfeited her interest in her husband's lifetime, still has for the rest of her life, following her husband's death, power to dispose of the fund as the survivor of the two, either by deed or by will. That power clearly did not cease with the cesser of her interest, so that she could alter the beneficial interests by appointing not to the children but in favour of grandchildren or by making an unequal division between her daughters, and it seems to me in the face of that that it is impossible to say that the interest vested in the children at the date of the cesser of the husband's interest. It was in fact admitted before me that the fund could not be distributed so long as the power of appointment in the survivor of the two spouses was outstanding, and that alone seems to me to show that it is not true to say that the remainder should vest until the event has happened which is stated to be the event in the deed, viz., the death of the survivor of the husband and wife. E F G

The result is that the draftsman has failed to provide for the event which has happened. Though this is the last resort to which the law has recourse when the draftsman has failed to dispose of that which he has set out to dispose of, yet here, I think, there is a resulting trust of the income of the fund until the death of the survivor of the spouses. The income will be divisible according to the proportion one part bears to the other or if the parts have become intermixed then in proportion to their respective values as recited in the settlement. H I

Declaration accordingly.

Solicitors: *Preston, Lane-Claypon & O'Kelly* (for the plaintiff); *Gibson & Weldon*, agents for *Bellamy-Knights & Griffin*, Shoreham (for the first, second, third and fourth defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A PORTMAN BUILDING SOCIETY v. GALLWEY AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), November 2, 1954.]

Company—Receiver—Appointment of corporate body—Payments to mortgagee by receiver—Acknowledgment of mortgagor's indebtedness—Companies Act, 1929 (19 & 20 Geo. 5 c. 23), s. 306—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 109 (2), s. 109 (8).

Limitation of Action—Acknowledgment—Mortgage—Payments made to mortgagee by receiver appointed under a different mortgage—Receiver's appointment contrary to Companies Act, 1929 (19 & 20 Geo. 5 c. 23), s. 306.

In February, 1936, the mortgagors, a limited company, mortgaged their leasehold premises to T., Ltd. and by the mortgage deed a firm of solicitors was immediately appointed receivers of the rents and profits of the premises. On Sept. 28, 1936, the mortgagors mortgaged the premises to the plaintiffs, and the first defendant and one S. joined in the mortgage as sureties for the repayment of the principal and interest thereby secured. By a deed of the same date made between T., Ltd., the mortgagors and the plaintiffs, the mortgage of February, 1936, was postponed to the mortgage of September, 1936. In July, 1938, T., Ltd., in exercise of powers conferred by the mortgage of February, 1936, appointed T.G.I., Ltd. receivers in place of the solicitors, and in 1941 appointed another limited company, H., Ltd., receivers in place of T.G.I., Ltd. By virtue of s. 109 of the Law of Property Act, 1925, the receivers would, if duly appointed, have been the agents of the mortgagors. In November, 1939, the mortgagors made default in payment of sums secured by the mortgage of September, 1936, and the plaintiffs' power of sale accordingly became exercisable in February, 1940, and all sums secured by the mortgage became payable by the sureties. In February, 1949, the mortgagors were dissolved under the Companies Act, 1948, s. 353. On Mar. 27, 1953, a writ was issued by the plaintiffs against the first defendant and the second defendant as the personal representative of S. who had died, claiming payment by them as sureties of all moneys due under the mortgage of September, 1936. The defendants pleaded the Limitation Act, 1939, and in reply the plaintiffs pleaded that up to and including 1948 payments had been made to them by the receivers as agents for the mortgagors on account of moneys owing under the mortgage of September, 1936. The deed of postponement of 1936 was not pleaded.

Held: (i) the payments made to the plaintiffs by the solicitors after the appointments of the limited companies as receivers must be taken to have been directed by the receivers and, assuming that the appointments were valid, the defendants (as sureties for the mortgagors) could not maintain that on the pleadings the payments ought not to be regarded as payments to the plaintiffs on behalf of the mortgagors in respect of the mortgage of September, 1936, because, even though the receivers were appointed under the mortgage of February, 1936, and were subject to the provisions of s. 109 (8) of the Law of Property Act, 1925, for the application of the moneys towards repayment of that mortgage, the receivers were agents of the mortgagors by virtue of s. 109 (2) of the Act of 1925; but

(ii) as at the relevant dates a limited company was disqualified from becoming a receiver of the property of another limited company by virtue of s. 306 of the Companies Act, 1929, the purported appointments of T.G.I., Ltd., and of H., Ltd., as receivers were a nullity and failed to create any contractual relation between those companies as receivers and the mortgagors and, accordingly, the payments made to the plaintiffs by the solicitors on the direction of T.G.I., Ltd. and of H., Ltd. were not made by agents of the mortgagors and did not defeat the defence under the Limitation Act, 1939, which, therefore, succeeded.

[For the Companies Act, 1948, s. 366, which has superseded s. 306 of the Companies Act, 1929, see 3 HALSBURY'S STATUTES (2nd Edn.) 735. A

For the Law of Property Act, 1925, s. 109, see 20 HALSBURY'S STATUTES (2nd Edn.) 673-677.

For the Limitation Act, 1939, s. 23, which provides for the fresh accrual of a right of action on acknowledgment or part payment, see 13 HALSBURY'S STATUTES (2nd Edn.) 1184.] B

Action.

The plaintiffs as mortgagees under a mortgage dated Sept. 28, 1936, sued the defendants respectively as surety and as the personal representative of a deceased surety for the repayment of moneys due under the mortgage from the mortgagors, S.G. Properties, Ltd., a company which had been dissolved. The only defence pleaded was that the claim was barred by the Limitation Act, 1939. The plaintiffs in their reply relied on the fact that receivers appointed under a prior mortgage, and their successors, had, from time to time up to and including 1948, made payments to them as mortgagees in respect of moneys due under the mortgage of September, 1936. C

The relevant facts appear in the judgment. D

Denys B. Buckley for the plaintiffs.

J. G. Monroe for the first defendant.

R. B. S. Instone for the second defendant.

WYNN-PARRY, J.: In this action the plaintiffs, as mortgagees under a mortgage dated Sept. 28, 1936, sue the two defendants as sureties, or, in the case of the second defendant, as representing the estate of a deceased surety, they having guaranteed the payment of moneys due under the mortgage by the mortgagor company, S.G. Properties, Ltd. E

At the date of that mortgage, there was in existence a prior mortgage on the same property dated Feb. 25, 1936, in favour of a company called Tudor Investment Trust, Ltd. Under that document, provision was made for the immediate appointment of a receiver, and in fact a firm of solicitors, Messrs. Shirley Woolmer & Co., as they then were, were appointed and acted as receivers. The evidence shows that it was part of the bargain represented by the mortgage of Sept. 28, 1936, that the prior mortgage should be postponed and, indeed, by a document of even date with the mortgage, the prior mortgage was postponed so as to rank after the mortgage in favour of the plaintiffs. Messrs. Shirley Woolmer & Co. acted as receivers under the mortgage of Feb. 25, 1936, until July 27, 1938, when, by a deed of that date made between the Tudor Investment Trust, Ltd., Messrs. Shirley Woolmer & Co. and the Temple General Investment Co., Ltd., which recited that Messrs. Shirley Woolmer & Co. were desirous of being discharged and the mortgagees were desirous of appointing the Temple General Investment Co., Ltd., as receivers in their place, it was provided by cl. 1: F G

"The mortgagees [Tudor Investment Trust, Ltd.] in exercise of the powers conferred on them by the principal deed [of Feb. 25, 1936] or by statute or otherwise hereby appoint the receiver to be receiver of the rents and profits and income of the premises comprised in the principal deed in the place of the solicitors." H

By cl. 3 the mortgagees released the solicitors from the provisions of the principal deed, which included their appointment as receivers, and from all moneys received or which ought to have been received pursuant to the provisions therein contained. By cl. 4 they gave to the solicitors a complete and full indemnity. I

The new receivers, Temple General Investment Co., Ltd., continued to act until Aug. 11, 1941, when, by a deed of that date, they were removed and a company called Hallingbury Trust, Ltd., were appointed receivers in their place. Throughout the whole of the material period, the actual collection of money continued to be made by Messrs. Shirley Woolmer & Co., and a partner in that

A firm, Mr. Storrs, gave evidence before me to the effect that, in each case, his firm collected the rents as solicitors and agents for the limited company in question. This procedure continued down to and, indeed, subsequent to Feb. 15, 1949, when the mortgagors, S.G. Properties, Ltd., were dissolved pursuant to the Companies Act, 1948, s. 353. I ought then to add that the mortgagors made default in payment of the monthly sums reserved and made payable by the mortgage of Sept. 28, 1936, in November, 1939, and accordingly, under the provisions of that mortgage, the mortgagees' power of sale became exercisable and the moneys owing to the plaintiffs from the two defendants as sureties became due and payable in February, 1940.

The two defendants plead the Limitation Act, 1939, and *prima facie* that is a good plea. It is met by the reply delivered by the plaintiffs to the two defences which is to the effect that, as a result of the relevant documents to which I have referred, Hallingbury Trust, Ltd., became and remained until Feb. 15, 1949—the date of the dissolution of the company—the agents of the mortgagors. The reply shows, and the evidence confirms, that payments were made to the plaintiffs by Messrs. Shirley Woolmer & Co. or their successors almost down to the present time, and it is pleaded that Hallingbury Trust, Ltd., as agents for the mortgagors, paid or procured to be paid to the plaintiffs those moneys.

Now, two points are taken by counsel for the second defendant. The first is that the deed of Sept. 28, 1936, postponing the prior mortgage is not pleaded and that therefore the plaintiffs are not entitled to rely on the fact of postponement, and accordingly that the payments which the receivers made must be taken not to have been in accordance with the Law of Property Act, 1925, s. 109 (8), which applied, as they were receivers of the income under that Act, and required them to make payments in accordance with the document [i.e. the mortgage of Feb. 25, 1936] in right of which they were appointed. Counsel says that those wrongful payments cannot be attributed to the mortgagors. To that counsel for the plaintiff replies, and in my view with force, that the receivers must be taken to have directed the payments by Messrs. Shirley Woolmer & Co., and as the receivers were, by virtue of s. 109 (2) of the Act of 1925, throughout the agents of the mortgagors, it does not lie in the mouths either of the mortgagors or of the sureties to question what they did. Therefore, whether or not the court is apprised of the deed postponing the prior mortgage is immaterial. I think that the point is well taken, and, therefore, I do not accept the first submission of counsel for the second defendant. But he has another and, to my mind, much more formidable submission. He draws attention to the fact that under the Companies Act, 1929, s. 306, re-enacted substantially by the Companies Act, 1948, s. 366, a body corporate is not qualified for appointment as receiver of the property of a company. In 1936, s. 306 of the Act of 1929 applied and that section was slightly different in form from s. 366 of the Act of 1948 because it was necessary to make an exception in 1929 as regards bodies corporate which had been appointed receivers prior to Aug. 3, 1928. Section 306 is divided into two sub-sections, sub-s. (1) containing the disqualification, and sub-s. (2) dealing with the exception. At the end of sub-s. (2) it is provided that

“subject as aforesaid any body corporate which acts as receiver as aforesaid shall be liable to a fine not exceeding £100.”

I On the basis of that section it is submitted that the appointment first of the Temple General Investment Co., Ltd., and, secondly, the second company, Hallingbury Trust, Ltd., was a nullity and that therefore it must follow that the plea on which the plaintiffs rely, that Hallingbury Trust, Ltd., became and remained until Feb. 15, 1949, the agent of the mortgagors, is not sustained.

It was urged on me by counsel for the plaintiffs that I should recognise that in fact the parties proceeded all through on the basis that whatever defect in law there might be in the appointment of the Temple General Investment Co.,

Ltd., and Hallingbury Trust, Ltd., they were receivers and they should therefore be treated as agents of the mortgagors for whom Messrs. Shirley Woolmer & Co. acted as agents. A

I must, I think, proceed strictly on the basis of the pleadings. The point is purely a point of law which is taken by counsel for the second defendant and, therefore, if I come to the conclusion in his favour that the effect of his point is to destroy the plea that Hallingbury Trust, Ltd., became and remained the agent of the mortgagors, then the plaintiffs ought not to succeed. The point is a very short one. The language of s. 306 is: B

“A body corporate shall not be qualified for appointment as receiver of the property of a company.”

In my view, the language is perfectly clear and it is intended to prevent, and has the effect of preventing, a body corporate from being the receiver of the property of a company. It has, in my view, the effect of making it ultra vires any body corporate to act as receiver, and it follows, in my judgment, that any attempt to appoint a body corporate as receiver of the property of a company must be a nullity and must fail to create any contractual relations between the body corporate in question and the company over whose property it purports to be appointed receiver. C D

The evidence of Mr. Storrs is that, from the time when his firm ceased to act as receivers, his firm acted as solicitors and agents first for the Temple General Investment Co., Ltd., and, secondly, for the Hallingbury Trust, Ltd., but I cannot conclude from that, as counsel for the plaintiffs would have me conclude, that they went on acting as agents for the mortgagors to collect and hand over the money to the plaintiffs. It may be that on differently drafted pleadings the point might be taken, and I say nothing as to what might have been the outcome; but, on the case as it is presented, I do not see that that point is open. The sole point put forward in the reply is that the Hallingbury Trust, Ltd., were, throughout the material period of the dissolution, the agents of the mortgagors as receivers, and, in my view, I am forced, for the reasons which I have given, by the language of the Companies Act, 1929, s. 306 (1), to hold to the contrary. E F

For these short reasons, therefore, I come to the conclusion, not without the reluctance which the court usually feels on a successful plea of the Limitation Act, 1939, that the plea in this case is successfully taken by each of the defendants, and that therefore I must dismiss the action with costs.

Judgment for the defendants. G

Solicitors: *Hewlett & Co.* (for the plaintiffs); *Lewis Lloyd & Co.* (for the first defendant); *Edwin E. Clark & Son* (for the second defendant).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

FISHBURN v. FISHBURN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), December 8, 9, 10, 13, 1954.] H

Divorce—Desertion—Continuance of desertion—Determination of deserted spouse not to take back deserting spouse—Deserting spouse deprived of locus poenitentiae and prevented from attempting reconciliation.

The parties were married in 1919. In 1946 the husband started going out alone on Sunday afternoons and evenings but would not tell the wife where he went. She also found stains on his handkerchiefs which appeared to her to be caused by lipstick. In January, 1947, she intercepted two letters written to her husband by another woman, and in consequence she withdrew from the matrimonial bedroom but the parties continued to live as one household. On June 18, 1949, the husband ceased to make any weekly allowance to the wife. On about July 9, 1949, the wife ceased to perform any wifely duties for the husband. On July 19, 1949, the wife I

A caused a summons to be issued against the husband on her complaint that he had wilfully neglected to provide reasonable maintenance for her. On Aug. 9, 1949, the complaint was heard and the case adjourned. On Sept. 2, 1949, the husband threw the wife's clothes out of his room which he thereafter kept locked against her. On Nov. 3, 1949, the wife's complaint was dismissed. Shortly afterwards the wife fitted a Yale lock to her room to keep the husband out and to prevent him eating his meals in there, telling him that if he would not have her she would not have him. In 1952 the wife was forced to give up work. On Dec. 4, 1952, she caused a summons to be issued against the husband on her complaint that he had deserted her and had wilfully neglected to provide reasonable maintenance for her. On Jan. 1, 1953, the complaints were heard and dismissed.

C On Nov. 13, 1954, the husband filed a petition for divorce on the ground of the wife's desertion. By her answer the wife denied desertion and cross-prayed for a divorce on the ground of the husband's desertion.

Held: (i) on the facts the husband's conduct in 1946 and 1947 had justified the wife in withdrawing from the marriage bed in 1947; thereafter the husband had made no attempt to effect a reconciliation but had in fact made it as clear as he could that he wanted no more to do with her; accordingly, he was not able to show that during the three years preceding the presentation of his petition, the wife was separated from him without his consent and his petition should be dismissed.

D (ii) although the wife was justified in withdrawing from the matrimonial bed in 1947, the withdrawal so justified was no more than temporary.

E Observations of DAVIES, J., in *Forbes v. Forbes* ([1954] 3 All E.R. at p. 466) applied.

(iii) on the facts, the wife had promptly evinced a firm and decisive determination that the husband should not return to her, thereby depriving him of any locus poenitentiae and preventing him from attempting a reconciliation, and accordingly her cross-prayer should also be dismissed.

F *Barnett v. Barnett* ([1954] 3 All E.R. 689) followed and applied.

Church v. Church ([1952] 2 All E.R. 441) distinguished.

[As to Refusal by Petitioner to Resume Conjugal Relations, see 10 HALSBURY'S LAWS (2nd Edn.) 657, para. 967; and for cases on the subject, see 27 DIGEST (Repl.) 347-350, 2877-2896.]

G Cases referred to:

(1) *Hopes v. Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 27 Digest (Repl.) 340, 2818.

(2) *Lang v. Lang*, [1954] 3 All E.R. 571.

(3) *Baker v. Baker*, [1953] 2 All E.R. 1199; [1954] P. 33; 117 J.P. 556; 3rd Digest Supp.

(4) *Forbes v. Forbes*, [1954] 3 All E.R. 461.

(5) *Barnett v. Barnett*, [1954] 3 All E.R. 689.

(6) *Church v. Church*, [1952] 2 All E.R. 441; [1952] P. 313; 3rd Digest Supp.

(7) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest (Repl.) 349, 2895.

(8) *Cohen v. Cohen*, [1940] 2 All E.R. 331; [1940] A.C. 631; 109 L.J.P. 53; 163 L.T. 183; 27 Digest (Repl.) 362, 2996.

I (9) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest (Repl.) 363, 3005.

Petition for divorce by the husband.

The parties were married on May 8, 1919, and there were two children of the marriage, one born in 1921 and the other born in 1925. The husband was formerly in the lighthouse service which he left in about 1940, since when the parties had resided at a house in Abbey Wood, a house purchased by them through a building society and registered in the names of both of them. In 1938 the wife found a

contraceptive appliance in the husband's pocket, which made her suspicious as the husband did not use such a thing with the wife. In 1946 the husband started going out alone on Sunday afternoons and evenings and refused to say where he had been. The wife also found stains on his handkerchiefs which appeared to her to be caused by lipstick. In January, 1947, the wife, as a result of her suspicions of her husband's conduct, intercepted two of the husband's letters from another woman, B. The wife thereupon withdrew from the matrimonial bedroom, but the parties continued to live as one household. On May 10, 1948, there was a quarrel during which the husband struck the wife; the husband was charged with assault and bound over to keep the peace. At the end of 1948 or the beginning of 1949 the husband reduced from £3 to £2 10s. the weekly allowance which he paid to the wife. On June 18, 1949, he ceased to pay her any weekly allowance. On July 2, 1949, the wife went away for a week's holiday and on her return she ceased to perform any wifely duties for the husband. On July 19, 1949, the wife caused a summons to be issued under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, complaining that he had wilfully neglected to provide reasonable maintenance for her. On Aug. 9, 1949, the complaint was heard by the magistrate sitting at Woolwich. Both parties gave evidence and the case was adjourned. Negotiations then took place as to the amount to be paid to the wife but no agreement could be reached and the husband in fact made no further payment. On Sept. 2, 1949, the husband threw the wife's clothes out of his room which he thereafter kept locked against her. On Nov. 3, 1949, the hearing of the wife's complaint was resumed and the complaint was dismissed. Shortly afterwards the wife fitted a Yale lock to her own door for the express purpose of keeping the husband out and of preventing him eating his meals in her room, telling him that if he would not have her she would not have him. In 1952 the husband instituted proceedings in the Woolwich County Court under the Married Women's Property Act, 1882, s. 17, in respect of the house, and the court made an order by consent that the legal estate was vested in both parties as joint tenants and that both parties should be at liberty to continue to occupy the parts of the house that each was then occupying. Shortly afterwards the wife was forced to give up work, and had not been able to work since. On Dec. 4, 1952, the wife caused summonses to be issued against the husband, complaining that he had deserted her and had wilfully neglected to provide reasonable maintenance for her. On Jan. 1, 1953, the complaints were heard and dismissed. On Nov. 13, 1954, the husband filed a petition for divorce on the ground of desertion, alleging that after he had left the lighthouse service, the wife, without cause, on numerous occasions accused him of associating with other women and also quarrelled with him concerning money; that she had moved her bedding into a separate room from that occupied by him, and that at a date in June or July, 1949, she had ceased to cook or clean for him or to look after him in any way, and had ever since lived separate and apart from him. By her answer as amended the wife alleged (i) that the separation between the parties was consensual, (ii) that she had just cause for living separate and apart from him, (iii) that the husband had by his conduct driven her away and that he was, therefore, the deserting party.

At the conclusion of the hearing of the evidence the wife sought and was granted leave to amend her answer by adding a cross-prayer for dissolution.

E. J. R. Crowther for the husband.

James Miskin for the wife.

WILLMER, J.: It should be stated at once that both the parties reside, and have for many years resided, in the same house. The legal estate in that house has been declared by a consent judgment of the county court to be vested in both of them as joint tenants. Although they live, and have lived for many years, under the same roof, I find as a fact, and indeed it is the case of both sides, that since the autumn of 1949 at least they have lived completely separate

- A and apart, having no common life and each keeping to his or her own part of the house. In those circumstances, it seems to me that the test laid down by DENNING, L.J., in *Hopes v. Hopes* (1) namely, that they were living as two households, is abundantly satisfied. [His LORDSHIP stated the facts and continued:] The final separation between the parties came in 1949. The sequence of events which led up to this is, of course, a matter of crucial importance,
- B and it has been the subject of a considerable conflict of evidence. For the moment it is sufficient to say, without dealing with the chronological sequence, first, that the husband reduced, and then stopped altogether, the payment of any housekeeping allowance; secondly, the wife stopped cooking for the husband or performing any other household duties; thirdly, the husband threw the wife's clothes out of his bedroom, where hitherto they had been kept; fourthly,
- C both the husband and the wife took to locking the doors of their respective rooms and keeping them locked against each other, each denying the other access; and lastly, the wife issued on July 19, 1949, a summons for wilful neglect to maintain. [His LORDSHIP considered the evidence and continued:] It is necessary to consider the allegation of desertion which each party makes against the other. So far as the husband is concerned, he admitted in cross-examination
- D that for years he has hated his wife like poison and has long since lost any desire to live with her. I appreciate that, as was pointed out by the Privy Council in *Lang v. Lang* (2), desire is by no means the same thing as intention, and that it is intention only which is material in considering a charge of desertion. I mention the husband's freely admitted desire because in the present case it appears to me on the facts that desire and intention go hand in hand. I am
- E satisfied that the husband's behaviour in 1946 and early 1947—his staying out every Sunday afternoon and evening, and refusing to give any reason; and the discovery of stains resembling lipstick on his handkerchiefs, as to which I substantially accept the wife's evidence—gave her grounds for suspecting that the husband was carrying on some sort of association with another woman. The discovery of the contraceptive in 1938 was not of particular significance, and in
- F view of the fact that it was followed by eight years of normal marital relations, could not by itself be relied on by the wife as an excuse for withdrawing in 1947. The incident does, however, have this significance: that it gave the wife some additional ground for suspecting the husband's behaviour in 1946 and 1947. When this behaviour was followed by the interception of the two letters from the
- G woman B., for which neither at the time nor in evidence in this court was the husband able to offer any credible explanation, the wife had, in my judgment, abundant justification for withdrawing from the husband's bedroom. I think there is some force in the comment made by counsel for the wife that no attempt was made by the husband to obtain the evidence of the woman B., nor that of the husband's sister, who it is said was the real (and perfectly innocent) cause of the husband's Sunday afternoon outings.
- H I pause here to remark that I am only concerned at the moment with the wife's withdrawal from the marriage bed. It was part of the wife's case, as put forward in the further and better particulars of the answer, that her later withdrawal from cohabitation was, in part at least, justifiable on the ground of a reasonable belief on her part that her husband had been guilty of adultery; and some argument was addressed to me on this point, in the course of which *Baker v.*
- I *Baker* (3) was cited. If this argument had been pressed, I should have felt some difficulty in acceding to it, in view of the fact that no actual charge of adultery has ever been put forward, and that at no time during the eight years which have elapsed does the wife appear ever to have investigated the matter. Her belief in the husband's adultery may have been reasonable enough, in view of all the suspicious circumstances, in 1947; but it does not follow that it continued to be reasonable during the three years immediately preceding the presentation of the answer, having regard to the wife's total absence of effort during all this time to ascertain the true facts. In this connection I would respectfully adopt the

words used by DAVIES, J., in *Forbes v. Forbes* (4) ([1954] 3 All E.R. at p. 466): A

"In my judgment, the fact that a petitioner has not chosen to bring and does not now make a charge of adultery may well be a most relevant matter for consideration when the court is asked to find that the petitioner on reasonable grounds believes, and has believed for three years preceding the presentation of the petition, that the respondent had committed adultery." B

For these reasons I regard the wife's reasonable suspicions in January, 1947, as no more than justification for her temporary withdrawal from the husband's bed.

But what followed? The husband does not appear ever to have invited her to return. Nor is there any evidence that he sought at any time to make amends, or to convince the wife of his innocence. He was content to allow relations with his wife to deteriorate still further, and in 1948 was found guilty of assaulting her. The culmination came in June, 1949, when he ceased to support her, for no sufficient reason that I have been able to find. When the wife issued her summons he expressed his willingness in court to pay her, but, in fact, has never done so: on the contrary, he made it clear that he was only prepared to pay her on terms that she should withdraw and live elsewhere. Finally, he threw her clothes out of his room, which had been the matrimonial bedroom, and took to keeping the door locked against her, thereby making it as clear as he could that he wanted no more to do with her. That was five years ago, and since that date there is no evidence to show that he ever altered his mind, that he ever made any offer of amends, or indeed, that he ever tried to approach the wife, except to the extent that, according to the wife's evidence, he persisted for a time in trying to take his meals into her room. In those circumstances, it appears to me hopeless for the husband to contend now that during the three years immediately preceding the presentation of the petition his wife was separated from him without his consent. At the best he made it abundantly clear by his conduct that he never intended in any circumstances to have the wife back; at the worst, he himself was guilty of expulsive conduct. In neither case could his petition succeed. C D E F

As I am now also concerned with the wife's cross-charge of desertion, it is necessary for me to resolve that question. I would say at once that, in my judgment, the proper inference to be drawn from the husband's conduct is that he expelled his wife, and that it was he who by his conduct brought the cohabitation to an end. I find accordingly that the de facto separation between the parties, which has subsisted since the autumn of 1949, was in fact initially brought about by an act of desertion on the part of the husband, for which at no time since has he sought to make amends. What then of the wife's cross-prayer for relief? The question is whether she can satisfy me that the separation initiated by the husband's act of desertion continued to be without her consent during the statutory period, having regard to the fact that shortly after the husband left she locked him out of her room, and at the same time told him that if he would not have her she would not have him. On behalf of the husband it is contended that those facts are indistinguishable from the facts in *Barnett v. Barnett* (5), recently before SACHS, J., and that the wife's cross-prayer must accordingly fail. In that case the wife, who had been deserted by her husband, changed the lock on her front door immediately after his departure for the express purpose of preventing him from returning; and when he did shortly afterwards come to the house for the purpose of collecting his clothes she made it abundantly clear to him that she would not ever receive him back. In such circumstances, SACHS, J., held that the wife could not set up that the desertion of the husband continued over the period during which she had evinced to him a firm and decisive determination that he should not return to her. G H I

On behalf of the wife it was contended that the facts in the present case are

A distinguishable from those in *Barnett v. Barnett* (5). It was said that the inference as to the wife's intention which might otherwise be drawn from the fact of her locking her door was rebutted by evidence which she gave to the effect that in certain conditions she would have been prepared to return to her husband; that the act of locking her door, in the circumstances of the present case, was no more than her natural reaction to her husband's behaviour in expelling her from his room; and, therefore, it affords no evidence of any intention on her part to bring the cohabitation to an end. On the contrary, it was argued that the wife in the present case, having been expelled, was to be regarded in law as being in the same position as if she had gone to live elsewhere, in which case it would have been natural to keep her door locked against the husband, just as much as against anyone else, until some move was made by the husband to approach her. On the wife's side reliance was placed on a decision of my own in *Church v. Church* (6). In that case the husband, who had been deserted by his wife in 1946, committed adultery in 1949 and wrote a letter to his wife informing her of this adultery, and stating that he never intended to return to her, and invited her to bring divorce proceedings against him. The wife took no action. The husband then took proceedings on the ground of the wife's desertion. It was argued on behalf of the wife that when the husband communicated to her his irrevocable intention never to have her back the separation was no longer without his consent, and he could, therefore, no longer allege desertion. I held, however, that in the absence of any approach by the wife, whose state of mind was quite unaffected by hearing of the husband's adultery, there was nothing to stop the wife's desertion from continuing to run. In the present case it has been argued on behalf of the wife that the decision in *Church v. Church* (6), whereby it was held that the husband who, having committed adultery, communicated to his wife his intention not to have her back, was not debarred from asserting that his wife's desertion continued, should apply in the case of the wife here, notwithstanding the fact that by locking her door she was, inferentially at least, communicating to her husband her intention never to receive him back.

F In *Barnett v. Barnett* (5) SACHS, J., clearly had some difficulty in reconciling what I had said in *Church v. Church* (6) with various dicta of members of the House of Lords in *Pratt v. Pratt* (7) and *Cohen v. Cohen* (8) and with the decision of the Court of Appeal in *Harriman v. Harriman* (9). It may well be that in *Church v. Church* (6) I used words which went beyond what was necessary for the case, and which conflicted with what was said by the House of Lords and the Court of Appeal in the cases referred to. Be that as it may, I do not think that the present case is governed by the decision in *Church v. Church* (6). It seems to me to be clearly distinguishable. In the first place, there is no question in this case of adultery on the part of the deserting spouse. Secondly, in *Church v. Church* (6) the deserted husband's intention not to receive his wife back was not communicated to her until a considerable time after the wife's desertion —in fact, the three years' period had already nearly elapsed. Over the intervening period the deserting wife's unshakable determination never to return had already been made apparent. In the present case, on the other hand, the wife's act in locking her door against the husband followed so swiftly after his act of desertion as not to afford him any reasonable locus poenitentiae. Thirdly, the deserted husband's communication to his wife in *Church v. Church* (6) did nothing to prevent the wife from making overtures, however belated, for a reconciliation; whereas in the present case the act of the wife in locking her door, and keeping it locked against her husband, effectively prevented him thereafter from approaching her by the most suitable method reasonably open to him. Indeed, on the wife's own evidence it can be put even higher against her, for she said that she only did it to prevent him taking his meals in her room, which it may well be thought might have provided him with most suitable opportunities to make overtures for a reconciliation. I have come to the conclusion that it is impossible

to distinguish the present case from *Barnett v. Barnett* (5). The act of the wife in fitting a Yale lock to her door could only have been directed against the husband, in the same way as the wife's act in changing the lock in that case was clearly directed against the husband. What the wife in the present case did in fitting the lock must be taken in conjunction with what, on her own evidence, she said to the husband at the time. Both by her act and by her words this wife evinced to her husband a firm and decisive determination that he should not return to her. Having evinced that determination in advance, and having, as it were, put it out of the husband's power, had he been so minded, to return to her, it seems to me that she is, in law, in the same position as she would have been if he had made a bona fide approach for reconciliation which she rejected.

In the result, I am satisfied that neither of these parties is entitled to the relief prayed for. It may seem unfortunate that a marriage which has so palpably broken down, and which for many years now has been a marriage in name only, should not be dissolved; but I am satisfied that my decision is in full accord with the realities of the case. The one thing that has been abundantly clear throughout the hearing of the present case is that neither party at any time within the three years immediately preceding the institution of the suit ever had the slightest desire or intention of resuming cohabitation with the other. There is one other matter to which I should briefly refer. It was suggested by counsel for the wife, before he had been instructed to ask leave to amend his answer by including a cross-prayer for relief, that the consent judgment obtained in the county court in 1952 constituted evidence that from that time onwards, at any rate, the separation was consensual, on the ground that each of the parties then consented to the other continuing to occupy such respective part of the premises as was then occupied. I find it impossible to construe the terms of this judgment as a consent to continued separation. It seems to me to do no more than provide that neither party should seek to evict the other, and otherwise to leave the position precisely as it was before. I wish to make it clear, therefore, that I do not found my decision on any inference to be drawn from the terms of the consent judgment in the county court proceedings.

Prayer and cross-prayer rejected.

Solicitors: *H. E. Thomas & Co.* (for the husband); *L. H. Whillamsmith* (for the wife).
[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

KURUMA SON OF KANIU *v.* REGINAM.

[PRIVY COUNCIL (Lord Goddard, C.J., Lord Oaksey and Mr. L. M. D. de Silva), December 7, 8, 1954, January 11, 1955.]

Criminal Law—Evidence—Admissibility—Relevant to matters in issue—Whether court concerned with method of obtaining evidence.

In considering whether evidence is admissible, the test is whether it is relevant to the matters in issue, and, if it is relevant, the court is not concerned with the method by which it was obtained (dictum of CROMPTON, J., in *R. v. Leatham* (1861) (8 Cox C.C. at p. 501) approved) or with the question whether that method was tortious but excusable; this principle, however, does not qualify the rule that a confession can only be received in evidence if it is voluntary.

There is no difference in principle for this purpose between a criminal case and a civil case.

Per CURIAM: it may well be that where an indictment alleges that an offence was committed at a particular place and no issue is raised thereon at the trial the court may take judicial notice that the place is where the indictment says that it is or may apply the maxim *omnia praesumuntur rite esse acta* (see p. 238, letter I, post).

Appeal dismissed.

- A [As to the Admissibility of Evidence obtained wrongfully, see 13 HALSBURY'S LAWS (2nd Edn.) 533, para. 602.]

Cases referred to:

- (1) *Saleh Mohamed v. Regem*, (1951), Unreported.
 (2) *R. v. Leatham*, (1861), 3 E. & E. 658; 8 Cox C.C. 498; 30 L.J.Q.B. 205; 3 L.T. 777; 25 J.P. 468; 121 E.R. 589; 14 Digest 244, 2343.
 B (3) *Lloyd v. Mostyn*, (1842), 10 M. & W. 478; 12 L.J.Ex. 1; 152 E.R. 558; 22 Digest (Repl.) 238, 2329.
 (4) *Calcraft v. Guest*, [1898] 1 Q.B. 759; 67 L.J.Q.B. 505; 78 L.T. 283; 22 Digest 211, 1976.
 (5) *Noor Mohamed v. Regem*, [1949] 1 All E.R. 365; [1949] A.C. 182; 2nd Digest Supp.
 C (6) *Harris v. Public Prosecutions Director*, [1952] 1 All E.R. 1044; [1952] A.C. 694; 116 J.P. 248; 3rd Digest Supp.
 (7) *H.M. Advocate v. Turnbull*, 1951 S.C. (J.) 96; [1951] S.L.T. 409.
 (8) *Rattray v. Rattray*, (1897), 25 R. (Ct. of Sess.) 315; 35 S.L.R. 294; 5 S.L.T. 245.
 (9) *Laurie v. Muir*, 1950 S.C. (J.) 19; 2nd Digest Supp.
 D (10) *Fairley v. Fishmongers of London*, 1951 S.C. (J.) 14; 2nd Digest Supp.
 (11) *Elias v. Pasmore*, [1934] 2 K.B. 164; 103 L.J.K.B. 223; 150 L.T. 438; 98 J.P. 92; Digest Supp.
 (12) *Olmstead v. United States*, (1928), 277 U.S. 438.
 (13) *R. v. Thompson*, [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 14 Digest 412, 4314.

E Appeal against conviction.

Appeal by special leave in forma pauperis from an order of the Court of Appeal for Eastern Africa, dated Mar. 27, 1954, dismissing an appeal by the appellant, Kuruma Son of Kaniu, against his conviction on Feb. 11, 1954, by a Court of Emergency Assize of the Supreme Court of Kenya at Nairobi, whereby he was convicted of being in unlawful possession of two rounds of ammunition, contrary to the Emergency Regulations, 1952, reg. 8A (1) (b), of the Colony and Protectorate of Kenya, and was sentenced to death. The facts appear in the judgment.

W. D. Collard for the appellant.

D. A. Grant for the Crown.

- G Dec. 8, 1954. Their Lordships dismissed the appeal.

Jan. 11, 1955. LORD GODDARD, C.J.: This is an appeal by special leave from a judgment of the Court of Appeal for Eastern Africa dismissing an appeal from a conviction by an Emergency Court of Assize in Kenya whereby the appellant was convicted of being in unlawful possession of two rounds of ammunition contrary to reg. 8A (1) (b) of the Emergency Regulations, 1952, of the said colony and sentenced to death. The ground on which leave had been obtained was that the evidence proving that the appellant was in possession of the ammunition had been illegally obtained and should not have been admitted. Before detailing the facts it will be convenient to recite reg. 29 of the Emergency Regulations, as it was this that formed the ground on which the objection was taken. Omitting words immaterial for the present case it is in these terms:

- I "Any police officer of or above the rank of assistant inspector may . . . with or without assistance and using force if necessary . . . (b) stop and search . . . any individual, whether in a public place or not, if he suspects that any evidence of the commission of an offence against these regulations is likely to be found on such . . . individual, and he may seize any evidence so found."

On the day in question the appellant, hitherto a man of good character, had leave of absence from the European farmer by whom he was employed to visit

his reserve. About 10 a.m. he started off on his bicycle along a main road on which he knew there was a road block where he would be liable to be stopped and searched. This was not the only way to his reserve; he could have gone by another route where he would not have encountered a road block. At the block he was stopped and Police Constable Ogowang examined his papers which were in order and then ran his hands over the outside of the appellant's clothing. According to his evidence, believing that he felt in the fob pocket of the appellant's shorts what seemed to be a pocket knife and ammunition, he blew his whistle to summon a superior officer, Rattan Singh. Neither of these police officers were of or above the rank of assistant inspector. They said that the appellant was taken by them to an enclosure where he was made to take off his shorts, which were then shaken and a pocket knife and two rounds fell out. He was then taken to the police station and charged with the offence. The two rounds were marked and were subsequently produced in evidence, and it is only right to say that they differed from those which the police officers then had as part of their equipment. The appellant all along denied that he was carrying these rounds and at the trial also denied that he had had a pocket knife on him. The police said they had returned the knife to him after he was in custody. No explanation was given of this remarkable action on their part, nor was the knife produced at the trial nor any reason given for its absence. It is also to be observed that three other persons, two police officers and one civilian, were said to have been present when the appellant was searched, and one of them indeed was said to have actually picked up the two rounds after they had fallen from the appellant's shorts. Their Lordships think it was most unfortunate, considering the grave character of the offence charged, which carries a capital penalty, that these important witnesses were not called by the prosecution: it was not suggested that they were not available. The assessors were all in favour of an acquittal, but the magistrate overruled them and convicted the appellant.

The first matter to which their Lordships desire to call attention is that the offence was alleged to have been committed at Chania Bridge in Thika in the Central Province. Thika was declared to be a Special Area by the Special Areas (No. 13) Order, 1953. By the Emergency Regulations, 1952, reg. 22B, which was added by the Emergency Amendment (No. 2) Regulation, 1953, it is provided that it is the duty of any person in a special area to stop and submit to search by an authorised officer, which means, by reg. 22A, a police officer. If, therefore, Chania Bridge was in Thika, as the indictment alleged, it would appear that the action of the policeman was regular as permitted by law. No point seems to have been taken on this matter at the Assize Court. In the Court of Appeal it was taken but that court said that, as no evidence had been given on the subject beyond the evidence of the constable who said he was on duty at Chania road block near Thika, it had not been proved that the offence was committed in a Special Area, and that it was too late for the Crown to rely on it. They referred to *Saleh Mohamed v. Regem* (1) as disapproving a dictum of the Supreme Court of Kenya that a magistrate was entitled to have judicial knowledge of the location of all the towns and villages in Kenya. A report of that case was not before the Board and their Lordships have no wish to criticise a decision that they have not read, but, with all respect to the Court of Appeal, it appears to them that this was, perhaps, an unduly narrow view to take. They think it may well be that, when an indictment alleges that a particular offence was committed at a particular place and no challenge or issue is raised at the trial on that point, the court may assume, or at least take judicial knowledge, that the place is situate where the indictment states it is or that the maxim *omnia praesumuntur rite esse acta* would apply. However, the Board will proceed to deal with the case on the footing that there was no power in any police officer under the rank of assistant inspector to search the appellant. As it was a direct result of the search that the ammunition was found on the appellant, it is submitted that the evidence was illegally obtained and, therefore,

A could not be given, or that the court was bound to ignore it. The proposition must be put in this alternative manner because it appears that no objection was taken when the witnesses were giving their evidence, but a submission to this effect was made at the close of the case for the prosecution.

In their Lordships' opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it and, in their Lordships' opinion, it is plainly right in principle. In *R. v. Leatham* (2), an information for penalties under the Corrupt Practices Prevention Act, 1854, objection was taken to the production of a letter written by the defendant because its existence only became known by answers he had given to the commissioners who held the inquiry under the Act, which provided that answers before that tribunal should not be admissible in evidence against him. The Court of Queen's Bench held that, though the defendant's answers could not be used against him, yet if a clue was thereby given to other evidence, in that case the letter, which would prove the case, it was admissible. CROMPTON, J., said (8 Cox C.C. at p. 501):

D "It matters not how you get it; if you steal it even, it would be admissible."

Lloyd v. Mostyn (3) was an action on a bond. The person in whose possession it was objected to produce it on the ground of privilege. The plaintiff's attorney, however, had got a copy of it and, notice to produce the original being proved, the court admitted the copy as secondary evidence. To the same effect was *Calcraft v. Guest* (4). There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasised in the case before this Board of *Noor Mohamed v. Regem* (5) ([1949] 1 All E.R. at p. 370), and in the recent case in the House of Lords of *Harris v. Public Prosecutions Director* (6) ([1952] 1 All E.R. at p. 1048, per VISCOUNT SIMON). If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out. It was this discretion that lay at the root of the ruling of LORD GUTHRIE in *H.M. Advocate v. Turnbull* (7). The other cases from Scotland to which their Lordships' attention was drawn, *Ratray v. Ratray* (8), *Laurie v. Muir* (9) and *Fairley v. Fishmongers of London* (10), all support the view that, if the evidence is relevant, it is admissible and the court is not concerned with how it is obtained. No doubt their Lordships in the Court of Justiciary appear at least to some extent to consider the question from the point of view whether the alleged illegality in the obtaining of the evidence could properly be excused, and it is true that HORRIDGE, J., in *Elias v. Pasmore* (11) used that expression. It is to be observed, however, that what the learned judge was there concerned with was an action of trespass and he held that the trespass was excused. In their Lordships' opinion, when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortious but excusable, but whether what has been obtained is relevant to the issue being tried. Their Lordships are not now concerned with whether an action for assault would lie against the police officers and express no opinion on that point. Certain decisions of the Supreme Court of the United States of America were also cited in argument. Their Lordships do not think it necessary to examine them in detail. Suffice it to say that there appears to be considerable difference of opinion among the judges both in the State and Federal Courts whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution. At any rate, in *Olmstead v. United States* (12), the majority of the Supreme Court were clearly of opinion that the common

law did not reject relevant evidence on that ground. It is right, however, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary and, therefore, one obtained by threats or promises held out by a person in authority is not to be admitted. It is only necessary to refer to *R. v. Thompson* (13), where the law was fully reviewed by the Court for Crown Cases Reserved. A B

As they announced at the conclusion of the arguments, their Lordships have no doubt that the evidence to which objection has been taken was properly admitted. The ground on which leave to appeal was given therefore fails, and they have humbly advised Her Majesty to dismiss the appeal. Their Lordships indicated when they announced their decision that there were matters of fact in the case which caused them some uneasiness, though they did not consider they were of a nature which, according to the settled practice of the Board, would entitle them to tender other humble advice. But they thought it right to call them to the attention of the Secretary of State and, accordingly, they say no more about them. C

Appeal dismissed. D

Solicitors: *Gaster & Turner* (for the appellant); *Charles Russell & Co.* (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

SIMMONS v. PENNINGTON & SON (a firm). E

[COURT OF APPEAL (Denning, Hodson and Parker, L.JJ.), November 26, 29, 1954.]

Solicitor—Negligence—Sale of land by client—Requisition answered in accordance with general conveyancing practice—Purchaser thereby enabled to refuse to complete and to recover deposit—Opportunity for re-sale pending trial of action for return of deposit—Advice against re-sale—Premises subsequently damaged by fire—Remoteness of damage. F

Premises, of which the plaintiff had been the owner since 1922, were subject to a covenant restricting their use to that of a private dwelling-house, but had in fact been used continuously for business purposes since before 1922 without any complaint being made. In 1948 the plaintiff sold the premises by auction to B., who paid a deposit. The particulars of sale described the premises as "valuable and commanding freehold corner shop premises", and there were special conditions of sale of which condition 7 provided that the property was sold subject to the restrictive covenants as to user and other matters contained in a certain deed, being the deed which had imposed the particular covenant restricting user to that of a private dwelling-house, so far as the covenants were subsisting and capable of taking effect. The special conditions stated that a copy of the restrictive covenants might be inspected at the offices of the vendor's solicitors, but did not further define the exact nature of the particular covenants. In answer to a requisition on title whether the property was subject to restrictive covenants the defendants, who were acting as solicitors for the plaintiff, replied "Yes. See Special Condition 7. There appear to have been breaches of the covenant as to user but no notice of breach has been served". The purchaser refused to complete and recovered his deposit in an action brought by him for the purpose against the plaintiff. In 1949, while the action was pending, opportunity arose to sell the premises to another purchaser, but the plaintiff was advised by the defendants through their managing clerk not to sell during the pendency of the proceedings, G H I

A and accordingly did not sell. Subsequently the premises were severely damaged by fire at a time when they were not insured against that risk, the plaintiff having allowed the insurance to lapse. In an action by the plaintiff against the defendants for damages for negligence as his solicitors,

B **Held:** (i) as the reply given by the defendants to the requisition on title was in accordance with the general conveyancing practice which had prevailed for a long time, the defendants were not negligent, although the answer enabled the purchaser to refuse to complete the contract, because that consequence could not reasonably have been foreseen at the time when the requisition was answered.

C (ii) even if the advice given by the defendants in 1949 against selling the premises was negligent, yet the damage to the premises by fire was too remote and the plaintiff's claim to recover this damage failed.

Appeal dismissed.

[As to the Negligence of a Solicitor in Non-Contentious Matters, see 31 HALSBURY'S LAWS (2nd Edn.) 134, para. 181; and for cases on the subject, see 42 DIGEST 105, 997 et seq.]

D Cases referred to:

(1) *Fletcher & Son v. Jubb, Booth & Helliwell*, [1920] 1 K.B. 275; 89 L.J.K.B. 236; 122 L.T. 258; 42 Digest 97, 894.

(2) *Purves v. Landell*, (1845), 12 Cl. & Fin. 91; 8 E.R. 1332; 42 Digest 92, 838.

(3) *Adam Bell v. Strathern & Blair*, (1954), 104 L.Jo. 618.

E (4) *Cooke v. Falconer's Representatives*, (1850), 13 Dunlop (C. of S.)

Appeal.

F The plaintiff appealed against an order of HARMAN, J., dated June 25, 1954, dismissing an action brought by the plaintiff against the defendants, Pennington & Son, for damages for negligence as his solicitors in, in effect, so answering requisitions made by the purchaser under a contract by the plaintiff for the sale of land as to enable the purchaser to call off the sale, and for negligently advising the plaintiff, pending an action for the return of the deposit, not to re-sell the premises.

G The plaintiff was the owner of certain shop property in Forest Gate, which he had bought in or about 1922. The title to the premises included a conveyance of 1870 which contained restrictive covenants prohibiting the use of the premises otherwise than as a private dwelling-house. When the plaintiff bought the premises they had been converted into shop premises and were being and were thereafter always used as shop premises without any complaint about that user being made.

H In 1948 the plaintiff offered the premises for sale by auction. The particulars of sale described the premises as "valuable and commanding freehold corner shop premises", and there were special conditions of sale, of which one, inserted on the advice of the defendants, was in the following terms:

I "7. This property is sold subject to the restrictive covenants as to user and other matters contained in a deed dated Sept. 29, 1870, and made between [J.G.] of the one part and [G.E.W.] of the other part so far as the same are still subsisting and capable of taking effect, and the purchaser shall in the conveyance to him covenant to observe the same so far as aforesaid and to indemnify the vendor in respect thereof. A copy of the said restrictive covenants may be inspected at the offices of the vendor's solicitors at any time during business hours or at the auction room and the purchaser whether he inspects the same or not shall be deemed to purchase with full notice thereof."

A purchaser bought the premises at the auction, signed a contract and paid a deposit of £900 to stakeholders. The purchaser had known the premises for

twenty-seven years and knew them to have been shop premises for all that time. A
The plaintiff instructed the defendants to act as his solicitors and to complete
the sale. The purchaser's requisitions on title included the following:

"(14) Is the property, or any part thereof, subject to any covenant or
agreement restrictive of the user or enjoyment thereof or otherwise?
If so, has the same been duly observed or performed?" B

The answer returned by the defendants to the purchaser's solicitors was:

"Yes. See Special Condition 7. There appear to have been breaches
of the covenant as to user but no notice of breach has been served."

The purchaser's solicitors then wrote to the defendants stating that the
purchaser had not been informed before the sale that there was a restrictive C
covenant which restricted the use of the property to that of a private dwelling-
house, and that the purchaser was not prepared to complete, and requesting
that the stakeholders should be instructed to return the deposit. Later, the
purchaser brought an action against the plaintiff for the return of the deposit.

In 1949 while the action was pending there arose an opportunity to sell the
premises to another purchaser, but the defendants by their managing clerk D
advised against selling the property while the action was pending. Acting on
this advice the plaintiff did not sell the property. Subsequently there was a
fire at the premises which caused great damage at a time when the premises
were not insured, the plaintiff not having renewed the insurance policy since the
auction sale in 1948.

In 1951 the action for return of the deposit was tried before ROMER, J., who E
held that the purchaser was entitled to recover his deposit and this decision was
affirmed on appeal.

The plaintiff then brought the present action against the defendants for
damages for negligence as his solicitors, both in answering the requisition on
title and in advising him against a sale of the premises in 1949. In relation to
the alleged negligence in answering the requisition the plaintiff averred that by F
the answer the defendants represented, expressly or impliedly, that the restrictive
covenant was or might be enforceable. The damages claimed for the alleged
negligence in advising against sale included the loss by reason of the damage
by fire when the premises were not insured.

At the trial HARMAN, J., held (i) that the defendants were not negligent in
regard to the answer to the requisition and (ii) that the defendants were negligent G
in the advice which they gave regarding the sale of the property pending the
action for the return of the deposit, but that the damage, i.e., the damage resulting
from the fire, was too remote since it was attributable to the plaintiff's omission
to insure the property, which omission the defendants could not reasonably be
expected to have foreseen.

Melford Stevenson, Q.C., and *J. T. Molony* for the plaintiff. H

Gerald Gardiner, Q.C., and *P. M. O'Connor* for the defendants.

DENNING, L.J., stated the facts and continued: The action for the return
of the deposit came to trial in 1951 before ROMER, J., and then it went to
the Court of Appeal. Both courts held that the purchaser was entitled to recover
his deposit. The reason was because of the answer which the plaintiff's solicitors
gave to the requisition. It was wrong, the courts said, for the solicitors to I
answer "Yes", because that meant there was a restrictive covenant. It was
also wrong, the courts said, to say: "There appear to have been breaches of
the covenant", because that meant that the covenant was still subsisting.
Both courts said that the answer to the requisition was plain and unambiguous.
It meant that the property, although sold as shop premises, was still subject to
a covenant forbidding it to be used except as a private dwelling-house. It
showed that the vendor was not going to make a good title. It was equivalent to

A a repudiation or a refusal to perform his part of the bargain, and the purchaser on that account was entitled to call off the contract. That appears, I think, most distinctly from the judgments of SIR RAYMOND EVERSHED, M.R., and of BIRKETT, L.J., in the Court of Appeal. The Master of the Rolls said the answer to the requisition provided the purchaser

B “with a heaven-sent opportunity to resile from a bargain of which he had already repented and he embraced that opportunity with alacrity . . . he undoubtedly took advantage of the rigour of the game and the loss must fall upon the vendor.”

So the answer to the requisition was a fatal mistake. It enabled the purchaser at once to get out of his bargain. He was entitled to cancel the contract forthwith and did so.

C The plaintiff, naturally, blames his solicitors for what has happened. He says: “I instructed you to carry this contract through for me. Instead of doing so, you repudiated it and lost me the contract. It is all very well for you to say that you did not mean to repudiate it, but everyone knows that, for a statement to be a repudiation, it must be clear and unequivocal, evincing an intention no longer to be bound by the contract. If you made such a statement on my behalf you must have been negligent.”

I find it very difficult to give a satisfactory answer to this argument, but I know that there must be one; for I am quite satisfied that the solicitors were not negligent. Let any lawyer put himself in their position. They knew that there were some old restrictions on these premises which had not been enforced for years. The restrictions were in all probability obsolete, but the solicitors could not assert categorically that they were obsolete. It would obviously not be right for solicitors, without full investigation, to commit the vendor to a warranty that the restrictions were obsolete. So they guarded their client by putting a special condition in the contract saying that he sold the property subject to the restrictions so far as they were still subsisting and capable of taking effect: and when it came to the answer to the requisition, they tried to protect their client by saying the same thing over again or, rather, what they thought was the same thing. It was, in the words of the very experienced managing clerk who dealt with it, a “stock requisition”, and he answered in the “stock form”. He answered it in the way in which, HARMAN, J., said, such questions had been answered from the time of the memory of man, or at all events for a long time.

G But by ill luck the courts held that the words which the solicitors used, instead of protecting their clients, amounted to a repudiation of the contract. That was, in my view, not the solicitors’ fault. It was not a thing which could reasonably have been anticipated to flow from the answer to the requisition. The solicitors acted in accordance with the general practice of conveyancers. No ill consequences had ever been known to flow from an answer in this form. Now that the case has gone adversely to the plaintiff, we can see that it was a mistake, but it is so easy to be wise after the event. One has to try to put oneself in the position of the solicitors at the time and see whether they failed to come up to a reasonable standard of care and skill such as is rightfully required of an ordinary prudent solicitor. It seems to me, applying that test, that it is impossible to say that these solicitors were guilty of a breach of duty to their client. It was one of those misadventures and misfortunes which do sometimes happen even in the best-conducted businesses. I think that HARMAN, J., was right in holding the solicitors were not guilty of negligence in regard to the answer to the requisition.

I The next point is as to the advice which the solicitors gave to their client advising him that he should not sell pending the action. The judge has found that the solicitors were negligent in giving that advice, because the action only affected the deposit. Neither side was at that time insisting on the sale or asking for specific performance. If the solicitors had thought about the matter

for ten minutes, they would have realised there was no objection to the sale. A
 I do not propose to say anything on the question of negligence because, in my
 judgment, the plaintiff's claim on this point fails because the damage is too remote.
 The market price did not go down at all and no damage would have been sustained
 if the property had been insured. The trouble was that the property was not
 insured against damage or loss by fire, and that was the fault of the plaintiff
 himself. He had the whole insurance entirely in his own hands, and the loss was B
 due to his own omission to insure. The ordinary prudent course for owners of
 property is to insure against fire, and the plaintiff did not follow it. The solicitors
 could not reasonably be expected to foresee that damage by fire would fall on
 the plaintiff. It was not, to use the phrase of ASQUITH, L.J.*, a thing which was
 "on the cards".

The result is that I am in complete agreement with the judgment of HARMAN, J., C
 on both points and I would dismiss the appeal.

HODSON, L.J.: I agree. The gist of the plaintiff's action on the first
 point was that he had lost the benefit of his bargain for the sale of his property
 by reason of the negligence of the experienced managing clerk employed by the
 solicitors who were doing the work for him. The particular act of negligence D
 relied on is the giving by the clerk of an answer to a requisition, which had the
 effect, as this court has held, of making the vendor say to the purchaser that he
 was forcing on him a property essentially different from that which was
 advertised. Reference to the advertisement shows that the property in question
 was advertised as "freehold corner shop premises". The answer to the requisition

"Is the property, or any part thereof, subject to any covenant or
 agreement restrictive of the user or enjoyment thereof or otherwise? If so,
 has the same been duly observed or performed?" E

was

"Yes. See Special Condition 7. There appear to have been breaches
 of the covenant as to user but no notice of breach has been served." F

There being a covenant against user of the premises except for the purpose of a
 private dwelling-house, that was the answer which the managing clerk naturally
 gave, and he drew attention to the special conditions in the catalogue which,
 if followed up, would have shown the purchaser the existence of the restrictive
 covenant. Admittedly, in answering the question in what was described as the
 usual way, the managing clerk had not in mind, nor, until long after this action G
 started, had anybody else in mind that he was putting forward a description of
 the property which was not the same but vitally different from the description
 of the property advertised for sale. That is the force of the plaintiff's case.
 He says that the defendants ought to have been alive to this and to have stated
 that the restrictive covenant was obsolete, as admitted on both sides at the
 hearing before ROMER, J.

HARMAN, J., has considered this matter and I think it worth while to read
 what he said. H

"Was [the managing clerk] negligent in putting his answer in that way
 even though he did not mean to do so? If he did it by carelessness it may
 well be negligence on his part. I cannot see that there was any negligence
 at all. He answered in a way which, although unfortunate in form, was in
 substance a way in which such questions have been answered from the time
 of memory of man." I

I should imagine the learned judge was drawing on his own experience as a
 practitioner in the Chancery Court. He went on:

"Both the experienced Chancery counsel who represented the plaintiff

* See *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* ([1949] 1 All E.R.
 at p. 1003, letter C).

A thought he should succeed and that this pretext of the purchaser would not be held valid. That turned out to be wrong, but if the managing clerk was wrong, he was wrong in very good company and everyone knows that it is not every piece of wrong advice which a lawyer gives which is held in our law to be negligence."

B Both the learned counsel referred to gave evidence in this case and they thought the opinion expressed by ROMER, J., that this inconsistency defeated the plaintiff was wrong. They advised an appeal but a division of this court took a different view from theirs. In those circumstances, it would be a remarkable thing if a solicitors' managing clerk who had produced that result, which was ultimately found to be wrong, should be held to be negligent within the ordinary principles of the law of negligence. It is said that HARMAN, J., misdirected himself on the matter, but I cannot accept that. What he said was:

C "I do not think I need deal at any great length with the question of a solicitor's liability for negligence. It is the same as anybody else's liability. Having regard to the degree of skill held out to the public by solicitors, does the conduct of the solicitor fall short of the standard which the public has been led to expect of the solicitor?"

D I think that that direction was right and consistent with authority. To my mind, the strongest way in which the plaintiff's case could be put is that this is not a case of negligent advice, which is the subject-matter of most of the decisions on solicitors' negligence, but that it is really a case of misdescription of a piece of property by a professional man. It is said that if a solicitor acting for a vendor misdescribes the property, he must, having regard to the professional skill which a solicitor is expected to exercise, be regarded as negligent. I have in mind, in considering the direction which HARMAN, J., gave to himself, the language of SCRUTTON, L.J., in *Fletcher & Son v. Jubbs, Booth & Helliwell* (1), where he said ([1920] 1 K.B. at p. 280):

E "... it would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a border-land within which it is difficult to say whether a breach of duty has or has not been committed."

F "Crass" and other adjectives attached to "negligence" are no longer used. The learned judge did not limit himself in any way. He did not direct himself by that adjective, although he did quote a passage from a decision in the House of Lords in *Purves v. Landell* (2) in which it appears. He had also before him a Scottish case, *Adam Bell v. Strathern & Blair* (3), in which a number of the authorities were brought together, and in particular there was a passage which seems to me to be applicable to this case although it has not any direct reference to professional advice but rather to other professional activities:

G "In *Cooke v. Falconer's Representatives* (4), 1850, 13 D., page 157, LORD FULLERTON at page 172 said: 'A professional man does not warrant that what he does will certainly have the effect which is expected from it . . . He warrants only that he shall bestow on the matter committed to him the skill generally possessed by his brethren in the profession. It is not enough in order to recover damages from a professional man to show that something which was committed to him to do has not had the effect which was expected from it: he must show an act of gross ignorance such as could not have been committed by any other ordinarily informed member of the profession'."

I have no hesitation myself in coming to the conclusion on this evidence that the learned judge came to a right conclusion on this part of the case. A

On the second question, I agree with what my Lord has said as to the remoteness of the damage claimed and I have very little to add. It is unnecessary to go further and consider whether in any event the learned judge was right in finding negligence against the solicitors in view of the fact that during the pendency of the litigation in question the defendant's managing clerk had advised the plaintiff not to sell the property. I think, in fairness to the managing clerk, it might be well to set out his reasons for giving that advice. The first reason was: B

"I thought the status quo should be maintained, as there was a pending action, until the action was decided."

That may not be a very good reason, but it is a very natural reaction of a solicitor to give such advice to his client when an action which concerns a particular subject-matter is before the court. To continue with his answer: C

"A second reason was that in the defence we were claiming forfeiture of the deposit and I thought that the court might order, if they decided that there was a binding contract, that the purchaser should have an opportunity of completing the purchase instead of forfeiting his deposit." D

There seems to be some force, at any rate, in that reason, although it is perfectly true no doubt that, if the managing clerk had thought the matter over deeply or considered it with his principals or with counsel, he would have appreciated that if the property had been in fact disposed of there could be no question of specific performance of the contract. The third reason he gave was this: E

"There was another reason, that in the defence we were asking the court for a declaration that we were entitled to re-sell, and I thought that if we were asking the court to say that we were entitled to re-sell we should not re-sell until the court said we could." F

It is unnecessary to express any conclusion about that matter and I for my part am not prepared, in those circumstances, nor is it necessary to do so, to criticise the learned judge's finding on it. I have drawn attention to the answers which the solicitors gave which show, at any rate, that there was something to be said for the view that there was no negligence on that part of the matter. I agree that the appeal fails. G

PARKER, L.J.: I agree that the appeal should be dismissed. The first ground on which it is said the defendants were negligent is based on the answer given by their managing clerk to requisition (14). That requisition and the answer to it have already been read, but it is to be observed that nowhere in the answer is there a plain statement, as it is said there should have been, that any restrictions as to user were obsolete and unenforceable. On the contrary, it has been held by this court that the words are plain and unambiguous and amount to a statement that the restrictions are living restrictions of which there have been breaches and that, accordingly, the statement in the answer amounts to a repudiation, in that it was being stated that property of a different description was being sold from that advertised in the particulars. In those circumstances, the plaintiff says, in effect: "I employed you, the defendants, to carry through the transaction. I did not employ you to repudiate it, and your statement giving rise to this repudiation was a mis-statement made with no conceivable excuse and you have fallen short of your duty to exercise reasonable skill". In the light of after-events that argument is a very attractive one, but at the same time I have no doubt that it fails. To state affirmatively that the covenants were obsolete and unenforceable was something the defendants' managing clerk was not called on to do. That was a matter for the purchaser to satisfy himself I

- A about. Indeed, if the managing clerk had taken on himself to state that the restrictions were obsolete and it turned out that he was wrong in some respect, it might well be said that he was negligent for having taken on himself something which it was not part of his duty to do. What it really comes to is this. It is said that he should have used some more negative words such as "there appears to have been a user inconsistent with the covenant, assuming it is not obsolete, but no notice of breach has been served"; in other words, some words which fell short of affirming that the restrictions were living restrictions. For my part I am quite satisfied that at the time when that answer was made no one, whether solicitor or counsel, could reasonably be expected to foresee the difficulties which might follow according to whether one formula was used rather than another.
- C So far as the second question is concerned, I find it unnecessary to go into the question whether the advice given by the defendants' managing clerk was given negligently, because it has not been shown, as it must be shown before damage can be recovered, that it was, to use the phrase used by ASQUITH, L.J., "on the cards"* not merely that a fire might result but that a fire might result at a time when the plaintiff was uninsured.
- D For these reasons, in my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Cree, Godfrey & Wood*, agents for *Preston & Redman*, Bournemouth (for the plaintiff); *Hewitt, Woollacott & Choun* (for the defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

E

R. v. ONUFREJCZYK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Sellers, JJ.), January 11, 1955.]

Criminal Law—Murder—Corpus delicti—Body of murdered man not found—Proof by circumstantial evidence.

F

On a charge of murder the corpus delicti may be proved by such circumstantial evidence as leaves open no other rational hypothesis than murder.

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The appellant, a Pole, and one S. owned a farm in partnership. Their farming venture was a failure. The appellant was in need of money and S. wanted to break off his relationship with the appellant. The last occasion when S. was seen alive by anyone other than the appellant was on Dec. 14, 1953, when S. took a horse to the local blacksmith to be shod. Thereafter S. disappeared completely and his body was never found. When the appellant was called to give an account of the disappearance he told a story of the departure of S. which was improbable and was inconsistent with a prior account given by the appellant to a sheriff's officer who had gone to the farm on Dec. 18, 1953. The appellant wrote contemporary letters explicable only on the footing that he never expected S. to return and put forward a proposition to one P. which, if carried out, would have involved S. being impersonated. Further the appellant endeavoured to persuade the blacksmith to say that S. had taken the horse to be shod on Dec. 17. Minute amounts of the blood of S. were found on the walls and ceiling of the kitchen in the house occupied by the appellant and S. The appellant was charged with the murder of S., the case for the prosecution being that he was murdered before Dec. 17, 1953.

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Held: (i) on a criminal charge the fact that the murdered man was killed, like any other fact, can be proved by circumstantial evidence, being evidence which leads only to that one conclusion of fact, although no body is found.

* See *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* ([1949] 1 All E.R. at p. 1003, letter C).

(ii) in the present case there was evidence from which the jury could infer that S. was dead, and, if he was dead, the circumstances of the case pointed to the fact that his death was not a natural death, and accordingly, the jury having been warned that the circumstantial evidence must be so cogent as to convince them that the facts could not be accounted for on any other rational hypothesis than murder, a corpus delicti had been established and the jury were entitled to find that the appellant murdered S.

R. v. Horry ([1952] N.Z.L.R. 111) applied.

Appeal dismissed.

[As to Proof of the Corpus Delicti, see 9 HALSBURY'S LAWS (2nd Edn.) 183, para. 268; and for cases on the subject, see 14 DIGEST 432-435, 4562-4586.]

Cases referred to:

(1) *Evans v. Evans*, (1790), 1 Hag. Con. 35; 161 E.R. 466; 14 Digest 432, 4562.

(2) *R. v. Horry*, [1952] N.Z.L.R. 111; 3rd Digest Supp.

Appeal against conviction.

The appellant, Michael Onufrejczyk, was convicted on Dec. 1, 1954, before OLIVER, J., sitting with a jury at Swansea Assizes, of the murder of Stanislaw Sykut and was sentenced to death.

Elwyn Jones, Q.C., and *T. J. Jones* for the appellant.

H. Edmund Davies, Q.C., *W. L. Mars-Jones* and *Eysr Lewis* for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court: The appellant, who is a Pole and who has been in this country since 1947, was convicted before OLIVER, J., at the last assizes for Swansea of the murder of another Pole, Sykut, his partner.

The principal question that has been argued, the trial having lasted for some twelve days and having been summed up with meticulous care by the learned judge who analysed the evidence in what I may describe as a masterly fashion, is whether there was proof of what the law calls a corpus delicti. In this case the remarkable fact, which has remained remarkable and unexplained, is that the body of this man, who was last seen so far as anybody knows on Dec. 14, 1953, has completely disappeared and there is no trace whatever either of him, or of his clothes, or of his ashes. It has been submitted to us that the law is that, unless the body can be found or an account can be given of the death, there is no proof of a corpus delicti. Corpus delicti means, first, that a crime has been committed, that is to say that the man is dead, and that his death has been caused by a crime. As SIR WILLIAM SCOTT (later LORD STOWELL) pointed out a great many years ago in a matrimonial case (*Evans v. Evans* (1), 1 Hag. Con. at p. 105), one does not begin to inquire whether the prisoner is guilty of the crime until one has established that a crime has been committed.

There is, apparently, no reported case in English law where a man has been convicted of murder and there has been no trace of the body at all. But it is, we think, clear that the fact of death can be proved, like any other fact can be proved, by circumstantial evidence, that is to say, by evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that the evidence must lead to one conclusion only.

OLIVER, J., began and ended his summing-up to the jury with a direction, which he said was as clear a direction as he could give, and which he took from *R. v. Horry* (2), which was before the New Zealand Court of Appeal in 1951. The headnote of that case which OLIVER, J., took as stating the law is this:

"At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime. Before he can be

A convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

B Speaking for myself, I entirely agree with that as a statement of law except that I would not use the words "morally certain"; I would say "such circumstances as render the commission of the crime certain". I myself think that it is always a pity in dealing with matters of evidence to use epithets either for the purpose of increasing its value or decreasing its value; and when one talks about cases in the books and somebody using the expression "a high degree of certainty" or "strong evidence" and words of that sort, they really add
C nothing to what the law requires. The law requires a case to be proved, and the jury are warned and told that they have to be satisfied on the evidence that the crime is proved and that the prisoner is guilty of the crime; and they should be told that if, when they have heard the evidence, they are not satisfied, if they do not feel sure that the crime has been committed or that the prisoner has committed the crime, then their verdict should be not guilty. One should
D leave out of account, if one can, any expression such as "giving the prisoner the benefit of the doubt". It is not a question of giving the benefit of the doubt; if the jury are left with any degree of doubt that the prisoner is guilty, then the case has not been proved.

OLIVER, J., having read that statement of the law to the jury, said:

E "It is indeed a grave step to find a murder proved when there is no body, but it is not the law, and I do not believe it has ever been the law; it is certainly not the law today that if a body can be got rid of so that no trace of it can be found, a murderer who has done so is not to be convicted. That is not the law. But, of course, the burden of proving everything against the man is upon the Crown. There is no burden on him to disprove anything.
F I think the most helpful way I can bring this to your minds is to say this. If Onufrejczyk had not given evidence at all in this case, and all you had was the case for the Crown, would you be satisfied with that case unanswered, the case for the Crown? If you would, then you will proceed. But if you were, for instance, to come to the conclusion that the case for the Crown standing uncontradicted was not good enough—suppose you took that view
G —then you need not go on to consider Onufrejczyk's explanation; there is no burden upon him."

A little later on, before he turned to the details of this remarkable case, he said this:

H "If [Sykut] did not die by natural causes, he was killed. Members of the jury, if he was killed his body was concealed or destroyed and has not been found. If he is dead and was killed and the body was destroyed or concealed he was murdered, was he not? That is the point. I want you to apply your minds to that set of circumstances and decide for yourselves whether in the light of these facts, and many more to which I shall have to draw your attention, you can say you are satisfied that no rational hypothesis except that he is dead, dead by violence, is open. If you are
I driven to that conclusion that would be a verdict of murder; but if you think that would be going too far and that you could not safely say that no rational explanation of his death except murder could be conceived, why then it will mean you have a doubt about it and you will acquit him."

I do not think that counsel for the appellant, for whose assistance in this case and for whose forceful and temperate argument the court is much indebted, would quarrel with that direction of the learned judge which seems to me as ample and as fair to the appellant as it is possible to conceive.

SIR MATTHEW HALE, who was writing at the end of the seventeenth century, A
says in his *PLEAS OF THE CROWN*, vol. 2, at p. 290:

“I would never convict any person of murder or manslaughter, unless the
fact were proved to be done, or at least the body found dead . . .”

He says that you must prove the fact of the murder, or at least that the body
has been found. He does not say, and it is very often quoted as though he had B
said, that you cannot convict a man of murder unless you can produce the
body. One has to remember, I think, especially as there have been dicta of other
judges in the earlier part of the last century going down to the middle of the
century which give some colour to the idea that the court will always require
in the case of murder or manslaughter the production of the body, that the
circumstances of these days are different from what they were when SIR MATTHEW C
HALE wrote. When SIR MATTHEW HALE wrote, there was no police force;
there was nothing except a watchman in a town and a parish constable, who
might have been an old infirm man of seventy or eighty years, in the country.
There was no telegraph. There were no motor cars. There was no aliens’
legislation such as we now know. There was no means of seeing that aliens
were registered and did not get out of the country without permission once D
they were here, and matters of that sort. It would be, therefore, a strong thing
indeed were any court to lay down that, without production of the body, or
accounting for it by somebody who had seen it or seen the murder committed
or something of that sort, a murderer could not be convicted.

The case against the appellant was that he and Sykut had a farm. The farm
was a failure, and the appellant had come to the end of his resources. He was E
in dire need of money; of that there cannot be any doubt, and his own letters
show it. He was trying to borrow money from this person and that person,
that relation and that near friend, and failed every time. He had actually got
to the point when he was obviously considering fraud, because he was hoping
to get a valuer who would over-value the farm so that he might be able to raise
more money on mortgage from his bank. Meanwhile, Sykut wanted to break F
off his association with the appellant. There was a suggestion that Sykut
should be paid out. Sykut had invested his money in the farm and was willing
to sell his share in the farm for £700 if he could get it from the appellant, and,
if not, Sykut said that the farm had to be put up for sale. They had been to
Mr. Roberts, a solicitor of Llandilo, and their difficulties had been discussed
before him. There was evidence, which I do not think, speaking for myself, G
was anything like so strong or convincing in pointing towards murder as a
great deal of the other evidence, that these men had quarrelled; but we come to
Dec. 14, 1953, by which date no conclusion had been reached between these
two men about the sale of the farm. The appellant at this time may or may not
have had any money beyond perhaps a few shillings or a few pounds, but it
seems clear that he had nothing at all to enable him to pay out his partner. H
The appellant was very anxious to avoid the sale by auction and wanted to
get the whole farm because, I suppose, he thought if he had the whole of it he
could make a satisfactory business out of it.

On Dec. 14, Sykut disappeared, so far as is known, not only from Carmarthen-
shire, not only from England but, so far as is known, from the face of the earth. I
Letters came from Poland from his wife after his complete disappearance when
there would have been ample time for him to have got back to Poland and
got in touch with his friends, which would seem to show that he had not got
back to Poland, and the last person who is known to have seen him is the
appellant.

The appellant’s activities after Dec. 14 were certainly very remarkable. There
was evidence, and very strong evidence, that on Dec. 18 he must have posted
a letter to a Polish woman living not very far away not later than a quarter to
five or, it may have been, five o’clock. He said in that letter:

- A "My case is already completed, but I must if only for a few hours pop in to London to take from my acquaintances money. I gave my partner the gross [i.e., the larger part] of the money because I borrowed for a few weeks, only I must sell what is possible. So beg you very much to help me in this matter and I will be very grateful, at the moment this is all for now, the rest we talk over when Mrs. comes over. Beg you to inquire whether
- B it is possible to sell the poultry alive before the holidays, as I must have at least part of the money to begin something and may be some of the cattle. Hand kisses, expecting as soon as possible to see you because my partner is leaving for fourteen days and might change his mind. Please don't wait a moment because it might be too late."
- C There he is saying that he has fixed up matters with his partner, that he has paid him most of the money and is expecting him to go away for a few days. What we know is that the appellant went up to London and was trying by every means in his power to borrow money from relatives there to enable him to pay off his partner. He was getting a woman, who came and gave evidence and evidently impressed the learned judge, to forge (there is no other word for it, though
- D she may not have known she was forging) documents purporting to be agreements, and so forth, and then adding a signature to them purporting to be Sykut's, and giving all sorts of contradictory accounts. When he had to give an account of how his partner disappeared, he told the sort of story you may see in a magazine, or a detective story, or a story by the late Phillips Oppenheim, of how a large, dark car, sometimes described as black and sometimes as green, had arrived at this lonely farm at 7.30 at night, finding its way up a dreadful rocky path; there were three men, one of whom had a revolver, and the unfortunate Sykut was put into that car at the point of the revolver and driven away. A story like that was told and yet, remarkably enough, on Dec. 18, a sheriff's officer had gone to the farm before seven o'clock at night to levy an execution. The execution was against the appellant alone, and when the officer came to the place where the business was carried on he naturally asked, as he had to see
- F that he was not levying on partnership property: "Where is Mr. Sykut?" He was told: "Oh, Sykut has gone to a doctor at Llandilo". He never went to a doctor at Llandilo according to the evidence that was given, but at 7.30 that night he was supposed to be kidnapped and taken to London. Then the appellant said in his evidence to the court that he was expecting his partner back at the farm, and yet all the letters which he is writing then seem to say
- G that his partner had gone to Poland and that he was not going to see him back. He was writing letters that can only be explained on the footing that he knew perfectly well that his partner could never turn up again. One of the matters of the greatest possible importance is that, when the appellant was in London and telling all sorts of contradictory stories to the people from whom he was trying to borrow money, he made two remarkable proposals. First, he asked
- H Mrs. Pokora, with whom he was evidently on terms of close friendship, to send him sham registered letters, that is to say, to get registered envelopes, to put sheets of paper in them and to send them to him, purporting to send him two hundred pounds. Another more remarkable thing was that he actually asked that the husband of this lady should come down and should go with him to see a solicitor at Llandilo and should impersonate his partner. Could he have done
- I that, would he have dared to do that, if he had thought there was the smallest chance of his partner appearing again, although the appellant said in his evidence in court that he did expect his partner to come back again, his partner who had new clothes and other property and left everything behind, if the appellant's story is true? His partner went off with these people, whether he was going to Poland or somewhere else, leaving his clothes, and never came back or made any attempt to get back. Indeed, the appellant said that he knew one of the men, Jablonski, which I daresay is as good as any other name if you are using

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a Polish name, arranged to meet his partner at Paddington station at three o'clock, on which day does not matter, and that Jablonski's account was that he went there and waited until three o'clock and nobody came. Later, so it was said, he met them at a Polish club and there this document was signed, and the signature said by the prosecution to be a forgery was affixed in the presence of Mr. Jablonski and another gentleman. There was nobody called from the Polish club to say that these people ever existed at all.

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I do not propose to go all through the evidence that was called, but there was a very remarkable piece of evidence which cannot possibly be accounted for in any other way than that the appellant was deliberately trying to manufacture evidence with regard to the life of Sykut, and that was the local blacksmith's evidence. On Dec. 14, the last day on which anyone saw Sykut alive, a horse from the farm had been taken by the appellant to the blacksmith for shoeing, and had been fetched by Sykut on the same day. The blacksmith had charged 17s. 6d. for shoeing the horse. The blacksmith's evidence was perfectly clear about that. He said there was no doubt in his mind at all about it; whether he referred to his book, I do not know, but I think he did. At the end of December, when the police were beginning to make inquiries, the appellant visited the blacksmith and paid him the money, and then he tried to persuade the blacksmith to say that it was on Dec. 17 that Sykut went there to take the horse away. The case for the prosecution was that Sykut was dead by the 17th, that he was killed either on or immediately after the 14th. That was the last day anybody had seen that unhappy man alive, and here is the appellant, at the end of December, when the police had begun to make inquiries, trying to get a man whose evidence on one point was vital, to give untrue evidence as to the date on which Sykut fetched the horse. If the blacksmith's evidence was true, the appellant was trying to get him to say something untrue.

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Those are all matters which were from time to time pointed out to the jury by the learned judge and on which they had the advantage of hearing counsel on both sides. It is perfectly true that the learned judge did not point out to the jury all the matters. Moreover a judge does very often say to a jury—"It is very remarkable that such a point has not been proved, and if it could be, it ought to have been proved." The case for the prosecution was:—This man has disappeared. He has completely gone from the ken of mankind. It is impossible to believe that he is alive now. I suppose it would have been possible for him to have got out of the country and become immured behind what is sometimes called the Iron Curtain; but here you have facts which point irresistibly towards the appellant being the person who knows and who disposed of that man in one form or another. It may be that it would be desirable to emphasise to the jury that the first thing to which they must apply their minds is: Was a murder committed? Speaking for myself, I think that the way the learned judge put it in the two passages which I have read did sufficiently direct the attention of the jury to the fact that they had to be satisfied of that, and, if they were satisfied of the death, and the violent death, of this man, they need not go any further. It is, no doubt, true that the prosecution relied considerably on certain minute spots of blood which were found in the kitchen when it was scientifically examined, spots so small that they might easily have escaped the attention of somebody who was trying to wash or wipe up blood. The appellant did not deny that the blood which was found, although it was a minute quantity, on the wall of the kitchen and, I think, on the ceiling of the kitchen, was the blood of his partner. He said that its presence there was due to the fact that his partner had cut his hand in the field with, I think, one of the tractors, and on coming in must have shaken his hand and shaken off some blood. That, of course, was a possibility and it was put to the jury. It was also a possibility that Sykut was disposed of in the kitchen, but there is no evidence that he was and, a matter which has been very properly stressed by counsel for the appellant, there is no evidence

A here how Sykut met his death. This court is of opinion, however, that there was evidence on which the jury could infer that he met his death, that he was dead; and, if he was dead, the circumstances of the case point to the fact that his death was not a natural death. Then, if that establishes, as it would, a *corpus delicti*, the evidence was such that the jury were entitled to find that the appellant murdered his partner.

B For these reasons, we have been unable to find any misdirection by the learned judge or anything in the summing-up which would justify us in saying that the case was not properly presented to the jury. We have come to the conclusion that there was evidence on which the jury were entitled to find that the appellant's partner was murdered and that the appellant was the murderer. Accordingly, this appeal is dismissed.

C *Appeal dismissed.*

Solicitors: *Porter & Glasbrook*, Llandilo, Carmarthenshire (for the appellant);
Director of Public Prosecutions (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

D BULL v. BULL.

[COURT OF APPEAL (Denning, Hodson and Parker, L.J.J.), November 25, 26, December 20, 1954.]

E *Tenancy in Common—Arising by way of resulting trust on purchase of freehold house—Beneficial interests in proceeds of sale—Occupation of portions of house by beneficiaries—Action for possession by one beneficiary against the other.*

F In 1949 the plaintiff and his mother, the defendant, together purchased a freehold house, the plaintiff contributing a larger part of the purchase price than the defendant and the conveyance being taken in his name. The money contributed by the defendant was not intended to be a gift from her to the plaintiff, and the defendant accordingly became entitled to an equitable interest proportionate to her contribution. The parties lived together in the house until April, 1953, when the plaintiff married and it was arranged that the defendant should occupy two rooms and that the plaintiff and his wife should occupy the rest of the house. Subsequently differences arose between the parties and the plaintiff brought an action for possession of the rooms occupied by the defendant.

G **Held:** as the effect of the purchase of the house in 1949 was that the plaintiff and the defendant became beneficial tenants in common of the proceeds of sale of the property which was subjected to the statutory trust for sale, the defendant had a right to participate in the enjoyment of the property until it was sold, and the plaintiff's action for possession failed.

H Per CURIAM: the answer to the question what is to happen if, in such circumstances as those of the present case, the two equitable tenants in common disagree is that the property may be sold in exercise of the statutory trusts for sale, for which purpose there must be two trustees for sale to enable a good receipt to be given for the price; if the trustees wish to sell with vacant possession and the assent of one tenant in common is withheld the only course open is to apply to the court under s. 30 of the Law of Property Act, 1925 (see p. 256, letter D, post).

I Appeal dismissed.

[**Editorial Note.** The decision in this case is of particular interest not only because of the passages in the judgment of DENNING, L.J., with whom the other members of the court agreed, which indicate what the appropriate course of action in other cases may be, with which HODSON, L.J., and, it seems, PARKER, L.J., agree, but also because of the view expressed by DENNING, L.J., that the

statutory trusts for sale under s. 35 of the Law of Property Act, 1925, would arise in circumstances such as those of the present case. Section 34 of that Act, except for sub-s. (1), does not apply where land is conveyed for a legal estate after 1925 to one person and there is no express creation of undivided shares. Sub-section (1) of that section does not expressly create statutory trusts in such circumstances but forbids the arising of a tenancy in common of a legal estate, and s. 36 (4) of the Settled Land Act, 1925, is similarly expressed. Neither states positively that a trust for sale shall be created. The decision in the present case seems to have been reached on the basis that the legislation in fact creates a statutory trust for sale in the circumstances, and thus ensures that the legal position accords with the general scheme of the real property legislation of 1925. HARMAN, J., came to a similar conclusion in the case of partnership property in *Re Rayleigh Weir Stadium* ([1954] 2 All E.R. 283).

In applying the views expressed by the court regarding the appropriate remedy if there is disagreement between beneficiaries, their observations are not, it is thought, intended to comprehend all courses, but to relate to difficulties such as were presented by the particular circumstances of the present case; the court was not, for example, here considering the possibilities of partition under s. 28 (3) of the Law of Property Act, 1925.

For the Law of Property Act, 1925, s. 14, s. 35, see 20 HALSBURY'S STATUTES (2nd Edn.) 457, 491.]

Cases referred to:

- (1) *Jacobs v. Seward*, (1872), L.R. 5 H.L. 464; 41 L.J.C.P. 221; 27 L.T. 185; 36 J.P. 771; 43 Digest 391, 146.
- (2) *Cowper v. Cowper (Earl)*, (1734), 2 P. Wms. 720 (24 E.R. 930); *on appeal* (1736), 2 P. Wms. 755 n. (24 E.R. 942); 43 Digest 626, 661.
- (3) *Re Warren*, [1932] 1 Ch. 42; 101 L.J.Ch. 85; 146 L.T. 224; Digest Supp.
- (4) *Re Buchanan-Wollaston's Conveyance*, [1939] 2 All E.R. 302; [1939] Ch. 738; 108 L.J.Ch. 281; 160 L.T. 399; Digest Supp.
- (5) *Re Hyde's Conveyance*, (Feb. 1, 1952), Unreported; 102 L.Jo. 58.

Appeal.

The plaintiff appealed against an order of His Honour JUDGE REGINALD CLARK, Q.C., at Ilford County Court, dated July 28, 1954, whereby he dismissed the plaintiff's claim to evict the defendant from the premises known as 101, Rishden Gardens, Ilford.

The facts appear in the judgment of DENNING, L.J.

F. Burrows for the plaintiff.

L. B. Schapiro for the defendant.

Cur. adv. vult.

Dec. 20. DENNING, L.J., read the following judgment: This is a most unfortunate dispute between mother and son. The son is now about thirty years of age and he has always lived with his mother. They have lived in several different houses, and, since 1949, the house has been 101, Rishden Gardens, Ilford. This house was bought partly with her money and partly with his, but the son seems to have provided the greater part and the conveyance was taken in his name. In April, 1953, the son married and it was arranged that his mother should have two rooms in the house and that he and his wife would have the rest. Soon afterwards, however, differences arose between the mother and her daughter-in-law with the result that the son told his mother to leave the house. She has not, she says, been able to find other accommodation suitable to her needs and so she has not left. She is still there. The son has, therefore, brought these proceedings to evict her. In answer to the claim the mother says that, although the house stands in her son's name, she herself contributed quite a lot of money towards it, and that in these circumstances he cannot evict her or, at any rate, cannot evict her without paying her the amount which she put into it.

A The judge has found that the mother did contribute a substantial amount towards the house and that she did not intend to make a gift of that money to her son. There was, therefore, no presumption of advancement but a resulting trust in her favour. Furthermore, the judge has found that, when the house was bought, it was the intention of both mother and son that the house, although taken in the son's name, should be a home for them both. The judge has held

B that in these circumstances the son cannot turn the mother out now as if she were a trespasser; and that his only remedy is by application to a court of equity. The son appeals to this court.

Similar circumstances must often arise in families, but strangely enough there is no authority on the point. The son is, of course, the legal owner of the house; but the mother and son are, I think, equitable tenants in common. Each is

C entitled in equity to an undivided share in the house, the share of each being in proportion to his or her contribution. The rights of equitable tenants in common as between themselves have never, so far as I know, been defined; but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take

D more than his proper share the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of a trespass (see *Jacobs v. Seward* (1)). Such being the rights of legal tenants in common, I think that the rights of equitable owners in common are the same, save only for such differences as are necessarily consequent on the interest being equitable and not legal. It is well known that equity follows the law; and it does so in these

E cases about tenants in common as in others.

In support of this view I would refer to the words used by SIR JOSEPH JEKYLL, M.R., over two hundred years ago in *Cowper v. Earl Cowper* (2) (2 P. Wms. at p. 753):

F "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; . . . "

I realise that since 1925 there has been no such thing as a legal tenancy in common (see s. 1 (6) of the Law of Property Act, 1925). All tenancies in common now are equitable only and take effect behind a trust for sale (see s. 36 (4) of the Settled Land Act, 1925). Nevertheless until a sale takes place these equitable

G tenants in common have the same right to enjoy the land as legal tenants used to have. Their position was well stated by MAUGHAM, J., in *Re Warren* (3). ([1932] 1 Ch. at p. 47):

"There is no doubt that, since the coming into force of the Law of Property Act, 1925, the position of undivided owners is different from what it was before. That Act, for the purpose of simplifying the law, has introduced provisions for undivided shares, and has made partition actions unnecessary and obsolete. But in substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act."

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I My conclusion, therefore, is that, when there are two equitable tenants in common, then, until the property is sold, each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner; and that neither of them is entitled to evict the other.

The question may be asked: what is to happen when the two disagree, as they have done here? The answer is that the house must then be sold and the proceeds divided between mother and son in the proper proportions. The son is the legal owner and he holds it on the statutory trusts for sale. He cannot

at the present moment sell the house because he cannot give a valid receipt for the proceeds. It needs two trustees to give a receipt (see s. 14 of the Trustee Act, 1925). The son could get over this difficulty by appointing another trustee (under s. 36 (6) of the Trustee Act, 1925) who would agree with him to sell the house. The two trustees would, no doubt, have to consider the mother's wishes, but as the son appears to have made the greater contribution he could in theory override her wishes about a sale: see s. 26 (3) of the Law of Property Act, 1925. The difficulty of the two trustees would be a practical difficulty because, so long as the mother is there, they could not sell with vacant possession. The mother is entitled to rely on her equitable interest as tenant in common which is preserved by two sections of the Law of Property Act, 1925. The first is s. 14 which says that the Act

" . . . shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation."

The second is s. 35 which says that the trust for sale is

" . . . subject to such . . . provisions, as may be requisite for giving effect to the rights of the persons . . . interested in the land . . . "

In this case the mother is in possession and in actual occupation as equitable co-owner and by virtue of that interest cannot be evicted by the trustees except with her consent. If the trustees wished in these circumstances to sell with vacant possession the only thing they could do would be to apply to the court under s. 30 of the Law of Property Act, 1925, on the ground that the mother's consent could not be obtained. The court could then make such order as it thought fit and this would include, I think, an order to turn the mother out if it was right and proper for such an order to be made (compare *Re Buchanan-Wollaston's Conveyance* (4), and *Re Hyde's Conveyance* (5)*).

My conclusion is, therefore, that the son, although he is the legal owner of the house, has no right to turn his mother out. She has an equitable interest which entitles her to remain in the house as tenant in common with him until the house is sold. If they disagree the house should be sold and the proceeds divided between them in the proper proportions; but he cannot at his will turn her out into the street. The house cannot be sold with vacant possession unless she consents. If she unreasonably refuses her consent, the son, by taking proper steps, can obtain an order for sale from the court and in aid of it the court can order the mother to go; but the court would only make such an order if it was satisfied that it was right and proper to do so and on such terms as to alternative accommodation as it thought right to impose. I find myself, therefore, in agreement with the learned judge and I would dismiss this appeal.

HODSON, L.J.: I agree.

PARKER, L.J.: I also agree and have nothing to add.

Appeal dismissed.

Solicitors: *Canter, Hellyar & Co.* (for the plaintiff); *Daybell, Court-Cooper & Co., Ilford* (for the defendant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

* Referred to (1952) 102 L.Jo. 58.

A

Re A SOLICITOR.

[QUEEN'S BENCH DIVISION (Gerrard, J.), January 11, 1955.]

B

Solicitor—Costs—“Contentious business” or non-contentious business—Lump sum or detailed bill—Lump sum bill submitted for costs incurred before commencement of proceedings—Solicitors’ Remuneration Order, 1883, art. 2 (c) and Sch. 2, as substituted by the Solicitors’ Remuneration Order, 1953 (S.I. 1953 No. 117), art. 2.

C

Statute—Order made under statutory power—Scope of order limited by scope of power—Repeal of statute—Superseding enactment conferring similar power not so limited—Original order saved—Scope of original order not extended.

D

In March, 1953, a client sought the advice of a firm of solicitors (“the first solicitors”) with regard to matrimonial difficulties which had caused her to live apart from her husband. On their advice inquiry agents were employed, a petition for judicial separation was prepared and costs were incurred in preparation for the filing of the petition which they had advised her to have ready if she decided to institute proceedings. At the same time the first solicitors advised the client on offers of financial provision made to her by her husband. The client withdrew her instructions from the first solicitors in July, 1953, before the petition had been filed and instructed a second firm. A petition in substantially the same form as that originally drafted was eventually filed by the second firm in December, 1953. In September, 1953, the first solicitors delivered a lump sum bill which contained a detailed description of the work that they had done. The client applied for and obtained from a master an order for the delivery of an itemised bill of costs. On appeal, the court, at the request of the parties, considered the appeal first on the footing that the lump sum bill was in respect of non-contentious business only.

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Held: (i) assuming that the whole of the business to which the lump sum bill related was non-contentious business within art. 2 (c) of the Solicitors’ Remuneration Order, 1883, the lump sum bill was a good bill and in accordance with Sch. 2 to that order as substituted by the Solicitors’ Remuneration Order, 1953, notwithstanding that the latter order had revoked the Solicitors’ Remuneration (Gross Sum) Order, 1934 (under which a gross or lump sum could be charged in lieu of detailed charges) and did not expressly enact that a gross sum could be charged or that a lump sum bill could be delivered; but

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(ii) the scope of non-contentious business to which art. 2 (c) of the Solicitors’ Remuneration Order, 1883, applied was limited by the words “and not being otherwise contentious business” in s. 2 of the Solicitors Remuneration Act, 1881, under which the order was made, although those words did not appear in art. 2 (c) of the order nor in the definition of non-contentious business in s. 81 (1) of the Solicitors Act, 1932, which had repealed and superseded the Act of 1881 but contained savings under which the order of 1883 continued to have effect; and

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(iii) as the business to which the lump sum bill related was in part contentious, because it comprised the collection of information and the taking of all steps, even to the engrossment of a petition for judicial separation, necessary to launch proceedings against the husband, the delivery of a lump sum bill was not justified in the present case by the provisions of Sch. 2 to the order of 1883, as amended, and accordingly the client was entitled to an itemised bill.

Re R. P. Morgan & Co. ([1915] 1 Ch. 182) not followed.

[**Editorial Note.** The whole of the work to which the lump sum bill of costs in the present case related was business which, if it were non-contentious business, would be within the scope of the Solicitors’ Remuneration Order,

1953, as that order applies to business transacted on or after Mar. 1, 1953. A
The result of the present case which is important to the legal profession is that, if business is wholly non-contentious, a lump sum bill may be delivered for the fair and reasonable amount under Sch. 2 to the Solicitors' Remuneration Order, 1883. The client's remedy, if he wishes to question the amount, is, in accordance with Sch. 2 to that order, to require the solicitor to obtain a certificate of the reasonableness of the amount from the Law Society or to have the bill taxed by the court. B
The certificate cannot be required if the lump sum bill has been paid or taxed.

For the Solicitors Act, 1932, s. 56, s. 82 (2), see 24 HALSBURY'S STATUTES (2nd Edn.) 49, 73.

For the Solicitors' Remuneration Order, 1883, and the Solicitors' Remuneration Order, 1953, see 20 HALSBURY'S STATUTORY INSTRUMENTS 195, 209.] C

Cases referred to:

- (1) *Duffett v. McEvoy*, (1885), 10 App. Cas. 300; 42 Digest 138 o.
- (2) *Re Merchant Taylors' Co.*, (1885), 30 Ch.D. 28; 54 L.J.Ch. 867; 52 L.T. 775; 42 Digest 241, 2732.
- (3) *Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.*, [1928] 1 K.B. 750; 97 L.J.K.B. 445; 138 L.T. 532; Digest Supp. D
- (4) *Frankenburg v. Famous Lasky Film Service, Ltd.*, [1931] 1 Ch. 428; 100 L.J.K.B. 187; 144 L.T. 534; Digest (Practice) 948, 4878.
- (5) *Re Morgan (R. P.) & Co.*, [1915] 1 Ch. 182; 84 L.J.Ch. 249; 112 L.T. 239; 42 Digest 256, 2879.

Appeal by solicitors from an order of Master HARWOOD for the delivery of a detailed bill of costs to a former client. The appeal was heard by GERRARD, J., in chambers, but the judgment was delivered in open court. The facts and history of the case appear from the judgment. E

Sir Hartley Shawcross, Q.C., and *Colin Duncan* for the solicitors.
Maurice Lyell, Q.C., for the client.

Cur. adv. vult. F

Jan. 11. **GERRARD, J.**, read the following judgment: The client and her husband lived in South Africa for some years until February, 1953, when, because of difficulties which had arisen between them, she left that country. She arrived in England towards the end of the next month, and almost immediately sought the advice of the solicitors, to whom I shall refer as the first solicitors, about her matrimonial troubles. They advised her that it would be in her interest to have ready a petition for judicial separation, so that in the event of her deciding to institute proceedings, it could be filed at short notice, and served on the husband on one of his periodical visits to this country. G

The first solicitors took a proof of evidence from the client, employed inquiry agents to watch the husband, and consulted counsel. On June 3, 1953, counsel settled a draft petition praying a judicial separation, the custody of the children of the marriage, alimony pending suit, and permanent alimony for the client and the children. That draft petition was based on certain allegations of cruelty. After the client had, with the first solicitors, considered counsel's draft, it was decided that certain amendments were necessary. On July 9, 1953, counsel re-drafted the petition. In the re-draft, certain allegations of adultery, based in part on the agents' inquiry, were added. The client approved the re-draft, and the document was engrossed by the first solicitors in order that proceedings might be launched at any moment if the client gave instructions for that to be done. Contemporaneously with these matters, the first solicitors were advising the client on offers of financial provision made to her on her husband's behalf. H

On July 14, 1953, she decided to terminate the retainer of the first solicitors, and retained another firm of solicitors, to whom I shall refer as the second solicitors. They conducted negotiations with the husband's advisers with I

- A regard to financial provision for the client, and also employed inquiry agents to watch the husband. In December, 1953, the client decided to file the petition for judicial separation. The engrossment of the amended draft petition settled by counsel was treated as a draft and considered by the client under the guidance of the second solicitors. Very minor alterations were made in three of the first twenty-eight paragraphs, and a further allegation of adultery alleged to have taken place in London in October, 1953, was added. The prayer was amended by praying for the discretion of the court to be exercised in the client's favour.

- B The petition in its final form was filed on Dec. 23, 1953; service was effected on the husband on Dec. 26, 1953, when he was visiting this country. The husband entered appearance under protest, objecting to the jurisdiction of the court. I understand that recently the question of jurisdiction was decided in the client's favour. On Sept. 3, 1953, the first solicitors delivered to the client a document containing a very detailed description of the work they had done on her behalf. The document contained a statement of their disbursements. It was not an itemised bill of costs in the traditional form; it was a lump sum bill which the first solicitors maintained complies with the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117). The client was advised by the second solicitors to challenge the first solicitors' right to present a bill in that form, and in due course sought and obtained an order from Master HARWOOD that the first solicitors should deliver a bill of costs. That order was made on Dec. 16, 1953.

- C The first solicitors appealed from this order, and the appeal came before me on Feb. 10, 1954, for the first time. I was asked to decide two points: (i) whether, having regard to the Solicitors' Remuneration Order, 1953, the document was a good bill, and (ii) whether, having regard to that order, the court can compel the delivery of a traditional itemised bill of costs. At the hearing of the appeal, I was not asked to consider the terms of the document of Sept. 3, 1953; I was asked to deal with the matter on the agreed footing that its contents related solely to non-contentious business, falling within the Solicitors' Remuneration Order, 1953, which deals solely with that form of business.

- D After hearing argument on that agreed footing, I was about to deliver judgment in chambers in favour of the first solicitors when I was asked by counsel for the first solicitors if I would reserve judgment and deliver my judgment in court, so that the matter might be reported, as the first solicitors and the Law Society, who were interested in the matter, regarded the case as of great importance to all solicitors. I agreed to adopt this course. When I had prepared my judgment on the agreed footing, my attention was drawn to some of the work described in the document of Sept. 3, 1953. It occurred to me as at any rate possible that some of the business to which the document refers was not non-contentious business, and if that were so, my judgment would be given on a wrong, though agreed basis. This was a situation which I did not relish, and I asked the parties to appear before me again. I informed counsel that although

- E I had not come to any conclusion about the matter, I did not think it was by any means certain that the agreed basis was correct. I then learned for the first time that a petition had in fact been filed shortly after the hearing before the master. After some discussion between counsel, it was agreed that I should be furnished with the history of the case on affidavit, and that I should be asked to consider whether the whole of the business to which the document of Sept. 3, 1953, relates was in fact non-contentious business, it being conceded that if any part was not, the document could not come within the Solicitors' Remuneration Order, 1953. I heard the argument on this part of the case on Nov. 24, 1954. I was asked to agree, and rightly or wrongly I did agree, that I would include in my judgment, whatever the result of the appeal, my reasons for the conclusion which I had already indicated, viz., that, assuming the whole of the business referred to in the document of Sept. 3, 1953, to be non-contentious business, the document would be a good bill, and the order of the master could not be supported.

I think it would be convenient if I give those reasons first. The decision of the matter involves a consideration of Solicitors' Remuneration Orders prior to that of 1953. I have to start with the order of 1883, but because of the assumption I am making in this part of my judgment, I need not refer to the parts of the order defining the business it covers; I can go straight to para. (c) of art. 2. I ought to mention here, to avoid confusion, that nobody seems quite sure whether it is right to call the order the order of 1882 or the order of 1883*. It is in fact called by both titles. Paragraph (c) of art. 2 of the order reads†:

"In respect of business not hereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is hereinbefore, or in Sch. 1 hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Sch. 1 hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Sch. 1 hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Sch. 2 hereto."

I draw attention to the words "according to the present system". They relate to traditional detailed solicitors' charges.

Schedule 2 reads:

"Such fees for instructions as, having regard to the care and labour required, the number and length of the papers to be perused, and the other circumstances . . . the allowance shall be . . ."

I need not read any more of that.

The Solicitors' Remuneration Act General Order, 1920 (S.R. & O. 1920 No. 1015), is the next material order, but I need not quote from it because it was, with variations not material to the present issue, re-enacted by the Solicitors' Remuneration (Gross Sum) Order, 1934 (S.R. & O. 1934 No. 548). That order provides:

"(1) Without prejudice to the power possessed by the court under the Solicitors Act, 1932, or otherwise or to the powers conferred upon the solicitor or the party chargeable with the bill under s. 66 of the Solicitors Act, 1932, the remuneration of a solicitor in respect of all business regulated by cl. 2 (c) of the General Order of 1883 as amended by any subsequent General Order may at the option of the solicitor be by a gross sum in lieu of by detailed charges: provided that within six months after delivery of a charge made under this order whether it has been paid or not the client may require that a detailed bill of charges shall be delivered and the solicitor shall thereupon comply with the requisition and any bill so delivered shall be subject to taxation as if the provisions of this order with respect to the regulation of remuneration by gross sum had not been made."

The significant features of the orders of 1920 and 1934 are (i) a charge by way of gross sum may be made; (ii) the client may, within a limited time, require that a detailed bill of charges shall be delivered and that any bill so delivered shall be subject to taxation in the ordinary way, as if no gross sum charge were permissible. The order of 1934 was revoked by art. 8 of the

* The full title of the order as printed in S.R. & O. Revised, 1948, is "General Order, dated August 1882, made in pursuance of the Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44)". It took effect from and after Dec. 31, 1882, and consequently was often called the "Solicitors' Remuneration Order, 1883". That title was authorised as its description by the Solicitors' Remuneration Order, 1944 (S.R. & O. 1944 No. 203), art. 1 (2) and accordingly is used in this report.

† The text as here printed is the text without the amendments made by the Solicitors' Remuneration Order, 1953, and the extract from Sch. 2 is from the schedule before the substitution of a new schedule by the order of 1953.

- A Solicitors' Remuneration Order, 1953, and by art. 2 of the order of 1953 for the words "according to the present system as altered by Sch. 2 hereto" contained in para. (c) of art. 2 of the order of 1883 there were substituted the words "in accordance with Sch. 2 hereto".

- It is contended on behalf of the first solicitors that this new schedule is intended to make two significant changes in the law with regard to solicitors' remuneration for non-contentious business. The first is that a solicitors' remuneration is to be such sum as may be fair and reasonable having regard to all the circumstances of the case and in particular to certain criteria laid down in the schedule. It is, I think, clear that in relation to business within the scope of Sch. 2 the principles of remuneration have changed and the schedule has substituted a more realistic method of ascertaining what the work done is really worth. About the substitution of these new principles of remuneration there is indeed no issue. It is with regard to the second alleged change that the dispute arises. It is contended for the first solicitors that although Sch. 2 of the order of 1953 makes no specific reference to charging by way of a gross or lump sum and revokes the Solicitors' Remuneration (Gross Sum) Order, 1934, it still enables a solicitor to deliver a lump sum bill in relation to business within its scope, and that in place of the protection given to the client by the orders of 1920 and 1934 under which he could call for a detailed bill of charges and have it taxed, a new method of protecting the client who receives a lump sum bill has been provided by the order of 1953.

- In Sch. 2 to the Solicitors' Remuneration Order, 1883, as originally enacted reference is made to "fees". In Sch. 2 to the Solicitors' Remuneration Order, 1883, as substituted by the Solicitors Remuneration Order, 1953, appear the words "such sum", "the sum charged", "a fair and reasonable sum", "the sum so certified" and "the reasonableness of his charge". It seems to me that these words clearly visualise the charging of a lump sum.

- The arguments put forward on behalf of the client were, as I understand them, these: prior to the Solicitors' Remuneration Act General Order, 1920, it was a fundamental principle that a bill had to be in a form which would enable the client to take it to an independent solicitor and obtain advice on it; as it was put in *Duffett v. McEvoy* (1) (10 App. Cas. at p. 302) to "enable the party to judge of the goodness of the items". It was argued that although the gross sum orders of 1920 and 1934 gave a right to a solicitor to charge by a lump sum, the fundamental principle was preserved because the client could, at his option require a detailed bill of charges and, if, on advice he was not satisfied of the goodness of the charges, he could have the bill taxed. Now it is said, that the client is not given by the order of 1953 any express right to require the delivery of a detailed bill, and as there are no express words giving a solicitor a right to charge by way of a lump sum, the wording of the order is not sufficiently strong to allow a lump sum charge to be made or to take away the ancient right of a client to have a detailed bill. Therefore, it is said, the document of Sept. 3, 1953, is not a good bill.

- It is true that the Sch. 2 substituted by the order of 1953 does not enable the client to call for a detailed bill; but it would be a very odd thing if the order were intended to deprive a solicitor of a right which he has enjoyed since 1920. The mere oddity of that situation is not, however, the test of the effect of the order. I think it is clear that taking the schedule as a whole, the "present system" referred to in the order of 1883 has plainly been substituted by a new system, and the new system involves a liberty to charge by way of a lump sum and gives a new form of protection to the client, the sufficiency of which can only be judged in the course of time. The right of the client to have the bill taxed is not affected, and the client may require the solicitor to obtain a certificate from the Law Society certifying that the sum charged is fair and reasonable, or, if it is not, what is a fair and reasonable sum, and the sum so certified, if less than that charged, shall, in the absence of taxation, be the sum payable.

Further, before the solicitor brings proceedings to recover costs on his bill, he must, unless the costs have been taxed, have drawn the attention of the client in writing to his right to require the solicitor to obtain such a certificate from the Law Society as I have mentioned and to the provisions of the Solicitors Acts, 1932 to 1950, with regard to taxation of costs, and, if the taxing master allows less than one-half of the amount charged, he must bring the facts of the case to the attention of the Law Society. It seems to me that the order of 1953 has not deprived a solicitor of the right to make a lump sum charge and that its object is to effect what one may perhaps call a further "modernising" of solicitors' charges in a process which began with the gross sum order of 1920. On any taxation of a bill delivered under the Sch. 2 substituted by the order of 1953, the taxing master will no doubt require evidence to satisfy himself that the charge of the solicitors is fair and reasonable, and will not, I imagine, be hampered by the absence of a long traditional itemised bill of costs. The solicitor may be hampered if he has not kept careful records of the work done. So if the business for which the first solicitors seek to charge in the document of Sept. 3, 1953, is wholly non-contentious business, in my view the order of the master cannot be supported.

I now turn to deal with the second aspect of the matter. As I have indicated, it is submitted on behalf of the client that the document of Sept. 3, 1953, relates in part to contentious business, and it is common ground that if that submission is correct, the first solicitors have not delivered a "good bill" under the order of 1953. In order to discover the sorts of business to which that order relates it is necessary to go back to the Solicitors Remuneration Act, 1881. It is entitled:

"An Act for making better provision respecting the remuneration of solicitors in conveyancing and other non-contentious business."

By s. 2, certain persons were empowered to make general orders prescribing and regulating the remuneration of solicitors in respect of certain classes of business. After setting out the persons entitled to make orders, the section read:

"... may from time to time make any such general order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business ..."

then there follow words which give power to revoke or alter any orders that are made. Those classes may be briefly described as (a) business connected with matters of conveyancing and (b) all other business of a non-contentious nature. The business comprised in class (b) appears to me to consist of two kinds: (i) business which is not business in any action or transacted in any court or in the chambers of any judge or master, and (ii) other business which is not for any other reason contentious business. In *Re Merchant Taylors' Co.* (2) COTTON, L.J., used these words (30 Ch.D. at p. 36):

"Under the Act I think it clear that what was meant was business other than conveyancing business, not being business in chambers or other contentious business ..."

Clearly the section confined the power to make orders to the regulation of remuneration for those sorts of business the nature of which is defined by eliminating every kind of contentious business.

It is convenient next to consider the orders made under the section. The first was the Solicitors' Remuneration Order, 1883. Article 2 of the order does not exactly copy the wording of s. 2 of the Act; it omits the words "and not being

- A otherwise contentious business". This seems to me a curious state of affairs. It is only in art. 4 of the order that there is a reference to contentious business, and that is in order to provide that the prescribed remuneration for matters of conveyancing business is not to include any business of a contentious character or any proceedings in any court. What is the effect, if any, of the omission from the order of the words in s. 2 of the Act? If one looks only at the order, ignoring matters of conveyancing, there would appear to be one test of whether business falls within art. 2: is the work done business in any action or transacted in the court of any judge or master? If it is, it does not fall within the order; if it is not, then it does. This hardly seems to keep in line with the power to make orders, given by s. 2, and it is not consistent with that part of art. 4 of the order to which I have referred. The words there used, like s. 2 of the Act, clearly visualise business of a contentious character outside as well as inside proceedings in a court. The words of the order cannot govern the Act, but the Act does govern the order. I cannot hold that what is not business in an action or transacted in any court or in the chambers of any judge or master must be non-contentious business; that would not march with s. 2 of the Act. Whatever difficulties there may be in interpreting the order, it cannot alter my obligation to ask of the work done by the first solicitors: was it contentious business within the meaning of those words in the Act? If it was, then the order cannot be applicable.

- So far, I have dealt with the order of 1883 and considered matters as I think they stood under the Act of 1881; but the Solicitors Act, 1932, a consolidating Act, has to be considered. By s. 56 of that Act, there is substituted for the power to make orders given by s. 2 of the Act of 1881 a new power to make orders regulating the remuneration of solicitors in respect of non-contentious business. By s. 82 (2) of the Act of 1932, it is provided, in effect, that the order of 1883 is to be treated as an order under and for the purposes of the corresponding provisions of the Act of 1932, viz., for this purpose s. 56 of that Act. So the order of 1883 was given a new lease of life, and, indeed, the order of 1953 is merely an amendment of it made pursuant to s. 56 of the Act of 1932.

- A definition of non-contentious business appears in s. 81 of the Act of 1932. It is of what I may call the "including" sort; it merely names some of the more obvious forms of non-contentious business as being included within that term. There is also a definition of contentious business of the same sort, naming obvious forms of contentious business. It does not seem to me that these forms of definition, or the fact that the order of 1953 was made pursuant to s. 56 of the Act of 1932, should cause me to change the conclusion I have previously expressed, that there may be contentious business which is not business in any action or transacted in any court or in the chambers of any judge or master. Indeed, that distinction is still recognised in art. 4 of the order of 1883 as it stands amended today.

- The first solicitors, as I have said, did their work relating to this matter before the filing of the petition. The matter had passed out of their hands for some months by the time the petition was filed. Were they engaged in contentious or non-contentious business? I have reached a conclusion after considerable hesitation. I was referred to certain authorities, but I agree with counsels' view that they do not greatly assist me in this matter; I shall have to refer to some authorities, but they will appear in their proper context at a later stage. I think it of assistance to consider the position which would have arisen if there had been one firm of solicitors acting throughout. As the petition has now been filed, it appears to me that in the event of an order being made in the pending proceedings, either by agreement or after the hearing of the petition, that the husband should pay the wife's taxed party and party, or solicitor and client, costs, the costs to which the client will be entitled will have to be ascertained by

reference to R.S.C., Ord. 65, and Appendix N. By r. 66 (3) of the Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), it is provided that: A

"In any cause or matter to which these rules apply the costs allowed to solicitors and the taxation of such costs shall, except where these rules otherwise provide, be in accordance with the provisions of Ord. 65 of the Rules of the Supreme Court so far as the same are applicable." B

The pending proceedings in the present case are a cause or matter to which the rules of 1950 apply and no question of exception arises. R.S.C., Ord. 65, r. 8, provides that:

"In causes and matters commenced after these rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'lower scale' in Appendix N in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this order otherwise provided for; and in causes and matters pending at the time when these rules come into operation, to which the higher scale of costs previously in force was applicable, the same scale shall continue to be applied." C

Rule 9 provides for costs being allowed on the higher scale on special grounds, and there are other rules governing the amounts which may be allowed on taxation. On any taxation on such an order as I have visualised, I think it is clear that some of the work done by the first solicitors, and to which the document of Sept. 3, 1953 relates, would have to be dealt with under item 72 and item 82 in Appendix N, subject to the discretionary powers of a taxing master under Ord. 65 to increase the items. D

In the petition, allegations are relied on which have their origin in work done by the first solicitors. Had there been one firm of solicitors acting throughout, that work would have had to be itemised in their bill of costs for the purpose of ascertaining the amount of costs payable by the husband under the order. A taxing master may, under Ord. 65, allow costs in respect of work done before the filing of a petition if, in his opinion, they have been properly incurred in obtaining materials proving of use and service in the proceedings. The authority for that is *Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.* (3), and *Frankenburg v. Famous Lasky Film Service, Ltd.* (4). Although there has been a change of solicitors, in my judgment if an order for the payment by the husband of the client's taxed costs is made, the second solicitors will have to include in their bill for taxation appropriate items in respect of the work done by the first solicitors on the basis of which a substantial portion of the petition is founded. For, if such an order is made, the client has a right to recover from the husband all her proper costs of the proceedings, including those relating to work done on her behalf by the first solicitors. As there is a cause or matter, that is a basis on which a taxation must proceed. Then by the rules, the costs may relate back to work done when there was no cause or matter. E F G H

The difficulty in the dispute arises from the fact that at the date of the termination of the first solicitors' retainer, and indeed at the date at which this matter came before the master, the petition had not been filed, there was then no cause or matter. I understand counsel for the client to contend that these circumstances are immaterial, and that, as on any taxation in the pending proceedings, items in respect of the work done by the first solicitors will fall to be dealt with under Ord. 65, Appendix N, those items can never have had the quality of non-contentious business. He also contended that because items are to be found in Appendix N which would cover work done by the first solicitors, that work could not be non-contentious business. I

Counsel for the first solicitors submitted that when they were acting there was no contention, and that there must be at least two parties contending before there can be a contention, and therefore before there can be contentious business.

- A He pointed out that there is no evidence that the husband or his advisers had knowledge of the fact that inquiries and preparations were being made by the first solicitors with the object of launching the petition if it were thought expedient. He further argued that the business in which the first solicitors were engaged could not be contentious business because there was then no filed petition, and that Ord. 65 could have no relevance to the first solicitors' costs,
- B because it deals solely with the costs when there is a cause or matter, and there was none at the date when the retainer ended, and they became entitled to demand their costs.

- It seems to me that the test of whether business is contentious or not must be capable of being applied at the date when the solicitors were entitled to present their bill. The client might in July, 1953, have decided, after the first
- C solicitors had done all their work, to drop the idea of taking proceedings, or she might have said: "I will return to South Africa and see what the law of South Africa can secure for me". In either of these events, the first solicitors would have been entitled to ask for their costs, and to proceed to recover them. Clearly the test of whether they would then have been entitled to remuneration on a contentious or non-contentious basis should not be a guess whether the client
- D would take proceedings at some date in the future. Further, it does not seem to me possible to say merely because she might at some date file a petition and thereafter obtain an order for costs, which then must be taxed under Ord. 65, or merely because appropriate items appear in Appendix N, that solicitors seeking remuneration at a period when it was quite unknown whether a petition would ever be filed must demand their costs on the basis of Ord. 65, which
- E only applies, even by relation back, when there is a cause or matter. So I am unable to accept the contention of counsel for the client, but as I have said earlier, I am also unable to take the view that there cannot be contentious business outside the business in actual proceedings.

- It is no doubt right that when the first solicitors were acting, the charges the client was minded to make against the husband had not been communicated
- F to him or his advisers, nor so far as I am aware had any intention to make the charges been communicated to him or them, and there was then no contention between the parties in the sense in which counsel for the first solicitors used that word. I do not think, however, that I have to ask myself if there was then a contention in that sense. I think that I have to ask myself what was the nature of the business on which the first solicitors were then engaged, and to
- G decide on its proper description. It was the collection of information and the taking of all steps, even to the engrossment of a petition, necessary to launch proceedings hostile to the husband at the moment the client gave the word, the background to this work being that differences between the client and her husband had resulted in her leaving the matrimonial home and South Africa at his suggestion. It seems to me that it is impossible without doing violence
- H to language to describe that business as non-contentious. I hold that the document of Sept. 3, 1953, related in part to contentious business, and the appeal therefore fails.

- I ought to add that it would appear that the conclusion I have arrived at is not consistent with the decision of NEVILLE, J., in *Re R. P. Morgan & Co.* (5), but having carefully considered the argument addressed to me, and paid all due
- I attention to that decision, I have felt bound to come to the conclusion I have already expressed.

Appeal dismissed.

Solicitors: *Bull & Bull* (for the solicitors); *Forsythe, Kerman & Phillips* (for the client).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

CHAN KAU alias CHAN KAI v. REGINAM. A

[PRIVY COUNCIL (Lord Oaksey, Lord Tucker and Mr. L. M. D. de Silva), November 23, 24, 25, 1954, January 11, 1955.]

Criminal Law—Murder—Self-defence or provocation—Burden of proof—Withdrawal of defence of provocation from jury.

Where murder is charged and the evidence discloses a possible defence of self-defence or of provocation, the burden of proof remains throughout on the prosecution and it is not at any time on the accused for him to establish either defence. B

H.M. Advocate v. Doherty ([1954] S.L.T. 169) and *Latour v. Regem* ([1951] 1 D.L.R. 834) approved.

Direction of BOSANQUET, J., in *R. v. Smith* (1837) (8 C. & P. at p. 162) disapproved. C

Appeal allowed.

[As to Burden of Proof in Criminal Cases, see 9 HALSBURY'S LAWS (2nd Edn.) 182, para. 266; and for cases on the subject, see 14 DIGEST 429, 4543 et seq.]

Cases referred to: D

(1) *Woolmington v. Public Prosecutions Director*, [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232; Digest Supp.

(2) *Mancini v. Public Prosecutions Director*, [1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 2nd Digest Supp.

(3) *H.M. Advocate v. Doherty*, [1954] S.L.T. 169; 1954 S.C. (J.) 1.

(4) *Latour v. Regem*, [1951] 1 D.L.R. 834; [1951] S.C.R. 19; 98 Can. C.C. 258; 11 C.R. 1; 2nd Digest Supp. E

(5) *R. v. Smith*, (1837), 8 C. & P. 160; 173 E.R. 441; 15 Digest 783, 8408.

(6) *Teper v. Reginam*, [1952] 2 All E.R. 447; [1952] A.C. 480; 116 J.P. 502; 3rd Digest Supp.

Appeal against conviction of murder.

Appeal by special leave in forma pauperis against a judgment of the Supreme Court of Hong Kong (Appellate Division) dated Mar. 5, 1954, dismissing the appellant's appeal against his conviction of the murder of Chan Fook by the Supreme Court of Hong Kong (REECE, J., sitting with a mixed jury) on Dec. 23, 1953. The facts appear in the judgment. F

Dingle Foot, Q.C., and *C. I. Poole* for the appellant.

D. A. Grant for the Crown. G

Nov. 25, 1954. Their Lordships allowed the appeal.

Jan. 11, 1955. **LORD TUCKER:** On Dec. 23, 1953, the appellant was convicted of the murder of one Chan Fook on July 23, 1953, after a trial before REECE, J., and a mixed jury in the Supreme Court of Hong Kong. His appeal to the Appellate Division of the Supreme Court was dismissed on Mar. 5, 1954. He now appeals in forma pauperis to Her Majesty in Council by special leave granted on June 24, 1954. H

Among those employed at the Naval Dockyard at Stonecutters Island were two rival groups led respectively by two men called Mak Hei and Ho Kai, and, prior to July 23, 1953, there had been trouble between members of these groups with the result that the Mak Hei group decided to attack the Ho Kai group as they left Ho Kai's house at the conclusion of a party which was taking place there that evening. Chan Fook was one of those attending the party and he was killed after leaving the house in the course of incidents arising out of the attack by Mak Hei's group. There is no dispute that his death was due to one or more violent blows with a weapon, sometimes described as a chopper and sometimes called a knife, wielded by the appellant. The appellant was not normally a member of either of the two rival groups. He was employed by I

A Mak Hei at a teahouse on Diamond Hill where Mak Hei carried on a business in addition to his employment at Stonecutters Island.

The case for the prosecution was that, although not a regular member of the Mak Hei group, the appellant, on the evening in question, joined with Mak Hei and other members of his group knowing that they intended to attack the Ho Kai group and that thereafter he actively assisted them in their unlawful enterprise, in the course of which he killed Chan Fook.

B The case for the defence was that at no time was the appellant taking any part in the unlawful expedition or the attack. Certain creditors of Mak Hei who had been introduced by the appellant were pressing for payment of their accounts for goods supplied to the teahouse and causing trouble. Accordingly, the appellant went to see Mak Hei on the evening of July 23 and told him that
C some of the creditors were threatening to remove the Frigidaire from the teahouse if their accounts were not paid. Mak Hei tried to put him off by saying that he was busy and going to a fight. The appellant went with him, not in order to take part in the fight, but for the purpose of pressing Mak Hei to pay his creditors. When the fight began Chan Fook mistook the appellant for one of his assailants and attacked him. The appellant endeavoured to escape and picked up a
D knife from a nearby stall with which he struck Chan Fook in self-defence or, alternatively, under such provocation as would reduce the crime to manslaughter. Such in outline was the defence sworn to by the appellant, but it will be necessary later to set out verbatim that part of his evidence which dealt with the events immediately leading up to the blow which he struck.

This evidence differed materially from a statement which the appellant had
E made to the police on July 23, 1953, which, even allowing for difficulties of language and translation, the jury might well have thought amounted to an admission by the appellant that he had knowingly joined in Mak Hei's party for the purpose of assisting in the attack. On a proper direction they might, accordingly, have altogether rejected the appellant's sworn testimony, but he was entitled to have his defence as given in evidence fairly put before the jury
F and it was the judge's duty to direct the jury on the law applicable to the case on that basis.

The appellant now submits that the defence of provocation was wrongly withdrawn from the jury and that there was misdirection with regard to the defence of self-defence.

Before dealing with these two separate aspects of the case, their Lordships
G think it desirable to state—and this was agreed by counsel for the Crown—that in cases where the evidence discloses a possible defence of self-defence the onus remains throughout on the prosecution to establish that the accused is guilty of the crime of murder and the onus is never on the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. Since the decisions of the House of Lords
H in *Woolmington v. Public Prosecutions Director* (1) and *Mancini v. Public Prosecutions Director* (2), it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions, save only in the case of insanity, which is not strictly a defence. It has been expressly so decided in the case of self-defence in Scotland and Canada; cf. *H.M. Advocate v. Doherty* (3) and *Latour v. Regem* (4). It is unfortunate that in *ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE*
I (33rd Edn.), at p. 942, para. 1649, a passage is quoted from the summing-up in the case of *R. v. Smith*—(5), where, dealing with self-defence, these words occur (8 C. & P. at p. 162): **1837**

“Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary . . .”

This actual passage was quoted by the trial judge in the course of his summing-up

in the present case. It clearly needs some modification in the light of modern A
decisions.

Turning now to the two matters relied on in the present appeal. The issue
of provocation was expressly withdrawn from the jury who were ultimately
directed—in response to a question from their foreman—that the only possible
verdicts were guilty of murder or not guilty. The appellant's defence as given
in evidence at the trial has already been outlined. It is now necessary to set B
out the vital passages verbatim, since withdrawal of the issue of provocation
from the jury must be judged on a view of the evidence most favourable to the
appellant. After describing the circumstances in which he came to be on the
scene with Mak Hei and saying that Mak Hei had told him to go and tell a
group of people not to start fighting as there was a policeman in sight, he said
that, before he got to them, they had already started fighting and he saw three C
or four persons setting on another. The questions and answers then proceed
as follows:

“ Q.—Did you see anybody holding anything ? A.—Yes I did. Q.—What
did you see ? A.—I could not tell what it was but I saw something wrapped
in newspaper. Q.—Then what happened ? A.—Then this man ran and
the other people ran after him. This person ran and the other people ran D
after him. Q.—Who do you mean by ‘ this person ’ ? A.—The person
from the opposite party. Q.—Did you know him ? A.—No. Q.—And
what happened ? A.—When this person was about near the Kong Wah
Café, he turned around and fought with the group of pursuers. I then went
up to these people and said, ‘ Policeman, So Wing ’. The several people E
stopped setting upon this person. I wanted to go. This person came up
and grabbed me with both of his hands. (In the manner as demonstrated
by the witness in the box—gripped by the chest.) Then he held me with
his left hand and hit me with his right hand (demonstrates). Q.—When
he hit you, did you notice whether he was injured or not ? A.—Yes, I think
he was suffering from minor injuries. REECE, J.: You think ? A.—No; F
he had a little quantity of blood on his person. Q.—What happened then ?
A.—He kept on beating me and I wanted to give him an explanation. I
said, ‘ You hit the wrong man. I have nothing to do with it ’. At that
time this man was really ferocious and so I had to resist. I had a chance
and I freed myself from him. I started to run. He ran after me and hit
my back. Well, I was acting on good intention to go up and tell the people
not to set upon him but, when he hit me, I felt that I was very angry. I G
ran up to a stall which I have said to be a candy stall but which I now say is a
bread stall and, at that moment, I was haywire. He was taller and bigger
than I am and I had to resort to something in my resistance. I did not
know that there was a knife in that place. As a matter of fact, I tried to
get a pole or a bottle or things like that. I was given no chance for con-
sideration and I picked up a knife blindly. This man squatted and was H
looking for something. I continued to run and he ran after me into the
street. He hit my head at the back. Q.—With what did he hit you ?
A.—I don’t know what it was but it was wooden. Q.—Did you see the
object ? A.—I did not. Q.—And then what happened ? A.—I wanted
to run but I was out of breath and, besides, I had flinching pains in both I
my loins. I was still beaten by him then, so I turned around (in a manner
as demonstrated) and did this (demonstrates). I could not remember
whether I struck once or twice. Then I ran along Sai Yeung Choi St.”

On this evidence, and assuming his presence at the scene of action to have
been innocent, their Lordships are of opinion that there was a case with regard
to provocation fit to be left to the jury, whose function it was, having regard
to all the circumstances of the case, to weigh in the scale the nature of the weapon

A used as against the degree of provocation received, and that, accordingly, the verdict of guilty of murder cannot stand.

With regard to self-defence, although the learned judge gave correct and ample directions in general terms at the beginning and end of his summing-up as to the onus of proof, when he came to deal with the defence of self-defence he quoted the passage referred to above from *R. v. Smith* (5) and added the words
B “he the accused must satisfy you that the defence was necessary” with the result that the jury were not, in fact, adequately directed on this issue. It is also true that, when dealing with the evidence of the appellant, he omitted to mention his having been struck by Chan Fook with a wooden implement and treated it as an attack with fists only. He also spoke of him as having “gone back” after picking up the knife. The learned judge did, however, leave the
C issue of self-defence to the jury, and their Lordships think he was wise to do so. By their verdict the jury rejected it.

In his appeal to the Appellate Division, the appellant made no complaint of the summing-up with regard to self-defence.

The appeal court disposed of the matters relied on in support of his appeal, of which the only one now remaining is that relating to provocation, in a judgment of six lines stating there was no substance in any of the grounds of appeal.
D

Viewing the case as a whole, their Lordships do not consider that the jury's rejection of the defence of self-defence amounted to a miscarriage of justice. It is difficult, if not impossible, to infer from the evidence, taking the most favourable view for the defence, that the appellant's life was ever seriously endangered so as to justify—as distinct from excuse—the use of such a weapon.

E Applying the test used in the case of *Teper v. Reginam* (6) in the judgment of the Board delivered by LORD NORMAND, viz. ([1952] 2 All E.R. at p. 451):

“The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant”

F and substituting for the words “improper admission of hearsay evidence” the words “these misdirections”, their Lordships have no hesitation in answering the question posed in the negative.

In the result, their Lordships have, for the reasons stated above, humbly advised Her Majesty that the appeal should be allowed and the verdict of guilty of murder set aside and the case remitted to the Appellate Division of the Supreme Court of Hong Kong with a direction to record a verdict of guilty
G of manslaughter and to pass sentence accordingly.

Appeal allowed.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

R. v. JUDGE FRASER HARRISON, *Ex parte* LAW SOCIETY. A

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Sellers, JJ.), January 13, 1955.]

Legal Aid—Costs—Charge on property recovered for deficiency of costs—Nil contribution of assisted person—Whether any enforceable charge—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), s. 3 (4)—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 19 (1), (2). B

An infant suing by his next friend was granted a civil aid certificate, and the contribution was assessed at nil. The infant recovered by way of settlement in High Court proceedings £500 without costs, which sum was transferred to the county court. The plaintiff's costs having been taxed pursuant to the Legal Aid and Advice Act, 1949, Sch. 3, the Law Society applied to the county court judge for the payment out of the sum in court of £134 14s. 9d., part of the taxed costs, being the amount paid out of the legal aid fund on account of the assisted person to his counsel and solicitors. The county court judge refused the application. On a motion for mandamus, C

Held: section 3 (4) of the Legal Aid and Advice Act, 1949, applied where a legally assisted person's contribution was assessed at nil in the same way as it applied where the contribution was assessed at a substantive amount, and the £500 recovered for the infant being accordingly charged for the benefit of the legal aid fund with the £134 14s. 9d., the order of mandamus should issue. D

[For the Legal Aid and Advice Act, 1949, s. 3 (4), see 18 HALSBURY'S STATUTES (2nd Edn.) 537. E

For the Legal Aid (General) Regulations, 1950, reg. 19 (1), (2), see 5 HALSBURY'S STATUTORY INSTRUMENTS 219.]

Motion for mandamus.

Motion on behalf of the Law Society for an order of mandamus directing His Honour JUDGE FRASER HARRISON of the Liverpool County Court to make an order for payment out of the fund in court of the sum of £134 14s. 9d. to the Law Society's No. 7 (North Western) Legal Aid Area, being the net liability of the legal aid fund on an assisted person's account in proceedings in which property was recovered for the assisted person pursuant to s. 3 (4)* of the Legal Aid and Advice Act, 1949. F

On Feb. 13, 1952, the Liverpool Local Committee in Legal Aid Area No. 7 of the Law Society granted a civil aid certificate to one Joseph Jones, an infant, for an action by his father and next friend for damages for personal injury sustained by him by the negligence and breach of statutory duty of Ferroconcrete (Lancashire), Ltd. The contribution of the assisted person was assessed at nil. On June 17, 1953, the action came before GLYN-JONES, J., at the Liverpool Assizes, and was settled on the defendants' undertaking to pay into court the sum of £500 without costs, which sum was ordered to be and was transferred to the Liverpool County Court there to be invested, applied or otherwise dealt with for the benefit of the assisted person in such manner as the county court in its discretion should think fit. When the terms of the settlement were brought to the notice of the trial judge with a view to their being approved by him he intimated that the assisted person seemed to have no case on the basis of the evidence which had been brought out, and that, if the case had gone on, he would have had to find in favour of the defendants, and that he regarded any payment by the defendants as an *ex gratia* payment. The trial judge added: G

"I gather that the defendants have not offered to pay any costs. We H

* By s. 3 (5) of the Legal Aid and Advice Act, 1949, the term "property recovered or preserved for any person" includes his rights under any compromise arrived at in order to bring proceedings to an end. I

- A must leave the legal aid fund to deal with the next friend. I make the usual order for taxation of costs . . . only as between solicitor and client."

The order as drawn up read:

- "on the defendants undertaking to pay into court the sum of £500 . . . It is ordered that on such payment into court being made all further proceedings herein be stayed, and that such sum be transferred to the Liverpool County Court there to be invested applied or otherwise dealt with for the benefit of the . . . infant plaintiff in such manner as the said county court in its discretion shall think fit. And it is ordered that the plaintiff's costs be taxed as between solicitor and client in accordance with the Legal Aid and Advice Act, 1949, Sch. 3."
- C The costs incurred by the legal aid fund on behalf of the assisted person were taxed at £153 6s. 6d. and the Law Society paid on account of the assisted person to his counsel and solicitors sums totalling £134 14s. 9d.
- D On Apr. 28, 1954, the applicants applied in the Liverpool County Court for an order for the payment out of the fund in court of the sum of £134 14s. 9d. On June 15, 1954, the county court judge refused the application on the ground that GLYN-JONES, J., had directed that the legal aid fund should deal with the next friend as regards costs, and that he could not deal with the matter because he could not decide on anything done by the trial judge to whom the application should be made. The applicants now applied for an order of mandamus. Notice of motion was served on the county court judge and the assisted person. Neither of them filed evidence, or took any other part in the proceedings. At the hearing counsel for the applicants drew the attention of the court to a doubt which had arisen whether on the construction of s. 3 (4) of the Act of 1949 the legal aid fund was entitled to enforce a charge on recovered property where the assisted person had to make no contribution to the costs of the proceedings.
- E
- F *Gerald Gardiner, Q.C., and J. S. Watson* for the applicants.
The respondent did not appear.

LORD GODDARD, C.J., stated the facts and continued: The applicants rightly say: "We want the costs we have been put to on behalf of the infant plaintiff out of the sum of money which has been paid into court and we are bound to ask for it because we are dealing with public money; the legal aid fund is public money and the Legal Aid and Advice Act, 1949, puts a duty on us". They refer to the Legal Aid and Advice Act, 1949, s. 3 (4), which provides:

- "Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings."
- H

- I Take a simple case: a man gets a certificate to enable him to bring proceedings and we will say that his contribution is assessed at £50. He proceeds with his action, he recovers judgment for £500 and he gets costs, but he can only recover the party and party costs against the defendant. Then the applicants could say: "We have on your behalf paid out costs exceeding that sum; we have expended a sum of £75", which may represent solicitor and client costs, "and, therefore, we shall want out of the damages the difference between the £50 and the £75 we have had to pay." That is the way it would work in the ordinary case. In the present case there is the difference that the contribution was, what is called, a nil contribution, that is to say, the infant, or his next friend, was not ordered to make any contribution towards the costs. We think it would

be a very narrow construction to place on this sub-section to say that, if there is a nil contribution, then, although the person may recover heavy damages, no part of those damages is to go towards paying his costs. By means of the civil aid certificate, the infant managed to recover the substantial sum of £500. It would be very unfortunate if the court felt bound to construe s. 3 (4) as saying, that, if his contribution was nil, his damages were not to be subject to a charge for the present or any costs. A

The only other statutory provision that is material is the Legal Aid (General) Regulations, 1950, reg. 19 (2) which provides: B

“The Law Society may enforce any such charge* in any manner which would be available if the charge had been given *inter partes*.”

The applicants endeavoured to enforce their charge by applying to the county court judge to order payment out of court to them of the amount of the costs which they had incurred. The county court judge refused to make the order because he was informed of some interlocutory observation which GLYN-JONES, J., apparently made when the parties were before him in his private room. He said something about: “There will have to be costs” or “The costs will be looked after between the Law Society and the next friend”. His attention was not directed to the statute or the regulations and of course the learned judge did not make an order with regard to costs. The learned judge was not intending to do anything which would override the provisions of the Act of Parliament and regulations. He simply made no order whatever with regard to costs. C

It seems, therefore, that the only question is whether or not this court can construe s. 3 (4) as applying not only to the case where there is a difference between the amount of the contribution and the costs incurred, but also to the case where there is no contribution. The court thinks that it is obvious that that was the intention of the legislature and, therefore, we think that this order must go. D

CASSELS, J.: I agree. E

SELLERS, J.: With regard to the construction of s. 3 (4) the assessment of the contribution might be very small, say £5 or £10 and I see no difference between the position of recovery of costs in those circumstances and where the assessment is nil. I agree with my Lord's construction of this sub-section. F

Order of mandamus granted.

Solicitors: *Hempsons*, agents for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the applicants).

[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law*.]

* “Such” charge refers to the charge mentioned in para. (1) of reg. 19, viz., any charge on property recovered or preserved for an assisted person arising under s. 3 (4) of the Legal Aid and Advice Act, 1949.

A DENTON URBAN DISTRICT COUNCIL v. BURSTED PROPERTIES, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, J.J.), January 14, 1955.]

B *Public Health—Paving and draining of yards and passages—Path giving access to a house—Whether included in “passage giving access to a house”—Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 49), s. 56 (1).*

B., Ltd. owned a dwelling-house, access to which from the street was by means of a path running through the front garden to the front door and thence round the house to the back door. The path was made of asphalt, but was not so made as to allow of the satisfactory drainage of its surface or subsoil to a proper outfall. The local authority served a notice on the company under the Public Health Act, 1936, s. 56 (1), requiring the company to “flag, asphalt or pave” the path.

C **Held:** the words “passage giving access to a house” in s. 56 (1) of the Act of 1936 did not include a path in an owner's garden giving access from his front gate to the door of his house; and, therefore, the notice was not justified by the terms of s. 56 (1) and the appeal must be dismissed.

D Appeal dismissed.

[For the Public Health Act, 1936, s. 56, see 19 HALSBURY'S STATUTES (2nd Edn.) 353.]

E **Case Stated.**

This case was an appeal by Denton Urban District Council from a decision of Lancaster Quarter Sessions. Bursted Properties, Ltd., the respondents on the appeal to the High Court, owned 1 Fairbourne Road, Denton, Lancashire, an occupied dwelling-house. An asphalt path ran through the small front garden from the footpath of the street to the front door of the house (a distance of about sixteen feet) and thence round the side of the house to the back door.

F On Dec. 14, 1953, the council, purporting to act under the Public Health Act, 1936, s. 56, served notice on the company requiring them to flag, asphalt or pave the path. The company appealed under s. 290 of the Public Health Act, 1936, to a court of summary jurisdiction and contended, inter alia, that the notice was not justified by the terms of s. 56. On Jan. 22, 1954, the court dismissed the appeal.

G The company then appealed to the Lancaster Quarter Sessions. On Mar. 12, 1954, on the hearing of the appeal, the following facts were found. The path was made of asphalt, but was not so formed, flagged, asphalted or paved and was not provided with such works on, above or below its surface, as to allow of the satisfactory drainage of its surface or subsoil to a proper outfall. The path provided the only access from the street to the front door and thence to the back door of the house. The part of the path between the gate and the front door traversed a garden which extended on both sides to a width of about thirty feet at its widest point, and on each side of this part of the path were beds about two feet wide containing small shrubs. Paths similar to the path were normally described as “paths” and not “passages”.

H Quarter sessions found that the path was not a “passage giving access to a house” within the meaning of s. 56 (1) of the Public Health Act, 1936, and that the notice was not, therefore, justified by the terms of that sub-section.

I The council now appealed.

W. D. T. Hodgson for the council.

L. J. Solley for the company.

LORD GODDARD, C.J.: This is a Case Stated by quarter sessions for the County of Lancaster before whom an appeal came in these circumstances. Under s. 56 of the Public Health Act, 1936, it is provided:

" (1) If any court or yard appurtenant to, or any passage giving access to, a house is not so formed, flagged, asphalted, or paved, or is not provided with such works on, above, or below its surface, as to allow of the satisfactory drainage of its surface or subsoil to a proper outfall, the local authority may by notice require the owner of the house to execute all such works as may be necessary to remedy the defect . . . "

Then, if a notice is served on the owner and he desires to dispute it, he can appeal to a court of summary jurisdiction and from that court there is an appeal to quarter sessions.* Then, if quarter sessions state a Case it can come to this court. It is rather a long chain of court proceedings to decide a comparatively small point, but the point is of some importance because it would appear that the appellants, the Denton Urban District Council, are serving notices on several owners of small properties in front of which there are gardens, i.e., small enclosures between the public highway and the front doors.

What the council have done in this case is to regard the way a person goes through his front garden to his front door as a passage, and they have served notice on the company to flag, asphalt or pave this passage. The justices held that it was a passage. On appeal, quarter sessions set out all the facts and said that, in their opinion, it was not a passage. Among other things they say:

" Paths similar to the said path are normally described as ' paths ' and not as ' passages ' . "

In fact, as I say, it is a path over the little front garden of this house. Section 56 (1) says:

" If any court or yard appurtenant to, or any passage giving access to, a house is not so formed . . . "

If there is a court or yard appurtenant to a house, it is within the curtilage; it is what would pass with the grant of the house and its appurtenances.

It has not been suggested here, and counsel for the council does not contend, that " a court or a yard " would include a garden and there is no reason why it should. If a court or yard where cars may be washed is appurtenant to a house it is, no doubt, very desirable that the water should be made to drain away, especially if the court or yard is flagged or made hard in some way. Different considerations might apply to a mere path, but these words are not, " if any court or yard or passage appurtenant to a house "; they are " any passage giving access to a house ". I think that the section aims at a passage in the nature of a court. One knows perfectly well that in towns there are passages down which people go to get to houses. I do not think the word " passage " is apt in this context to describe what the council want to have paved in the present case, viz., the way a man may walk from his front gate to his front door and round the side of the house to the back door. At any rate, I am not prepared to differ from the conclusion to which quarter sessions came and, therefore, I would dismiss this appeal.

CASSELS, J.: I agree.

LYNSKEY, J.: I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *James Smith*, Denton (for the council); *Capel Cure & Clarke* (for the company).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

* See Public Health Act, 1936, s. 290, s. 301, as applied by *ibid.*, s. 56 (1).

A
DAVIS CONTRACTORS, LTD. v. FAREHAM URBAN
DISTRICT COUNCIL.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), December 13, 14, 20, 1954.]

B *Building Contract—Delay not due to fault of either party—Scarcity of labour—Buildings ultimately completed—Whether contractors entitled to sum in excess of contract price on quantum meruit.*

Contract—Frustration—Change of circumstances—Scarcity of labour to fulfil building contract.

C In July, 1946, D., Ltd., who were building contractors, agreed with the F. council to build for them seventy-eight council houses within a period of eight months for a price fixed by the contract subject to certain adjustments. The parties contemplated that adequate supplies of labour would be available, and the contractors' tender had been accompanied by a letter stating that the tender was subject to an adequate supply of labour being available. Owing to scarcity of skilled labour, however, the work of erecting the houses took twenty-two months instead of eight months. On completion of the buildings the council paid to the contractors the adjusted contract price. The contractors claimed that by reason of the scarcity of labour the contract had been brought to an end and that they were entitled to recover a sum in excess of the adjusted contract price on the basis of a quantum meruit.

E **Held:** an unexpected turn of events which renders the performance of a contract more onerous than the parties contemplated does not release the party adversely affected from the contract; in the present case the scarcity of labour, which was not due to the fault of either party, was not sufficient to justify a finding that the contract had been brought to an end when the expectations of the parties were not realised, and accordingly the contractors had not been released from the terms of the contract as regards price and could not maintain a claim for payment on a quantum meruit.

Bush v. Whitehaven Port & Town Trustees (1888) (2 Hudson's B.C., 4th Edn., p. 122) explained and distinguished.

British Movietonews, Ltd. v. London & District Cinemas, Ltd. ([1951] 2 All E.R. 617) followed.

G Per DENNING, L.J.: if, in the course of carrying out a contract, a situation fundamentally different from anything which the parties had in contemplation is brought about by the conduct of one of them, then, even though his conduct may not be a breach of contract, he will not be allowed to take advantage of the new situation to the detriment of the other party when it would be unjust to allow him to do so (see p. 278, letter D, post).

H Appeal allowed.

[As to Variation of Building Price where Circumstances have Changed, see 3 HALSBURY'S LAWS (3rd Edn.) 435, para. 819; and as to the Implication of Conditions in Building Contracts where the Owner Prevents Completion, see *ibid.*, 450, para. 854; and for cases on the subject, see 7 DIGEST 370, 153 et seq.]

I Cases referred to:

- (1) *Bush v. Whitehaven Port & Town Trustees*, (1888), 52 J.P. 392; 2 Hudson's B.C., 4th Edn., 122; *affd.* C.A. 2 Hudson's B.C. 4th Edn. 130; 7 Digest 392, 232.
- (2) *Sir Lindsay Parkinson & Co., Ltd. v. Works & Public Buildings Comrs.*, [1950] 1 All E.R. 208; [1949] 2 K.B. 632; 2nd Digest Supp.
- (3) *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*, [1919] A.C. 1; 87 L.J.K.B. 746; 118 L.T. 731; 7 Digest 335, 20.

- (4) *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A.C. 524; A 104 L.J.P.C. 88; 153 L.T. 425; Digest Supp.
- (5) *Jennings & Chapman, Ltd. v. Woodman, Matthews & Co.*, [1952] 2 T.L.R. 409; 96 Sol. Jo. 561; 3rd Digest Supp.
- (6) *Brewer Street Investments, Ltd. v. Barclay's Woollen Co., Ltd.*, [1953] 2 All E.R. 1330; [1954] 1 Q.B. 428.
- (7) *British Movietonews, Ltd. v. London & District Cinemas, Ltd.*, [1951] 2 B All E.R. 617; [1952] A.C. 166; 2nd Digest Supp.
- (8) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 12 Digest (Repl.) 687, 5284.
- (9) *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 12 Digest (Repl.) 456, 3410.

Appeal.

The Fareham Urban District Council appealed from a judgment of LORD GODDARD, C.J. (Special Paper), dated May 18, 1954, whereby he upheld an arbitrator's award in favour of the contractors.

The facts appear in the first judgment.

H. L. Phillimore, Q.C., and *Stephen Chapman* for the council.
C. B. Salmon, Q.C., and *J. S. Daniel* for the contractors.

Cur. adv. vult.

Dec. 20. The following judgments were read.

DENNING, L.J.: In 1946 Davis Contractors, Ltd. agreed to build seventy-eight houses for the local urban district council at Fareham in Hampshire. The contract price was £92,425 8s. 4d., subject to adjustments. The houses were to be completed within eight months, but owing to an unforeseen shortage of labour the work took twenty-two months. This delay was due to an unexpected lag in demobilisation. It was not the fault of the contractors and they are not liable in damages for it. They go further, however, and say that, on account of the delay, they are entitled to more pay. They have already received the contract price which, after various adjustments, comes to £94,424 17s. 9d. They say, however, that, by reason of the delay, they are entitled to throw over the contract price and claim on a quantum meruit. The arbitrator has held that they are entitled to do this and has awarded them an extra £17,258 13s. 1d. The reason for the arbitrator's decision is because he found that both parties entered into the contract on the basis that adequate supplies of labour and materials would be available at the times required so as to finish the work within eight months. It turned out that they were not available, with the result that the work was unavoidably extended from a period of eight months to one of twenty-two months. On account of this he found that the footing of the contract was so changed that it became void and the contractors were entitled to a fair and reasonable price for the work they have done.

There are two points in the case: first, whether this extra payment is justified by the wording of the contract; secondly, whether it is justified by the general law on the principle of *Bush v. Whitehaven Port & Town Trustees* (1).

The arbitrator has made two awards: an original award in the form of a Special Case: and a supplemental award. The original award came before LORD GODDARD, C.J., who decided in the contractors' favour on the first point. He thought that, on the wording of the contract, the contractors could throw over the contract price and sue on a quantum meruit. It was unnecessary for him, therefore, to go into the second point. On an appeal from him to this court, consisting of SOMERVELL, BIRKETT and ROMER, L.JJ., this court differed from him on the first point. They thought that the wording of the contract was not sufficient to enable the contractors to throw over the contract price. It was necessary, therefore, for the court to consider the second point: but, as the

- A findings of the arbitrator were not sufficiently specific, they remitted the case to him for further findings. He has now made a supplemental award in which he decides under the general law that the footing of the contract was so changed that its provisions no longer apply. Both points have been canvassed afresh before us. We have thought it right to consider, not only the second point, but also the first point: because, although this court gave a ruling on it, it was never embodied in a formal decision.

First, then, the wording of the contract. When the contractors submitted their tender to the council, they attached to it a letter dated Mar. 18, 1946, in which they said:

- C "Our tender is subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified."

There is some little doubt whether that letter was incorporated in the final contract, because it was not included amongst the documents that were signed and exchanged. [HIS LORDSHIP then said that he approached the case on the footing that the condition contained in the letter of Mar. 18 was incorporated

- D in the contract, and came to the conclusion that on the true construction thereof, the condition was referable only to the time of completion and not to the contract price and that, when supplies of labour were not available, the contractors were released only of their obligation as to time. HIS LORDSHIP continued:] Secondly, the application of *Bush v. Whitehaven Trustees* (1). The arbitrator decided in favour of the contractors because he thought the case came within the principle
- E of *Bush v. Whitehaven Trustees* (1). We have, therefore, to consider what is the principle contained in that case. The facts were these: In 1886 Bush agreed with the trustees to build a water-main in the Lake District for £1,335. The contract was made in June and the work was to be done in the next four months, which were the dry summer months. Bush made his tender on that footing. The trustees were to give him possession of the site as and when required, but
- F they failed to do so. The land was not all available until Oct. 6. The result was that the work had to be done in the wet winter months instead of the dry summer months. Bush claimed an extra payment on that account. His difficulty was that there was an express clause in the contract saying that, if the site was not made available in time, the contractor should be entitled to an extension of time but not to any increase of payment; but the courts got over that clause.
- G The jury found that the conditions of the contract were so completely changed, in consequence of the defendants' inability to hand over the site in the time required, as to make the special provisions of the contract inapplicable. On that finding it was held by this court that Bush was entitled to a further £600 over and above the contract price. LORD ESHER, M.R., said (2 HUDSON'S B.C., 4th Edn., at p. 131) that

- H "the condition of things had been so altered after the making of the original contract (they had been so greatly altered) that it was not reasonable, or right, or fair, or just to hold that the original contract was made with regard to those circumstances."

- I He held that in the new situation Bush had a claim for a fair remuneration for the work done, in other words, to a quantum meruit.

The arbitrator thought that *Bush's* case (1) applied here, because, just as in that case a summer contract was turned into a winter contract, so here an eight months' contract was turned into a twenty-two months' contract. The arbitrator said:

"I find that the footing of the contract was so changed that it became void and the [contractors] are entitled to a fair and reasonable price for the work they have done,"

There is, however, a great difference between *Bush's* case (1) and the present one. A
 The Whitehaven trustees there had themselves failed in their duty to deliver
 the site to the contractor. This failure on their part did not give rise to a claim
 for damages against them, as they had been careful to safeguard themselves
 against that, but it was a failure within their sphere of operations. It had
 created a fundamentally different situation in which it was unjust to hold the
 contractor bound by the contract price. He was, therefore, released from it B
 and allowed to sue on a quantum meruit. Likewise in the recent case of *Sir*
Lindsay Parkinson & Co., Ltd. v. Works & Public Buildings Comrs. (2) the Com-
 missioners of Works, by ordering extra work to the tune of £1,000,000, themselves
 created a fundamentally different situation in which it was unjust to hold the
 contractors bound by the limitation of profit contained in the contract. The
 contractors were therefore released from that limit and allowed to sue on a C
 quantum meruit. It would not be correct to regard those cases as frustration
 cases. They are illustrations of a very old principle laid down by LORD COKE
 long ago, that a man shall not be allowed to take advantage of a condition
 brought about by himself (see COKE UPON LITTLETON, 206b, quoted in *New*
Zealand Shipping Co. v. Société des Ateliers et Chantiers de France (3), per LORD
 FINLAY, L.C., [1919] A.C. at pp. 7, 8; see also *Maritime National Fish, Ltd.* D
v. Ocean Trawlers, Ltd. (4)). In this connection the principle means this: that
 if, in the course of carrying out a contract, a situation fundamentally different
 from anything which the parties had in contemplation is brought about by the
 conduct of one of them, then, even though his conduct may not be a breach of
 contract, he will not be allowed to take advantage of the new situation to the
 detriment of the other party when it would be unjust to allow him to do so. E
 Recent illustrations of this principle are *Jennings & Chapman, Ltd. v. Woodman,*
Matthews & Co. (5), and *Brewer Street Investments, Ltd. v. Barclay's Woollen Co.,*
Ltd. (6).

At one point in the argument counsel for the contractors tried to bring the
 present case within that principle. He suggested that the reason why labour
 was not available for this contract was because the council had licensed F
 or started much other work at the same time which had drawn away much
 labour from this work. The arbitrator, however, made no finding to this effect.
 On the contrary, he found that the trouble was

"the national shortage of building labour at that time due to the un-
 avoidable and unforeseen lag in demobilisation."

That was not a thing for which the council were responsible. The case cannot, G
 therefore, be brought within the principle of *Bush v. Whitehaven Trustees* (1).

This case then becomes simply one where, without the fault of either party, H
 there has been an unexpected turn of events which renders the contract more
 onerous than the parties had contemplated. This is no ground for relieving
 the party of the obligation he has undertaken. That is made quite clear by the
 decision of the House of Lords in *British Movietoneux, Ltd. v. London & District*
Cinemas, Ltd. (7). When an owner employs a builder to do work for a fixed sum,
 his whole object is to secure himself against the unexpected difficulties which so
 often arise. We could seriously damage the sanctity of contracts if we allowed
 a builder to charge more simply because, without anyone's fault, the work took
 him much longer than he thought. I would allow the appeal accordingly. I

MORRIS, L.J.: When this appeal was before the court in July, 1954,
 the court ordered that the Special Case be referred back to the arbitrator so
 that he might make further findings of fact for the information of the court
 relevant to the application of the principle in the case of *Bush v. Whitehaven*
Trustees (1) and the contentions of the parties on that issue. The previous
 award was not in certain respects clear and the arbitrator was invited, if he
 intended his award to be a final award, to state his own conclusions in relation

A to the contentions. The arbitrator made a supplemental award which is now before the court. The previous award which was stated in the form of a Special Case formulated two questions of law. The first was:

“Whether the stipulation as to availability of labour and materials made in the [contractors’] letter of Mar. 18, 1946, became a term of contract.”

B The second was:

“Whether the [contractors] are entitled to be paid any sum in excess of £94,424 17s. 9d. already paid them.”

If the answer to the first question was “Yes”, then the arbitrator awarded £17,651 13s. 1d. to be paid to the contractors. If the answer to the first question was “No”, but to the second question it was “Yes”, then he awarded the like sum to be paid to the contractors. If the answer to both questions was “No”, then he awarded no further sum to the contractors. When the Special Case came before LORD GODDARD, C.J., he answered the first question in the affirmative. He so answered the first question because he held that the contract was subject to a condition that adequate supplies of material and labour would be available. As they had not been available the contract ceased to operate and the contract price no longer held good. The work of erecting the houses had, however, continued, and continued with the concurrence of the council: the result of this was that the council impliedly promised to pay a reasonable sum. Being of this opinion the Lord Chief Justice accordingly answered the second question also in the affirmative. This was because the amount payable on a quantum meruit basis was found by the arbitrator to be an amount which exceeded the amount already paid by £17,651 13s. 1d. The contractors themselves agreed that a sum of £393 ought in fact to be deducted from this figure. The Lord Chief Justice did not uphold the suggested application of the principle in the case of *Bush v. Whitehaven Trustees* (1). He said:

F “It is not necessary to go as far as in *Bush v. Whitehaven Trustees* (1), a well-known case which has apparently been approved by the House of Lords as well as by the Court of Appeal. I do not think that it is necessary to go as far as that because I do not think that it is a destruction of the whole foundation of the contract.”

G When the appeal came before this court in July, 1954, the court consisted of SOMERVELL, BIRKETT and ROMER, L.JJ. Having heard full arguments from both sides on all questions relating to the applicability and effect of the letter of Mar. 18, 1946, the court did not call for a reply from the council in regard to that part of the case. SOMERVELL, L.J., addressing learned counsel for the council said:

H “Mr. Phillimore, on the first point, my brethren both take the view that the letter must be regarded as incorporated. I am not quite sure about it, but we all take the view that we do not want to hear you on the construction: that is to say, assuming the letter was incorporated we accept your argument that these words do not give the contractors a right to claim the £17,000.”

I The court did not, however, reach the stage of giving judgment, for when passing on to consider whether the principle in *Bush v. Whitehaven Trustees* (1) applied, the court came to the view that the award did not sufficiently set out the arbitrator’s findings of fact referable to this issue. It was decided, therefore, to remit the award to the arbitrator, the parties having liberty to re-formulate their contentions. SOMERVELL, L.J., remarked: “One of the troubles here is that the law and the facts have got a little mixed up”. Announcing the decision of the court to remit the award to the arbitrator, SOMERVELL, L.J., said:

“I think we have made it clear, though we have not given our reasons, that we do not want to trouble the arbitrator further on the question of the

letter and its construction because we have had full argument about that. A
You both realise we have decided that ? ”

The award was therefore remitted and a supplemental award has now been made and is before the court. The court is, however, now differently constituted and the matters previously argued have therefore been re-argued, and it becomes necessary for the court to arrive at independent conclusions.

In the supplemental award the questions of law have been somewhat re- B
formulated. They are as follows:

“ (1) Whether the stipulation as to the availability of labour and materials made in the [contractors’] letter of Mar. 18, 1946, became a term of contract; (2) whether the [contractors] are entitled to be paid any sum in excess of the £94,424 17s. 9d. already paid them, namely, on a quantum meruit, by reason of (a) the footing upon which the contract was made having been so changed in the course of its execution that its provisions no longer applied, or (b) an implied term in the contract that it ceases to bind in the circumstances as found. (3) Whether if the [contractors] became entitled to claim any sum in excess of that already paid to them by the [council] such a claim was barred by the conduct of the parties after the [contractors] had first intimated their intention to claim additional payment.” C D

There are in effect two main issues to be considered when dealing with the questions of law which the award states for the opinion of the court. They are: A. Is the letter of Mar. 18, 1946, to be regarded as forming a part of the contractual documents and if so what is its meaning and effect ? B. Are the contractors in reliance on *Bush v. Whitehaven Trustees* (1) entitled to be paid a sum in excess of what they have already received ? I will set out my conclusions in regard to these two main issues. [HIS LORDSHIP then considered the question whether the letter of Mar. 18 was incorporated in the final contract and came to the conclusion that it was so incorporated. He then proceeded to deal with the construction of the condition contained in the letter and decided that when supplies of labour became inadequate the contractors were released from the time limit of eight months but the contract did not come to an end and the contract price held good. HRS LORDSHIP continued:] I pass now to B. It is important to have in mind the main findings of the arbitrator and the way in which they are expressed. Paragraph 4 (6) of the award is as follows: E F

“ At the time of entering into the said agreement the [contractors] and the [council] anticipated that there would be available in the building industry a sufficient labour force and a sufficient supply of materials to enable the work specified in the agreement to be carried out substantially within the time stipulated in the agreement ” G

and by para. (7) the arbitrator found: H

“ The conditions in which the work had to be carried out were different from those anticipated by the [contractors] and the [council] in that ”

they were different from those expected by the contractors and the council, and he sets out the various features. In the supplemental award there are the following findings:—

“ I find that both parties entered into the contract on the basis that adequate supplies of labour and materials would be available at the times required. (3) I find that adequate supplies of labour and material were not available at the times required and that as the duration of the work was unavoidably extended from a period of eight months to one of twenty-two months the footing of the contract was removed, from which it follows that the [contractors] are entitled to be paid a fair and reasonable price for the work they have done.” I

A The arbitrator also says:

"I find that the footing of the contract was so changed that it became void and the [contractors] are entitled to a fair and reasonable price for the work they have done."

B It is clear that some of these findings involve a blend of law and fact: but what the arbitrator is holding is, I think, reasonably plain. Some of the words which he uses need some consideration. It is said that both parties entered into the contract on the "basis" that adequate supplies of labour and materials would be available when required: it is said that the "footing" of the contract was so changed that the contract became void. It is manifest and it has been held by the arbitrator that the parties expected that labour and materials would be available: it is held that these expectations were not realised. In one sense, therefore, the basis on which the parties had proceeded no longer remained. But before it can result as a matter of law that a contract becomes at an end it must appear that the parties to the contract only intended to remain bound by their contract provided that some basis or footing continued to exist. If A, a builder, enters into a contract with B by which A promises to build a house for B within a period of twelve months for £X, it may well be that both A and B would confidently have believed that labour conditions would enable A to complete the building of the house within the contract period. In one sense that would be the basis or footing on which they would have proceeded. If unexpected labour difficulties occurred so that A became involved in much extra cost and asserted that the contract had ended and that B should on the basis of a quantum meruit pay an increased amount he would probably find that B could successfully say that there was no room for any implication that the contract should not continue to bind even though the builder for his part had run into difficulties. B might be sympathetic with A in his difficulties but would resist any suggestion that there had been any implication that in the event of any such difficulties occurring the contract would cease to have binding validity.

F In *British Movietoneux, Ltd. v. London & District Cinemas, Ltd.* (7), VISCOUNT SIMON said ([1951] 2 All E.R. at p. 625):

G "If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

H Words of great importance in the section which I have just quoted are the words "never agreed to be bound". Much to the same effect was a passage in the speech of EARL LOREBURN in *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (8) ([1916] 2 A.C. at p. 403):

I "But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree . . . In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom

the principle upon which the court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

In *Bush v. Whitehaven Trustees* (1) the plaintiff sent in his tender in the month of June and was given to understand that he was to begin at once and was to have four months in which to finish the work and his calculations were made on that footing. The contract contained certain express provisions in regard to the commencement of the work and the time for completion and there was a provision that non-delivery of the use of the site was not to vitiate or affect the contract. The defendants did not in fact make the site available until October. Instead of being summer work the work became winter work. The plaintiff claimed to treat the contract as at an end and to recover on a quantum meruit. At the trial the jury answered in the affirmative the question:

"Were the conditions of the contract so completely changed in consequence of the defendants' inability to hand over the sites of the work as required as to make the special provisions of the contract inapplicable?"

On the answers of the jury to the questions put to them the plaintiff succeeded. LORD ESHER, M.R., in his judgment in the Court of Appeal said that there was evidence which entitled the jury to say that the new state of circumstances was so different from the former that it was wholly unreasonable and unjust to suppose that either party, if they had known the new state of circumstances, would have made the same contract in regard to them. *Bush v. Whitehaven Trustees* (1) was therefore a case in which it was shown and held that the parties had never agreed to be bound in the fundamentally new state of affairs: they must have made their bargain on the footing that the plaintiff would get on to the site in the month of June.

In the present case, although both parties thought that labour and material would be available when required, I can see no warrant for holding that the contract was only to bind if labour and material were available when required. The contractors raised the topic of the availability of labour and material in the covering letter. If, contrary to the view which I have expressed, the second paragraph of that letter brought it about that the contract came to an end when it happened that labour or material were not available when required, then the matters which I am now considering do not arise. But if the view that I earlier expressed is correct, then the contractors were providing for an extension of time and a freedom from penalties in the event of being held up by shortages of labour or material, and were therefore providing for a continuance of the contract in that eventuality. In my judgment, there are no circumstances in the present case similar to those in *Bush v. Whitehaven Trustees* (1) which show that conditions so completely changed as to make the special provisions of the contract inapplicable. In the present case the parties expected that the difficulties would not arise: but they envisaged the possibility that the difficulties might arise and in my view made a provision (by the terms of the covering letter) which would be applicable if the difficulties arose. There was no question of some unexpected emergence of a fundamentally new situation. The indications are therefore that they contemplated that the contract would be binding even though their expectations as to availability of labour and material might be disappointed. The findings of the arbitrator do not show or establish that the contract would cease to bind if supplies of labour or material became, or over a long period remained, unavailable. Although the basis or footing of the contract was removed in the limited sense that the expectations of the parties were not realised, the facts found do not require an implication in the contract that it was to come to an end if those expectations were not realised. Such an implication is not necessary and cannot be said to be denoted by the conduct or actions of the

A parties but on the contrary to be negatived. The contract provisions therefore did not cease to apply and the contractors are not entitled to be paid on the basis of a claim by way of quantum meruit.

B For these reasons, while I would answer the first question of law: "Yes, but not so as to entitle the contractors to any of the sums now claimed", I would answer the second question in the negative; the third question does not therefore arise. It follows that in my view the appeal succeeds.

C **PARKER, L.J.**, dealt first with the question whether the letter of Mar. 18, 1946, was incorporated in the contract and came to the conclusion that it did not form part of the final contract. His LORDSHIP said that if he were wrong in that view, he construed the condition contained in the letter as affording a shield against penalties for delay and not as releasing the contractors from their obligations under the contract. His LORDSHIP continued: It was further contended on behalf of the contractors—indeed this was counsel's main point—that quite apart from any express term in the contract they were entitled to claim a quantum meruit based on the arbitrator's finding that

D "the footing upon which the contract was made has been so changed in the course of its execution that its provisions no longer apply":

E in other words, frustration. This is a finding of law or at any rate of mixed fact and law, and the real question for the court is whether the primary facts found entitle the arbitrator to make this finding. The council in asking the contractors to tender for completion in eight months and the contractors in tendering on that basis clearly anticipated that enough labour would be available, and indeed the arbitrator so finds. He further finds that a contractor can only hold a nucleus of foremen and leading hands and depended at the time on getting labour through the labour exchanges, and that in the present case the contractors were unable to get labour from the exchanges "due to the unavoidable and unforeseen lag in demobilisation". Largely as a result of this he finds that the contract ceased to be substantially an eight months' contract and became one of twenty-two months.

F The question, accordingly, for this court can be stated simply as follows, namely, whether in these circumstances the contractors' inability to get skilled labour (the main cause of the delay) an inability not due to the fault of either party, is enough to justify a finding of frustration. In approaching this question it is important to bear in mind the warning expressed by **VISCOUNT SIMON** in *British Movietonews, Ltd. v. London & District Cinemas, Ltd.* (7), where he says ([1951] 2 All E.R. at p. 625):

G "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made."

H It is no doubt for this reason that the supervening event is in general a "catastrophic event", per **ASQUITH, L.J.**, in *Parkinson's* case (2), where he says ([1950] 1 All E.R. at p. 227):

I "Frustration cases differ from the present case, in so far as in many of them a catastrophic event is involved. A catastrophic event, caused by the act of neither party, intervenes, destroying some basic, though tacit, assumption on which the parties have contracted, and with that assumption destroying the contract itself."

It is also important to bear in mind the nature and conditions of the contract itself. Where, as here, the contract conditions provide for an extension of time being granted for delay the "catastrophic event" must cause a delay so abnormal

as to fall outside what the parties could have contemplated in the clause: see *Metropolitan Water Board v. Dick, Kerr & Co.* (9). A

Applying these considerations, I cannot find in the facts found by the arbitrator anything sufficient to justify his finding of law. Strong reliance was, however, placed on the decision in *Bush v. Whitehaven Trustees* (1) which, as COHEN, L.J. in *Parkinson's* case (2) pointed out, involved the implication of a term that the contractor should not be bound to complete the work if the assumed state of affairs did not exist. Yet in that case there was no catastrophic event and the contract, as here, provided for what was to happen in the event of delay. It is, however, important to realise that the assumed state of affairs in that case was that the building owners, the defendants, should hand over the sites with reasonable despatch to enable the work to be completed substantially within the contract time. In the events which happened a summer contract was converted by the action of the defendants into a winter contract, and the jury found that in consequence the conditions of the contract had so completely changed as to make the special provisions of the contract inapplicable. It seems to me that where the assumed state of affairs ceases to exist by reason of the action of the defendants, as it did in that case, it is much easier to imply that the special exemption provisions, and indeed the whole contract, have ceased to be applicable. D It is quite another thing to imply such a term when the assumed state of affairs has ceased to exist through no fault of the defendants and without any catastrophic event.

I would allow the appeal and answer the first two questions in the award in the negative.

Appeal allowed. Leave to appeal to the House of Lords granted. E

Solicitors: *Kingsford, Dorman & Co.*, agents for *Blake, Laphorn, Roberts & Rea*, Portsmouth (for the council); *Blakeney & Marsden Popple* (for the contractors).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A RICHARD THOMAS AND BALDWIN'S, LTD. v. CUMMINGS.

[HOUSE OF LORDS (Lord Oaksey, Lord Porter, Lord Reid, Lord Tucker and Lord Keith of Avonholm), October 18, 19, 20, 1954, January 20, 1955.]

Factory—Dangerous machinery—Transmission machinery—Duty to fence—Machinery dismantled, guard removed and power cut off—"In motion"—Movement by hand—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 13 (1), s. 14 (1), s. 16.

By the Factories Act, 1937, s. 16, "All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be . . . constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and for any . . . adjustment shown by such examination to be immediately necessary . . ."

The respondent, a fitter employed by the appellants, was instructed to adjust the position of a face plate of a grinding machine so that two holes could be drilled in it. The machine, when in use in the ordinary way, was driven by belts passing over pulleys. The machine had been under repair for a considerable time, the motive power had been cut off and the cover enclosing the belts and pulleys had been removed, but the belts were still in position and the pulley on the machine was still geared to the face plate. The pulleys and belts were transmission machinery or dangerous machinery which was required normally to be fenced by s. 13 and s. 14 of the Act of 1937. In order to do his work the respondent had to pull one of the belts by hand so that the face plate could be turned round, and, while he was doing this, his hand was injured. On the question whether the appellants were in breach of their statutory duty to the respondent in that, at the time of the accident, the fencing was not maintained,

Held: although the pulley and belt were being moved by hand at the time of the injury, yet, on the true construction of s. 16 of the Act of 1937, they were not "in motion" within the meaning of that section, which did not prohibit the removal of fencing for the purpose of repairing machinery, and, accordingly, the appeal must be allowed.

Decision of the COURT OF APPEAL sub nom. *Cummings v. Richard Thomas & Baldwins, Ltd.* ([1953] 2 All E.R. 43) reversed.

[For the Factories Act, 1937, s. 13, s. 14 and s. 16, see 9 HALSBURY'S STATUTES G (2nd Edn.) 1008, 1009, 1011.]

Appeal.

Appeal by the employers, Richard Thomas and Baldwins, Ltd., from an order of the Court of Appeal dated Apr. 24, 1953, and reported sub nom. *Cummings v. Richard Thomas & Baldwins, Ltd.* [1953] 2 All E.R. 43, dismissing their appeal from an order of PEARSON, J., at Swansea Assizes, dated Nov. 26, 1952.

H The facts appear in the opinion of LORD OAKSEY.

H. I. Nelson, Q.C., and *T. G. Roche* for the appellants.
Marven Everett, Q.C., and *R. Geraint Rees* for the respondent.

The House took time for consideration.

Jan. 20. The following opinions were read.

I LORD OAKSEY: My Lords, this is an appeal from an order of the Court of Appeal affirming the judgment of PEARSON, J., in favour of the respondent for £325 and costs. The respondent's claim was for damages for personal injuries sustained on Feb. 12, 1951, whilst working as a fitter in the appellants' works at Ebbw Vale, Monmouthshire. At the time of the accident, the respondent was about fifty years of age and had been employed by the appellants for about fourteen years, for the last eight to ten years of which he had been employed as a fitter and at the time of the accident was earning about £10 per week.

In the appellants' premises at Ebbw Vale is a machine known as a Waldrich grinding machine which is used for grinding large and small rollers employed in the rolling of steel sheet. The machine is about twenty-five feet long and is driven by an electric motor, whose motive power is transmitted from a pulley on the motor to a pulley on the machine by four belts riding in grooves in the pulleys. The distance between the centres of the two pulleys is three feet three inches, and the length of belting clear of the pulleys is two feet six inches. The belts and pulleys are entirely enclosed by a metal casing bolted to the floor. Photographs were put in evidence which showed the construction of the machinery. Some time prior to the accident it was decided to fix a new drive to one of the rollers of the machine. This could not be done without stripping down the machine and removing the casing. All power was, therefore, cut off from the machine, the machine stripped down and the casing removed. The machine had been in this condition and incapable of use for a period of six weeks prior to the accident.

On Feb. 12, 1951, the respondent was instructed to drill two holes in the face plate of the machine. This was part of the work connected with the proposed alterations to the machine. This work did not involve the restoration of motive power and at no time was there any motive power connected to the machine. The respondent was assisted in his work by his mate, who was also a fitter, and another man. After setting up a pneumatic drill on a fixed pillar beside the face plate, the respondent moved the face plate into position for drilling the first hole, by pulling on the belts connecting the motor with the machine. He then drilled the first hole. After that it was necessary to move the face plate 180 degrees to bring it into position for drilling the second hole by again pulling on the belt. The respondent did the pulling while his mate watched the face plate so as to tell the respondent when the face plate was in the right position. The respondent was pulling on the top side of the belt from left to right, i.e., away from the machine down towards the motor (which, of course, was not connected to any power or capable of working). He pulled several times (he did not know how often) without mishap but then, when he pulled again, his hand went too far and the fingers of his left hand became caught between the belt and the pulley wheel on the motor and the little finger of his left hand was injured, and had subsequently to be amputated above the proximal interphalangeal joint. The accident occurred because, instead of grasping the belt at the top (when he could have pulled for two feet six inches or so), he grasped it in the middle and started his pull from that point (which was, of course, nearer the bottom pulley) and did not remove his hand before it reached the bottom with the result that it was caught between the pulley and belt.

The writ was issued on Jan. 4, 1952, and by it the respondent claimed damages for negligence and breach of statutory duty. The appellants' premises were a factory within the meaning of the Factories Act, 1937, and the duties alleged to have been breached were those imposed by s. 13, s. 14 and s. 16 of that Act, the material parts of which, and of s. 152, it is convenient to set out.

" 13. Transmission machinery.—(1) Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . .

" 14. Other machinery.—(1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . .

" 16. Construction and maintenance of fencing.—All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be of substantial construction, and constantly maintained

A and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are *necessarily exposed for examination* and for any lubrication or *adjustment* shown by such examination to be immediately necessary, and all such conditions as may be specified in regulations made by the Secretary of State are complied with.

B “152. General interpretation.—(1) . . . ‘Machinery’ includes any driving belt: . . . ‘Prime mover’ means every engine, motor or other appliance which provides mechanical energy derived from steam, water, wind, electricity, the combustion of fuel or other source: . . . ‘Transmission machinery’ means every shaft, wheel, drum, *pulley*, system of fast and loose pulleys, coupling clutch, driving-belt or other device by which the motion of a prime mover is transmitted to or received by any machine or appliance: . . .”

C Three questions have been argued in your Lordships’ House: first, whether the appellants were guilty of a breach of the statutory duty imposed by s. 16 constantly to maintain and keep in position the fencing while the part required to be fenced was in motion or in use; secondly, whether, if not so guilty, the appellants were guilty of negligence at common law; and thirdly, whether the respondent was guilty of contributory negligence. On the second and third questions I see no reason to differ from the judgments of the courts below.

D The first question is, however, a question of importance. PEARSON, J., held that the pulley blocks and the pulley belt in between them were transmission machinery; that they were not necessarily exposed within the meaning of s. 16; that they were at the time of the accident in motion unfenced, and that, therefore, E the appellants were guilty of a breach of s. 16. SINGLETON, L.J., agreed that the machinery was transmission machinery or, if not, dangerous machinery, and rejected the appellants’ argument that s. 13 to s. 16 refer only to movement by mechanical energy as opposed to movement by hand. He, therefore, dismissed the appeal. HODSON, L.J., agreed in the result and that the machinery was transmission machinery and that the sections in question did not refer only to F movement by mechanical energy. MORRIS, L.J., dissented on the ground that the transmission machinery was not in motion because no transmission was taking place from a prime mover.

In my opinion, the appeal must succeed. Whether or not this machinery was transmission machinery when unconnected with a prime mover, it was clearly a dangerous part of other machinery within s. 14 and, therefore, must be fenced. G But the question, in my view, depends on the true construction of s. 16, and on that I am of opinion that the belt and pulley in question were not in motion or in use at the time of this accident, within the meaning of s. 16. They were not in motion or in use for the purposes for which they were intended, but for repair, and, in my opinion, s. 16 does not prohibit the removal of fencing when such removal is necessary for repair. Any other construction of s. 16 would prevent H altogether the repair of dangerous machinery wherever such repair was not shown to be immediately necessary, unless such repair could be carried out without removing the fencing, and there must be innumerable parts of dangerous machinery which cannot be repaired without fencing being removed and without some movement being made therein.

I The words of the exception in s. 16 are expressly confined to occasions “when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary.”

It is not without significance that the word “repair” which had occurred in s. 10 (1) (d) of the Factory and Workshop Act, 1901, was omitted from s. 16 of the Act of 1937, and it is clear, in my opinion, that s. 16 only excepts examination and adjustment if immediately necessary whilst the machinery is in normal motion or use, but does not except repairs which are not immediately necessary and

which, therefore, cannot be carried out whilst the machinery is in normal motion without the fencing. The words "in motion or in use" in s. 16 do not, in my opinion, refer to such movement of machinery by hand as took place in the present case, and s. 16 does not deal in any way with such movement. There is, therefore, no statutory prohibition which makes it obligatory to keep fencing in position when machinery is being repaired and is only being moved in so far as is necessary for the repair. It follows that, in my opinion, there was no breach of duty in the present case and the appeal must be allowed. The respondent must pay the costs in the courts below, but there will be no order as to costs in your Lordships' House. A B

LORD PORTER: My Lords, William Cummings was an employee of the appellants as a fitter, and on Feb. 12, 1951, in the course of that employment was injured as a result of his left hand being caught between the belts of a grinding machine and the pulleys round which they revolved. Normally, the belts and pulleys are enclosed in a complete cover which prevents any possibility of such an accident, but, on the occasion on which the accident in question happened, the machine had been dismantled and this cover had been removed in order that repairs might be effected. The belt and pulleys were installed in order to drive what is known as a face plate which is rotated in the course of the machine's use. The machine itself, being under repair, had not been in use for some six weeks before the accident. In the course of the repair, it became necessary to turn the face plate through an angle of 180 degrees in order to drill two holes in it opposite to one another, and, in order to effect this turn, the respondent took hold of the belt and pulled the face plate round. In doing so his fingers slipped between the belt and rollers, with the result that they suffered injury. C D E

For this injury, the respondent sued the appellants, alleging that they were negligent at common law and in breach of their statutory duty under s. 13 or s. 14 of the Factories Act, 1937, and of s. 16 of the same Act. [His LORDSHIP read the enactments* and continued:] F

My Lords, so far as common law negligence is concerned, I am in agreement with both the courts which have already considered the case and, in common with the rest of your Lordships, am of opinion that no such negligence has been established. For many years the covers of these machines have been taken off from time to time for the purpose of effecting repairs, and no instance of a similar accident has been suggested. Nor, to my mind, would such an accident be anticipated. It has, indeed, been urged that the respondent was himself in fault, inasmuch as his injury was caused by his own negligence. Having regard to the opinion I hold, it is not necessary to decide this point, but, as at present advised, I am inclined to agree with the courts below that it was inadvertence rather than negligence on the respondent's part which led to the accident. G

The matter at issue is, accordingly, narrowed to the question whether there was a breach of statutory duty on the appellants' part. For this purpose, it does not matter whether the machinery in question is "transmission" under s. 13 or "dangerous" under s. 14. H

It was argued on behalf of the appellants that it was not the former because it was not being mechanically propelled at the time when the movement was made. I see no reason for so confining the expression "transmission machinery", nor is such a limitation of meaning warranted by the wording of the definition. It was, I think, transmission machinery and, therefore, required to be fenced under s. 13. Furthermore, under s. 16, the fencing had to be maintained and kept in position whilst the fenced parts were in motion or use. It was not, however, contended that, at the relevant time, they were in use and, therefore, I

* The enactments read are those printed at p. 286, letter H, p. 287, letter A, ante, which are set out in the opinion of LORD OAKSEY.

A the only question which remains is whether, at the moment at which the accident occurred, they were in motion within the meaning of the section.

To the extent to which they were being moved they were, in a sense, in motion, but it does not follow that the words of the section include every kind of movement. Some assistance may, I think, be obtained first, by the collocation of the words "in use or in motion". "In use" would certainly mean running as it was meant to run and doing the work it was meant to do. But provision is required for cases where it was running as it was meant to run but not doing the work it was meant to do. In such a case it would, in my view, be in motion but not in use. The addition of the words "in motion" is, accordingly, required to cover such a set of circumstances, but one would not normally say that the machine was in motion when some one turned it over by hand for the purpose of effecting a repair or some similar purpose. This view is strengthened when it is found that no provision is contained in the Act enabling fencing to be removed for the sake of repair. In such a case they may be in movement but not in motion. If it were not so, and if the judgment of the Court of Appeal were to prevail, they could be uncovered for repair only if they were kept motionless.

D It is difficult to see why so complete a prohibition against uncovering the transmission machinery should be required when full working or motion are permitted in the case of examination, lubrication or adjustment. It may be that, by means of some intricate or complicated machinery, repairs might be effected though the machinery was still fenced, but such a requirement is, as I think the evidence establishes, impracticable in use and far-fetched in theory.

E Moreover, it has to be remembered that, by s. 10 (1) (d) of the Act of 1901, the necessity for maintaining the machinery whilst in motion was abrogated whilst it was under repair or under examination in connection with repair. That provision was excluded from the Act of 1937 not, I think, with the result of making repair impossible unless the machine was at rest, but because it was felt that repair should not be permitted whilst it was running in its normal manner, whether driving its ordinary load or not. In the present case, it was not working in its normal way but merely being turned over in order to effect the necessary repair. Such movement does not, in my opinion, constitute being in motion within the meaning of the statute.

Accordingly, in my opinion, the action fails and the appeal should be allowed.

G LORD REID: My Lords, the respondent was injured whilst assisting in the adjustment of the position of the face plate of a grinding machine so that two holes could be drilled at a particular point on it. This machine, when in use in the ordinary way, was driven by belts passing over a large pulley on the machine and a smaller pulley on an electric motor, and the belts and pulleys were fenced by a substantial cover over them which was bolted to the floor. For a considerable time before the accident the machine had been under repair.

H The cover had been removed, but the belts were still in position and the pulley was still geared to the face plate, so the face plate could be turned by pulling the belts. The respondent was pulling the belts to bring the face plate into position when his fingers were caught between the belts and one of the pulleys.

I I have no doubt that these belts and pulleys were transmission machinery within the meaning of s. 13 of the Factories Act, 1937, and I can find no support for the appellants' argument that the Factories Act only applies to machinery driven by mechanical power. The real question is the proper interpretation of s. 16 of the Act. That section requires that fencing shall be constantly maintained and kept in position while the parts required to be fenced

"are in motion or in use, except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all such conditions as

may be specified in regulations made by the Secretary of State are complied with." A

The question is whether these belts and pulleys were "in motion" when the respondent sustained his injuries. If they were not, then there was no contravention of the statute. It was not argued that the machine or its parts were "in use" when the accident happened, and I do not find it necessary to determine precisely what is the meaning of those words because I do not think that that would assist the determination of the meaning of the phrase "in motion". B

Using the phrase in its ordinary sense, I do not think that one would naturally say of a man moving parts of a machine round to a required position that he had set the machine or its parts in motion. The phrase "in motion" appears to me to be more apt to describe a continuing state of motion lasting, or intended to last, for an appreciable time. But, on the other hand, it would not be a misuse of language to say that the respondent set the parts of the machine in motion. It is, therefore, necessary, in my judgment, to look at the context in which the phrase occurs to determine whether it must be held to denote any movement of the parts however small, however slow, and however caused; or to have a more limited meaning. The exception which I have quoted and which follows immediately after the words "in motion or in use" appears to me to be very illuminating. It permits exposure while the parts are in motion where necessary for examination, and for any lubrication or adjustment shown by such examination to be immediately necessary, but for no other purpose. There appears to be nothing in the Act to authorise setting exposed parts in motion for the purpose of executing repairs or of making any adjustments not immediately necessary. But there must be many occasions in the course of repairing and readjusting machinery when it is necessary to expose parts which, in ordinary use, must be fenced, and to move them to an appreciable extent. There is some dispute whether it would have been practicable to devise some means of carrying out the necessary movements in this case while the guard was in position, but, even if that could have been done in this case, there must be other cases in which it would be impracticable. I can see no answer to the argument that, if the respondent's construction of s. 16 is correct, it is practically impossible in such cases to make the necessary repairs and readjustments without committing an offence by contravening the provision of s. 16. It was argued for the respondent that the statutory powers to make regulations, particularly under s. 60, were wide enough to enable the Secretary of State to deal with such cases and, therefore, any unreasonable consequences of adopting the respondent's interpretation could be avoided. But I cannot agree that these powers to make regulations were intended, or could be used, for that purpose. C D E F G

The fact that the interpretation for which the respondent contends would lead to so unreasonable a result is, in my opinion, sufficient to require the more limited meaning of "in motion" to be adopted unless there is some very strong objection to it, and none was suggested. It is true that the Factories Act is a remedial statute and one should, therefore, lean towards giving a wide interpretation to it, but that does not justify interpreting an ambiguous provision in a way which leads to quite unreasonable results. H

There was much argument about inferences to be drawn from a comparison of provisions in the Act of 1937 with corresponding provisions in the Act of 1901 and earlier Acts. I do not get much assistance from these comparisons but, on the whole, they appear to me to favour the appellants. The most relevant is a comparison of the exception in s. 16 of the Act of 1937 with s. 10 (1) (d) of the Act of 1901, which required that fencing must be maintained while the parts to be fenced were in motion or use I

"except where they are under repair or under examination in connection with repair or are necessarily exposed for the purpose of cleaning or

- A lubricating or for altering the gearing or arrangements of the parts of the machine."

The reference to repair in the exception has been omitted in the later Act. On the narrower interpretation of "in motion", that omission is readily intelligible. It may well have been thought wrong to allow repair work involving the removal of fencing while a machine is running. But, if the wider interpretation of "in motion" were correct, it could hardly have escaped notice that this omission would give rise to the difficulties to which I have already referred, and I find it very difficult to attribute to Parliament an intention to create such difficulties. But these comparisons only confirm me in the opinion which I would have held without them.

- C There being no breach of statutory duty by the appellants, the respondent could only succeed by proving common law negligence on the part of the appellants. But I agree with your Lordships that the evidence falls far short of establishing negligence. I, therefore, agree that the appeal should be allowed.

- LORD TUCKER:** My Lords, I agree with the trial judge (PEARSON, J.) that the evidence in this case was insufficient to warrant a finding of negligence D against the respondent (the plaintiff in the action). Neither of the courts below have held the appellants guilty of common law negligence, there being no finding either way on this issue, the trial judge considering it unnecessary in view of his decision that the appellants were liable for breach of statutory duty, and the Court of Appeal not having heard any argument on the question. In this state of affairs it would, in my view, require very cogent evidence from the shorthand E transcript to justify your Lordships at this stage of the proceedings in finding that the appellants were negligent by reason of their failure to take reasonable steps to provide a reasonably safe system of work, and I certainly do not consider that the evidence in the present case comes up to the required standard.

- Agreeing, as I do, that a study of the Factories Acts from 1878 to 1937 lends no support to the appellants' main contention, viz., that the Act of 1937, on its true F construction, applies only to power-driven machinery, it remains to consider whether the trial judge and the majority of the Court of Appeal were right in holding that the appellants were in breach of their statutory obligation under s. 13 and s. 16 of the Factories Act, 1937, securely to fence the transmission machinery and constantly to maintain and keep in position such fencing while the transmission machinery was in motion.

- G The machinery in question being clearly "transmission machinery", the only question is whether it was "in motion" when, the power derived from the prime mover having been cut off, the respondent was pulling the belt by hand so as to get the face plate into position for a necessary repair to be effected. "Transmission machinery" is defined by s. 152 (1) as

- H "every shaft, wheel, drum, pulley, system of fast and loose pulleys, coupling clutch, driving-belt or other device by which the motion of a prime mover is transmitted to or received by any machine or appliance."

"Prime mover" is defined as

- I "every engine, motor or other appliance which provides mechanical energy derived from steam, water, wind, electricity, the combustion of fuel or other source."

What, then, is the meaning of the words "in motion" as applied to transmission machinery with which alone this case is concerned? My Lords, on this issue I am in complete agreement with the view expressed by MORRIS, L.J., in his dissenting judgment in the Court of Appeal, when, after quoting the definitions of "transmission machinery" and "prime mover" he said ([1953] 2 All E.R. at p. 51):

"In this case there was no motion of the prime mover, there was no

mechanical energy, there was nothing to transmit, and no transmission was taking place." A

Accordingly, he held that the transmission machinery could not be described as "in motion".

My Lords, I would respectfully adopt this language and reasoning which seems to me to provide the answer in the present case without requiring any decision as to the meaning of the words "in motion" as applied to other kinds of machinery or the parts of other machines. B

On this ground I would allow the appeal and enter judgment for the appellants.

LORD KEITH OF AVONHOLM : My Lords, I have had the advantage of reading the opinion of my noble and learned friend, LORD REID, in which I concur. Appeal allowed. C

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *Gee & Edwards*, Swansea (for the appellants); *W. H. Thompson* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

GOVERNMENT OF INDIA, MINISTRY OF FINANCE (REVENUE DIVISION) v. TAYLOR AND ANOTHER. D

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), November 23, 24, 25, 29, 1954, January 20, 1955.]

Company—Winding-up—Foreign tax—Claim by Indian government—Admissibility of proof—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 302. E

A company incorporated in England carried on business in India under a licence granted by the Municipality of Delhi. In 1947 the company's undertaking was purchased by the Indian government under an option contained in the licence. In 1947 a large part, and in 1948 the balance, of the purchase price was paid and remitted to England. In May, 1949, the company went into voluntary liquidation. On Oct. 24, 1951, the Income Tax Commissioner at Delhi served a demand notice under the Indian Income Tax Act, 1922, in respect of the year 1948-49, calling on the company to pay a large sum as capital profits tax in respect of the price paid to it on the sale of its undertaking. The Indian government claimed in the voluntary liquidation of the company the tax due under this and other similar assessments. The liquidators rejected the claim. F

Held: the claim was not admissible to proof because (i) it was a well recognised rule of English law, applying equally in relation to the revenue laws of a member state of the British Commonwealth as to those of a foreign country, that the courts of this country did not enforce the revenue laws of another country (principle stated by LORD MANSFIELD in *Holman v. Johnson* (1775) (1 Cowp. at p. 343) considered), and (ii) the "liabilities" in satisfaction of which, under the Companies Act, 1948, s. 302, the liquidators were bound to apply the property of the company, were only those obligations which were enforceable in an English court. G

Re Lorillard ([1922] 2 Ch. 638) and *Re Art Reproduction Co., Ltd.* ([1951] 2 All E.R. 984) approved.

Decision of the COURT OF APPEAL, sub nom. *Re Delhi Electric Supply & Traction Co., Ltd.* ([1953] 2 All E.R. 1452) affirmed. H

[As to Enforcement of Revenue Laws, see 7 HALSBURY'S LAWS (3rd Edn.) 10, para. 14; and for cases on the subject, see 11 DIGEST (Repl.) 325, 16-18.] I

Cases referred to:

(1) *King of the Hellenes v. Brostrom*, (1923), 16 Lloyd's Rep. 167.

(2) *Re Visser*, [1928] Ch. 877; 97 L.J.Ch. 488; 139 L.T. 658; 11 Digest. (Repl.) 323, 7.

- A (3) *Sydney Municipal Council v. Bull*, [1909] 1 K.B. 7; 78 L.J.K.B. 45; 99 L.T. 805; 11 Digest (Repl.) 322, 6.
- (4) *A.-G. v. Lutwydgc*, (1729), Bunb. 280; 145 E.R. 674; 11 Digest (Repl.) 322, 4.
- (5) *Boucher v. Lawson*, (1736), Lee temp. Hard. 85, 194 (95 E.R. 53, 125); Cunn. 144 (94 E.R. 1116); 11 Digest (Repl.) 440, 823.
- B (6) *Planché v. Fletcher*, (1779), 1 Doug. K.B. 251; 99 E.R. 165; 11 Digest (Repl.) 325, 17.
- (7) *Holman v. Johnson*, (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, 16.
- (8) *Lever v. Fletcher*, (1780), 1 Park's Marine Insurances, 8th Edn., p. 507; 29 Digest 158, 1135.
- C (9) *Clugas v. Penaluna*, (1791), 4 Term Rep. 466; 100 E.R. 1122; 11 Digest (Repl.) 441, 829.
- (10) *Bernard v. Reed*, (1794), 1 Esp. 91; 170 E.R. 290; 12 Digest (Repl.) 308, 2367.
- (11) *Waymell v. Reed*, (1794), 5 Term Rep. 599; 101 E.R. 335; 11 Digest (Repl.) 441, 830.
- D (12) *James v. Catherwood*, (1823), 3 Dow. & Ry. K.B. 190; 11 Digest (Repl.) 325, 18.
- (13) *Huntington v. Attrill*, [1893] A.C. 150; 62 L.J.P.C. 44; 68 L.T. 326; 57 J.P. 404; 11 Digest (Repl.) 515, 1293.
- (14) *A.-G. for Canada v. William Schulze & Co.*, (1901), 9 S.L.T. 4.
- (15) *Re Lorillard*, [1922] 2 Ch. 638; 92 L.J.Ch. 148; 127 L.T. 613; 24 Digest 798, 8275.
- E (16) *Re Art Reproduction Co., Ltd.*, [1951] 2 All E.R. 984; [1952] Ch. 89; 3rd Digest Supp.
- (17) *Peter Buchanan, Ltd. v. McVey*, (1950), 100 L.Jo. 497.
- (18) *Moore v. Mitchell*, (1929), 30 F. (2d) 600.
- (19) *Ex p. James, Re Condon*, (1874), 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 5 Digest 819, 6961.
- F (20) *Re River Steamer Co., Mitchell's Claim*, (1871), 6 Ch. App. 822; 25 L.T. 319; 22 Digest (Repl.) 369, 3974.
- (21) *Ralli Brothers v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 11 Digest (Repl.) 435, 791.

Appeal.

- G Appeal by the Government of India, Ministry of Finance (Revenue Division), from an order of the Court of Appeal dated Nov. 11, 1953, and reported sub nom. *Re Delhi Electric Supply & Traction Co., Ltd.* [1953] 2 All E.R. 1452, dismissing an appeal from a decision of VAISEY, J., dated July 30, 1953.

The facts appear in the opinion of VISCOUNT SIMONDS.

- H *Sir Andrew Clark, Q.C., N. E. Mustoe, Q.C., and R. R. D. Phillips* for the appellant.

Millard Tucker, Q.C., Raymond Jennings, Q.C., and O. R. Smith for the respondents.

The House took time for consideration.

Jan. 20. The following opinions were read.

- I VISCOUNT SIMONDS : My Lords, the respondents to this appeal are the present liquidators in the voluntary winding-up of an English company, the Delhi Electric Supply and Traction Co., Ltd., which was, in 1906, incorporated for the purpose of operating an electricity supply undertaking and a tramway undertaking under a licence and order granted by the Municipality of Delhi. The appellant is the Government of India, a sovereign independent republic which acknowledges Her Majesty as head of the British Commonwealth. The question for your Lordships' decision is whether VAISEY, J., and the Court of

Appeal were right in rejecting the appellant's claim to prove in the liquidation of the company in respect of an amount of income tax due from the company to the appellant under Indian income tax law. A

The relevant facts can be very shortly stated. The company, having carried on its undertakings in India until 1947, in that year sold the whole of them to the Government of India as from Mar. 2, 1947, for Rs.82,11,580. The greater part of this sum was paid to the company in India on Mar. 1, 1947, and was remitted to England a few days later. The balance was paid to the company in India in September, 1948, and remitted to England shortly afterwards. On Apr. 18, 1947, the Indian Income Tax and Excess Profits Tax (Amendment) Act, 1947, was passed and, by s. 6 thereof, s. 12B was inserted in the Indian Income Tax Act, 1922. The opening words of s. 12B are as follows: B

"(1) The tax shall be payable by an assessee under the head 'Capital gains' in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after Mar. 31, 1946; and such profits shall be deemed to be income of the previous year in which the sale, exchange or transfer took place . . . " C

This amendment is deemed, by s. 1 (2) of the Act of 1947, to have come into force on Mar. 31, 1947. D

On May 25, 1949, the company went into voluntary liquidation by special resolution, and the respondent Taylor and one Lovering were appointed joint liquidators. They had previously, as directors of the company, made a statutory declaration as to the solvency of the company, and later, in their statement as to the position of the liquidation of the company, they referred to the liability for special taxation in India. They also, in March, 1951, inserted a notice in the Gazette of India calling on all creditors to prove their debts or claims, and acceded to a request by the Commissioner of Income Tax at Delhi to stay the liquidation proceedings to enable his department to prove their claim. On Oct. 24, 1951, the Commissioner of Income Tax served a demand notice under s. 29 of the Indian Income Tax Act, 1922, for the year 1948-49, calling on the company to pay Rs.16,54,945.11.0 of tax, which consisted mainly of a sum of Rs.15,62,817.3.0 representing tax on the surplus on the sale of the company's undertakings. I need not pursue the various steps that were taken in India, appeals against the assessment, payment of a sum on account out of assets which were still in India, re-assessment of the amounts claimed to be due under the head "Capital gains", and further demands which culminated in a claim on the surviving liquidator, Taylor, in February, 1953 (Lovering having in the meantime died), for sums of Rs.15,62,817.3.0 and Rs.13,001.10.0. The quantum of those assessments is still a matter of appeal in India, but that there is some liability in India in respect of tax for capital gains is beyond doubt, and there appears to be also an ascertained liability in respect of what I may call ordinary income tax which is not under appeal. E F G

It was in those circumstances that the respondent Taylor, in April and May, 1953, rejected the appellant's claims stating that no part of the company's assets (all of which were then in England) could properly be applied in payment of any claim for taxes by a foreign government. Thereupon, the appellant applied to the High Court in England for an order reversing the rejection of its claim and, on July 30, 1953 (the respondent Hume having in the meantime been appointed joint liquidator with the respondent Taylor), VAISEY, J., made an order refusing the appellant's application. From this order the appellant appealed to the Court of Appeal (SIR RAYMOND EVERSHED, M.R., JENKINS and MORRIS, L.JJ.), and that court unanimously dismissed the appeal. H I

The questions raised in the appeal to this House are two: (a) whether there is a rule of law which precludes a foreign state from suing in England for taxes due under the law of that state, and (b) whether (assuming the first question to be answered in the affirmative) a claim for Indian taxes is, nevertheless, a

A "liability" within the meaning of s. 302 of the Companies Act, 1948, which the liquidators are bound to discharge.

The Court of Appeal agreed with VAISEY, J., in answering to the first question "Yes" and to the second question "No", and I have no doubt that they were right.

B My Lords, I will admit that I was greatly surprised to hear it suggested that the courts of this country would, and should, entertain a suit by a foreign state to recover a tax. For at any time since I have had any acquaintance with the law I should have said, as ROWLATT, J., said in *King of the Hellenes v. Brostrom* (1) (16 Lloyd's Rep. at p. 193):

C "It is perfectly elementary that a foreign government cannot come here—nor will the courts of other countries allow our government to go there—and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to by the country to which he belongs."

D That was in 1923. In 1928, TOMLIN, J., in *Re Visser* (2), after referring to *Sydney Municipal Council v. Bull* (3), in which the same proposition had been unequivocally stated by GRANTHAM, J., and saying that he was bound to follow it, added ([1928] 1 Ch. at p. 884):

E "My own opinion is that there is a well recognised rule, which has been enforced for at least two hundred years or thereabouts, under which these courts will not collect the taxes of foreign states for the benefit of the sovereigns of those foreign states; and this is one of those actions which these courts will not entertain."

F My Lords, it is not seemly to weigh the pronouncements of living judges, but it is, I think, permissible to say that the opinions of few, if any, judges of the past, command greater respect than those of LORD TOMLIN and SIR SYDNEY ROWLATT, and what appeared to one of them to be a "well recognised rule" and to the other "elementary" law cannot easily be displaced.

G My Lords, the history and origin of the rule, if it be a rule, are not easy to ascertain, and there is, on the whole, remarkably little authority on the subject. I am inclined to agree with the Court of Appeal that the early cases of *A.-G. v. Lutwydgc* (4) and *Boucher v. Lawson* (5), to which some reference was made, do not give much help. It is otherwise when we advance a few years to the age of LORD MANSFIELD. That great judge, in a series of cases, repeated the formula "For no country ever takes notice of the revenue laws of another" (see *Planché v. Fletcher* (6), *Holman v. Johnson* (7), and *Lever v. Fletcher* (8)). The last-named case I find only in a text-book, PARK'S MARINE INSURANCES, which in its day ran through many editions. I am myself referring to the 7th Edn. at p. 359. The author, JAMES ALLAN PARK, himself a distinguished judge of the Common Pleas, states the rule as I have cited it from *Planché v. Fletcher* (6) and then proceeds:

H "In another case a short time afterwards at Guildhall LORD MANSFIELD in his charge to the jury advanced the same doctrine which had been established by the whole court in the preceding case."

I He then refers to *Lever v. Fletcher* (8). It is true that LORD MANSFIELD was not directly concerned with the case of a foreign power suing in an English court to recover revenue, but with the validity of a contract made abroad where the seller was not implicated in smuggling operations which contravened the revenue laws of this country, or with the rights of insurers where a ship which had cleared for Ostend went direct to Nantes, thereby affecting the customs dues payable abroad. But in each case he could not have reached his conclusion but for the fact that he applied the rule that no country ever takes notice of the revenue laws of another. Where LORD MANSFIELD led, LORD KENYON followed, though he

was not a judge who followed blindly. I agree with the learned Master of the Rolls that it is clear from such cases as *Clugas v. Penaluna* (9), *Bernard v. Reed* (10) and *Waymell v. Reed* (11), that LORD KENYON accepted without qualification the broad rule which LORD MANSFIELD had formulated. I pass over a number of cases where the question was as to the admissibility of documents made in a foreign country and not stamped according to the law of that country, pausing only to remind your Lordships that in *James v. Catherwood* (12), SIR CHARLES ABBOTT, C.J. (later LORD TENTERDEN), said (3 Dow. & Ry. K.B. at p. 191):

"This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of LORD HARDWICKE, that in a British court we cannot take notice of the revenue laws of a foreign state."

The learned chief justice went on to apply the rule in a manner that may not have been justified, but that does not detract from the importance of his unqualified assertion of it.

Here, my Lords, is a formidable array of authority. It is possible that the words "take notice of" might, if applied without discrimination, lead to too wide an application of the rule; for, as TOMLIN, J., pointed out in *Re Visser* (2), there may be cases in which our courts, although they do not enforce foreign revenue law, are bound to recognise some of the consequences of that law, and, for this reason, the terms of LORD MANSFIELD'S proposition have been criticised. But, in its narrower interpretation, it has not been challenged, except in the three cases mentioned earlier in this opinion, and in them it was unequivocally affirmed. Nor does the matter rest there. For Sir Andrew Clark, who argued the case for the appellant with equal vigour and candour, admitted that he knew of no case in which a foreign state had recovered taxes by suit in this country, nor of any case in any foreign country in which the government of this country had done so. And, in this connection, it is worthy of note that, as my noble and learned friend, LORD SOMERVELL OF HARROW, has by his independent researches discovered and will presently tell your Lordships, this same rule is stated in at least one French text-book of high authority. The matter is carried one step further by the fact that the rule appears to have been recognised by Parliament. For I see no other reason for the exclusion from the advantages of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, of a judgment for

"a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty",

except that it was regarded as axiomatic that the courts of one country do not have regard to the revenue laws of another and, therefore, will not allow judgments for foreign taxes to be enforced.

It may well be asked, then, on what grounds this appeal is founded. I think that learned counsel relied on two main grounds, first, that LORD MANSFIELD'S proposition, which I have more than once quoted, extended to revenue law a doctrine properly applicable only to penal law, and (I think it must be faced) that LORD MANSFIELD was wrong in so extending it, and everyone who has since followed him was wrong: and, secondly, that, whatever may have been the rule in the past, there ought to be, and is a trend towards, a mitigation of the rule, particularly as between states which are united by the bonds of federal union or by such looser ties as bind the British Commonwealth of nations.

My Lords, these seem to me frail weapons with which to attack a strong fortress. The suggestion that LORD MANSFIELD'S proposition was too wide was supported partly by the fact that, in *Huntington v. Attrill* (13), the proposition was somewhat more narrowly stated, as it was also in the case of *A.-G. for Canada v. William Schulze & Co.* (14). In those cases, the question was of enforcement of a penalty imposed by a foreign state, and the observations of the court were directed to that question. This seems to me an inadequate reason for challenging a wider statement in regard to a different subject-matter. Further, on the assumption

- A which must be made that the decision in *Huntington v. Attrill* (13) was correct, it was conceded that it must cover, not only a penalty strictly so-called, but also any tax which could be regarded as penal or confiscatory. This seems to me to create a difficult task of discrimination, which is not made easier by the test suggested by learned counsel. "If a tax", he said, "is the sort of tax which is recognised in this country, it is not penal". I am little disposed to introduce so
- B nice a refinement into a rule which has hitherto been stated in terms that are easy to understand and to apply.

Then some reliance was placed on the fact that, in earlier editions of DICEY'S CONFLICT OF LAWS, the relevant rule was thus stated:

- C "The court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign country", and that it was only after the decision of *Sydney Municipal Council v. Bull* (3), that in later editions the words "or revenue" were added after "penal". [Later the words "or political" were also added]. This seems to me a worthless argument, for already in the earlier editions it was said that the
- D "essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community and not an action for remedying a wrong done to an individual"

(see, e.g., 2nd Edn., at p. 208), an apt description as it seems to me of a suit to recover taxes.

- E The second branch of the argument for the appellant was directed to showing that, in the United States of America, there had been, in certain states, a disposition to relax the rigidity of the rule, and he was able to point to certain cases not cited to the Court of Appeal where the courts of one state had admitted and enforced claims for revenue by another state, notably in the States of Missouri and Kentucky. And reference was made also to the fact that, in the 1948 supplement to the well known "RESTATEMENT", some doubt was cast on the rule.
- F But it was conceded that this was not the trend in all states, the States of New York and of Delaware continuing to apply the old rule. My Lords, I do not think it necessary to occupy your time by an examination of the American cases. I am ever willing to get help from seeing how the law, which is our common heritage, has developed on the other side of the Atlantic, but a development which is not universal and is in any case confined to relations between state and state
- G within the Union, can have no weight in determining what the law is in this country. Finally, it was urged that, whatever might be the position as between this country and a foreign country, it was not the same as between different members of the British Commonwealth, including those members which, though within the Commonwealth, do not acknowledge the sovereignty of the Queen. For such a distinction there is no authority, and I can see no reason. If such
- H a change is to be made, it is not for the courts to make it. It will be the task of governments and perhaps of parliaments. I do not think that it will be an easy task.

- I I must add that, since writing this part of my opinion, I have learned from my noble and learned friend, LORD KEITH OF AVONHOLM, that he has discovered a case in the courts of Eire which confirms the view I have expressed. I come then, my Lords, to the second question and will not detain you long, for, with all deference to those who have thought otherwise, I find it an easy one to answer. We proceed on the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries. It is sometimes, not happily perhaps, called a rule of private international law; it is at least a rule which is enforced with the knowledge that, in foreign countries, the same rule is observed. And, since it is a rule which operates equally in regard to natural and artificial persons, the company, with which we are here concerned, could not, on the day before its resolution to wind-up became effective, have been

sued by the Indian government for the recovery of tax in the courts of this country. But it is said that, from the moment that the company went into liquidation, the situation changed, the old rule of law was abrogated, and our courts became the means of collecting the taxes of a foreign power. This may seem the more surprising when it is remembered that the winding-up of a company, whether voluntarily or by the court, is only the machinery by which an entity, which can no longer, or at least no longer usefully, carry on its business, is brought to its statutory end. It is difficult to see why such a process should create new rights in foreign powers hitherto unknown in this or any other country. But it is said that, under the Companies Act, 1948, s. 302, the "liabilities" which the liquidator in a voluntary winding-up is bound to discharge include an obligation to pay tax due to a foreign state. All turns on the meaning of the word "liabilities" in this section. On the one hand, it is said by the respondents that it means only those obligations which are enforceable in an English court, and, on the other hand, that its meaning is extended—I do not know how far—but at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.

My Lords, I have no hesitation in adopting the former of these meanings. I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding-up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding-up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides. It would be a strange result if it were found that the statute introduced a new category of creditors to compete with those who alone, apart from it, could enforce their claims. It was urged on your Lordships that in certain other sections of the Act, notably s. 278 and s. 283, "liabilities" must include obligations not enforceable in this country. That may well be, but, though I accept the proposition that a word should be used in the same sense throughout a statute, it is by no means a universal rule, and I am not pressed by it in construing a section of an Act so long and complex as the Companies Act, 1948, where a word may be and, in the case of "liabilities" in fact is, used in many different contexts. I am, on the other hand, satisfied that the case of a statute-barred debt presents a very close analogy and that, in concluding that the present claim cannot be admitted, your Lordships are assisted by such cases as *Re Lorillard* (15) and *Re Art Reproduction Co., Ltd.* (16), which were, in my opinion, rightly decided.

I would dismiss this appeal with costs.

LORD MORTON OF HENRYTON : My Lords, I had prepared some observations on the important questions which arise on this appeal, but I have formed the view that these observations add nothing of value to the speech which has just been delivered by my noble and learned friend on the Woolsack. I shall, therefore, say only that I agree with his reasoning and with his conclusion.

LORD REID : My Lords, I concur.

LORD KEITH OF AVONHOLM : My Lords, on the first issue raised in this appeal, I am in full concurrence with the opinion of my noble and learned friend, **VISCOUNT SIMONDS**. Such additional observations as I make under this head are due to the fact that I have had access to a judgment delivered by **KINGSMILL MOORE, J.**, in the High Court of Ireland on July 21, 1950, in *Peter Buchanan, Ltd. v. McVey* (17). This admirable judgment, which somehow has escaped the notice of the reporters, covers all the points raised under this head of the appeal and was affirmed by the Irish Court of Appeal on Dec. 19, 1951.

- A It illustrates two propositions: (i) that there are circumstances in which the courts will have regard to the revenue laws of another country; and (ii) that in no circumstances will the courts, directly or indirectly, enforce the revenue laws of another country. We are not concerned to consider in this case the validity of the first proposition or the limits to be put on it. But it is interesting to notice how it was applied in the case cited. The plaintiff company was a company
- B registered in Scotland which had been put into liquidation by the revenue authorities in Scotland under a compulsory winding-up order in respect of a very large claim for excess profits tax and income tax. The liquidator was really a nominee of the revenue. The defendant held ninety-nine £1 shares of the capital of the company, and the remaining share was held by a confidential cashier and book-keeper as trustee for him. These two sole shareholders were also sole
- C directors. The defendant, having realised the whole assets of the company in his capacity as a director and having satisfied substantially the whole of the company's indebtedness, other than that due to the revenue, by a variety of devices had the balance transferred to himself to his credit with an Irish bank and decamped to Ireland. The action was in form an action to recover this balance from the defendant at the instance of the company directed by the liquidator.
- D The first answer of the defendant was that, as he had received the money from the company in his capacity as a shareholder in pursuance of an agreement between all the incorporators, the company could not now ask to have it back. The learned judge held that the transaction was a dishonest transaction designed to defeat the claim of the revenue in Scotland as a creditor and was ultra vires the company and, accordingly, rejected the defendant's submission. On the
- E other hand, he held that, although the action was in form an action by the company to recover these assets, it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another state. He, accordingly, dismissed the action. The judgment contains an able and exhaustive examination of the authorities.

- One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties. Another explanation has been given by an eminent American judge, JUDGE LEARNED HAND in *Moore v. Mitchell* (18), in a passage, quoted also by
- G KINGSMILL MOORE, J., in the case of *Peter Buchanan, Ltd.* (17), as follows (30 F. (2d) at p. 604):

- “While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal
- H liabilities, a court will not recognise those arising in a foreign state, if they run counter to the ‘settled public policy’ of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations
- I between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot

prosecute without determining whether those laws are consonant with its own notions of what is proper.” A

On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognised and which has been applied by a consistent train of decision. It may be possible to find reasons for modifying the rule as between states of a federal union. But that consideration, in my opinion, has no relevance to this case. B

On the second question in this appeal, I have come with reluctance to the view that the distribution sections of the winding-up provisions of the Companies Act, 1948, are controlled by the same considerations. I do not find it necessary to give the word “liabilities” different meanings in the various sections. In particular, in s. 278 (1) (c), s. 283 and s. 302, it can, in my opinion, bear the same meaning. I find it impossible to hold that assessment to Indian income tax does not impose a liability on the company. From the point of view of the Indian government it obviously is a liability. If there were assets of the company in India attached or attachable for the tax no one could doubt that it was a liability. It cannot cease to be a liability because the Indian assets have all been brought to this country. It is, in my opinion, a liability within the meaning of s. 302. But the section is speaking in general terms. When the liquidators come to distribute the assets in satisfaction of the liabilities they find that this particular liability is unenforceable. It is as if it were written down to zero. Let me take the position before the date of the resolution for winding-up. The company could have paid the tax if so minded. Equally, it could have refused to pay the tax. If it had been sued, the action would have been dismissed. That would not have extinguished the liability. The liability would have remained exactly as before. But if, after the dismissal of the action, the company went into liquidation, can it be that a duty then emerges on the liquidators under s. 302 of the Act to pay the tax which has been successfully resisted by the company before the winding-up started? I can see no ground for so holding. C D E

I was impressed for a time by the reference made by counsel for the appellants to the rule in *Ex p. James, Re Condon* (19). Counsel stressed that he could not appeal to the rule as directly applicable, for it applied only to an officer of the court which the liquidator in a voluntary winding-up was not. But, as I understood him, the suggestion was that the court, in a compulsory winding-up, would direct a liquidator to pay the tax on the ground of honesty and fair dealing, and it would be impossible to follow one line in a winding-up by the court and another in a voluntary winding-up, a view, I may observe, taken in another connection by WYNN-PARRY, J., in *Re Art Reproduction Co., Ltd.* (16)). The rule, however, which is at best exercised as a discretionary power by the court, appears to have been exercised only in cases where there has been some form of enrichment of the assets of a bankrupt or insolvent company at the expense of the person seeking recoupment. No case has been brought to our notice of the application of the rule where there has been no enrichment of one party with corresponding loss to the other. F G H

While, then, this is a liability in the sense of s. 302 of the Act, it is not a liability which the liquidators were bound to pay. This, in my opinion, is not to contradict the section. The same situation could arise where there was a debt statute-barred in this country, but not statute-barred in another country. If there were assets in that other country sufficient to meet the debt, a liquidator might be compelled to recognise the debt as a liability that had to be discharged. If there were no assets in that country and recovery had to be sought in this country, the liquidator could not be compelled to pay it out of assets in his hands (*Re River Steamer Co., Mitchell's Claim* (20); *Re Art Reproduction Co., Ltd.* (16)). The reasons given in the passage already cited from JUDGE LEARNED HAND's judgment in *Moore v. Mitchell* (18), are as cogent, in my opinion, against a liquidator in this country recognising a claim for taxes demanded by a foreign country I

A as they are against the enforceability of such a claim in a court of law. It is not for a liquidator to discriminate between the merits or demerits of the claim. He must allow all such claims, or none. The liquidators here could pay the Indian tax with the consent of the contributories, as there are no other creditors who could be prejudiced. But they cannot be compelled to pay it if the contributories withhold their consent.

B For these reasons, I agree the appeal should be dismissed.

LORD SOMERVELL OF HARROW : My Lords, the facts and the circumstances in which the present issue came before our courts have already been stated. The first issue in the present appeal is whether a foreign state can use the courts of this country for the collection of its taxes. The statement by

C **LORD MANSFIELD** in *Holman v. Johnson* (7) (1 Cowp. at p. 343) "For no country ever takes notice of the revenue laws of another", may include the present issue but goes beyond it, and is, I think, directed to a different problem. The plaintiff claimed the price of tea delivered in Dunkirk. The defendant intended as the plaintiff knew to smuggle the tea into England. **LORD MANSFIELD** uses the words cited in considering the *lex loci contractus*. He is stating that the courts there

D would, in no circumstances, have regard to any illegality arising under the revenue laws of this or any other country. He then proceeds to consider the alleged illegality under our law. The question whether today our courts would, as between parties, enforce a contract to break the revenue laws of another country has little, if any, relevance to the issue which we have to decide. In *Ralli Brothers v. Compania Naviera Sota y Aznar* (21) ([1920] 2 K.B. at p. 300),
 E **SCRUTTON, L.J.**, in a passage cited by the Master of the Rolls, reserved that issue for consideration should it arise. I desire to make clear that I am not dealing with that issue.

There is no decision binding on your Lordships' House and the matter, therefore, falls to be considered in principle. If one state could collect its taxes through the courts of another, it would have arisen through what is described,

F vaguely perhaps, as comity or the general practice of nations inter se. The appellant was, therefore, in a difficulty from the outset in that, after considerable research, no case of any country could be found in which taxes due to state A had been enforced in the courts of state B. Apart from the comparatively recently English, Scottish and Irish cases, there is no authority. There are, however, many propositions for which no express authority can be found because

G they have been regarded as self-evident to all concerned. There must have been many potential defendants. Tax gathering is an administrative act, though, in settling the quantum, as well as in the final act of collection, judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract, but of authority and administration as between the state and those within its jurisdiction. If one

H considers the initial stages of the process, which may, as the records of your Lordships' House show, be intricate and prolonged, it would be remarkable comity if state B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of state A. Once a judgment has been obtained and it is a question only of its enforcement, the factor of time and expense will normally have disappeared. The principle remains. The claim is one for a tax.

I That fact, I think, itself justifies what has been clearly the practice of states. They have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used. The position in the United States of America has been referred to, and I agree that the position as between member states of a federation wherever the reserve of sovereignty may be, does not help.

The following passage from **PILET'S TRAITÉ DE DROIT INTERNATIONAL PRIVÉ**, 1924, para. 674, confirms the negative result of counsel's researches in respect of French law.

“ Les jugements rendus en matière criminelle ne sont pas les seuls qui soient soumis à la loi de la territorialité absolue. Les jugements rendus en matière fiscale ne sont eux non plus susceptibles d'aucune exécution à l'étranger, et l'on n'a même jamais songé à la possibilité de faire exécuter sur le territoire de l'un d'eux une sentence relative aux droits fiscaux de l'état qui aurait été rendue sur le territoire d'un autre.”

The appellant is asking the English courts to do what the courts of no other country have done. In some fields this might commend the argument, but here, for the reason which I stated at the outset, it is fatal. Some tentative suggestion was made that some different principle should apply as between members of the Commonwealth. No ground which I could follow was put forward in support.

On the question of the construction and application of the Companies Act, 1948, s. 302, I think the appeal also fails. For myself, assuming that the word “liabilities” should have regard to the law of the country in which the company had been doing business, I would not have regarded this as sufficient to overrule the special principle that foreign states cannot directly or indirectly enforce their tax claims here.

Appeal dismissed.

Solicitors: *Stanley Johnson & Allen* (for the appellants); *Sanderson, Lee, Morgan, Price & Co.* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

CORPORATION OF LONDON *v.* CUSACK-SMITH AND OTHERS.

[HOUSE OF LORDS (Lord Oaksey, Lord Porter, Lord Reid, Lord Tucker and Lord Keith of Avonholm), November 16, 17, 18, 22, 1954, January 20, 1955.]

Town and Country Planning—Purchase notice—“Owner” of land—Person entitled to receive rackrent—Grant by freeholders of long lease—Confirmation of purchase notice—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 19 (1), s. 119 (1).

In 1873 freehold premises were leased for eighty years at a rent of £350 per annum. In 1922 a sub-lease of the premises was granted at £1,136 per annum. In 1925 the freeholders leased the premises to the sub-lessees for seventy-five years at a rent of £750 per annum, subject to, but with the benefit of, the lease of 1873. In 1940 the sub-lease of 1922 and the lease of 1925 were transferred to H. & Sons, Ltd. In 1942 H. & Sons, Ltd. acquired the residue of the lease of 1873. During the war of 1939-45, the premises were totally destroyed by enemy action. In 1950 H. & Sons, Ltd. applied to the Corporation of London, as the planning authority, for permission to develop the site by re-building the premises, and, on permission being refused, they served a purchase notice on the corporation under the Town and Country Planning Act, 1947, s. 19 (1), requiring the corporation to purchase their leasehold interest in the site. The Minister confirmed this notice and the leasehold interest of H. & Sons, Ltd. was assigned to the corporation. In 1952 the freeholders applied to the corporation for permission to develop the site, and, on permission being refused, they appealed to the Minister under s. 16 (1) of the Act. The Minister disallowed

A the appeal, and the freeholders then served a purchase notice on the corporation under s. 19 (1) of the Act, requiring the corporation to purchase the fee simple.

B **Held** (LORD OAKSEY and LORD PORTER dissenting): the freeholders were not entitled to serve a purchase notice as an owner of land under s. 19 (1) because they were not an "owner" within s. 119 (1) of that Act since, the land not having been let at a rackrent by the lease of June, 1925, the Corporation of London as assignees of that lease were, and the freeholders were not, the persons who would be entitled to receive the rackrent if it were so let, and the definition of owner contained in s. 119 (1) was not excluded by the context of s. 19 (1).

C Decision of the COURT OF APPEAL, sub nom. *R. v. Minister of Housing and Local Government, Ex p. Corporation of London* ([1954] 1 All E.R. 88) reversed.

Per CURIAM: whether a rent at which land is leased is a rackrent is to be determined, for the purposes of the definition of "owner" in s. 119 (1) of the Act of 1947, according to the circumstances at the date of the lease.

D [For the Town and Country Planning Act, 1947, s. 19 and s. 119, see 25 HALSBURY'S STATUTES (2nd Edn.) 517, 635.]

Cases referred to:

(1) *Borthwick-Norton v. Collier*; [1950] 2 All E.R. 204; [1950] 2 K.B. 594; 114 J.P. 375; 2nd Digest Supp.

E (2) *Truman, Hanbury, Buxton & Co. v. Kerslake*, [1894] 2 Q.B. 774; 63 L.J.M.C. 222; 58 J.P. 766; 30 Digest (Repl.) 507, 1473.

(3) *Rawlence v. Croydon Corpn.*, [1952] 2 All E.R. 535; [1952] 2 Q.B. 803; 116 J.P. 515; 3rd Digest Supp.

(4) *Bowditch v. Wakefield Local Board*, (1871), L.R. 6 Q.B. 567; 40 L.J.M.C. 214; 25 L.T. 88; 36 J.P. 197; 19 Digest 597, 261.

Appeal.

F Appeal by the Corporation of London from an order of the Court of Appeal dated Dec. 15, 1953, and reported sub nom. *R. v. Minister of Housing and Local Government, Ex p. Corporation of London* [1954] 1 All E.R. 88, allowing an appeal from an order made by the Divisional Court on Apr. 29, 1953, on the application of the corporation, and reported [1953] 2 All E.R. 80, quashing an order of the Minister of Housing and Local Government confirming a purchase notice served by the freeholders of premises in the City of London on the corporation under the Town and Country Planning Act, 1947, s. 19 (1).

The facts appear in the opinion of LORD OAKSEY.

Harold Williams, Q.C., and *D. C. Walker-Smith* for the appellants, the Corporation of London.

H *Harold Heathcote-Williams, Q.C.*, *J. R. Willis* and *O. R. W. W. Lodge* for the respondents, the Jones trustees.

Rodger Winn and *R. J. Parker* for the respondent, the Minister of Housing and Local Government.

The House took time for consideration.

Jan. 20. The following opinions were read.

I **LORD OAKSEY:** My Lords, in this case, the appellants are appealing from a judgment of the Court of Appeal in England, dated Dec. 15, 1953, whereby the court allowed an appeal by the first-named respondents (hereinafter called "the Jones trustees") from a judgment of a Divisional Court of the Queen's Bench Division dated Apr. 29, 1953, for an order of certiorari quashing a decision by the second-named respondent (hereinafter called "the Minister") dated Dec. 31, 1952, and made pursuant to the Town and Country Planning Act, 1947 (hereinafter called "the Act").

The issue in this appeal is whether the Jones trustees, who are the freeholders of certain premises known as No. 69, Ludgate Hill, in the City of London (hereinafter called "the said premises") are "owners" within the meaning of s. 19 (1) of the Act. The immediately relevant provisions of the Act are as follows:

" 19. (1) Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state; and (b) in a case where permission to develop the land was granted as aforesaid subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions; (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'purchase notice') requiring that council to purchase his interest in the land in accordance with the provisions of this section . . .

" 119. (1) In this Act, except so far as the contrary is provided or the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say: . . . 'land' means any corporeal hereditament, including a building as defined by this section, and in relation to the acquisition of land under Part IV of this Act includes any interest or right in or over land; . . . 'owner', in relation to any land, means, except in Part VI of this Act, a person other than a mortgagee not in possession, who, whether in his own right or as trustee or agent for any other person, is entitled to receive the rackrent of the land or, where the land is not let at a rackrent, would be so entitled if it were so let, and, in Part VI of this Act, has the meaning assigned to it by s. 64 of this Act; . . . "

The only question in the case is whether the definition of "owner" in s. 119 (1) is such as to prevent a freeholder who has let the premises at less than a rackrent from serving a purchase notice in respect of his interest in the land under s. 19 (1).

It is, however, I think desirable to state in detail the devolution of the said premises. The Jones trustees are trustees of the real estate of Alexander Jones deceased, and they are, and they or their predecessors in office as trustees of the said real estate at all material times have been, entitled in fee simple to the said premises as trustees as aforesaid. By a lease (hereinafter called "the lease") dated Sept. 29, 1873, the Commissioners of Sewers of the City of London, who were then freeholders of the said premises, demised them to Thomas Treloar for a term of eighty years from the said Sept. 29 at a yearly rent of £350. By a conveyance dated May 26, 1874, the said Commissioners of Sewers conveyed the freehold reversion in the said premises immediately expectant on the lease to the said Alexander Jones. On Feb. 13, 1881, the said Alexander Jones died, and on Mar. 5, 1881, probate of his will was granted out of the Principal Probate Registry to predecessors in office of the Jones trustees. By an underlease (hereinafter called "the underlease") dated May 23, 1922, the trustees of the said Thomas Treloar deceased sub-demised the said premises to Samuel Taylor Williamson and Eric Bryan Williamson for a term of eighty years less seven days from Sept. 29, 1873, at an annual rent of £1,136. By an assignment dated Oct. 2, 1924, the said Samuel Taylor Williamson and Eric Bryan Williamson assigned the underlease to Eric Bryan Williamson and Cameron Matthew Walker. By a lease dated June 23, 1925 (hereinafter called "the lease of the reversion"),

A the predecessors in office of the Jones trustees demised the freehold reversion in the said premises vested in them (but subject to and with the benefit of the lease) to Eric Bryan Williamson and Cameron Matthew Walker for a term of seventy-five years from Sept. 29, 1924, at an annual rent of £750. By an assignment dated Feb. 19, 1940, the said Eric Bryan Williamson and Cameron Matthew Walker in consideration of the payment to them of £4,000 assigned

B the underlease to Hamptons & Sons, Ltd. (hereinafter called "Hamptons").

On May 10, 1941, the buildings comprised in the said premises were completely destroyed by enemy action. The annual rent of £750 due under the lease of the reversion was, nevertheless, duly paid until Nov. 29, 1951. By an assignment dated Apr. 8, 1942, the personal representatives of the last surviving trustee of the said Thomas Treloar deceased, in consideration of the payment to them of

C £4,000, assigned the lease to Hamptons. On and after Apr. 8, 1942, the position was that the lease, underlease and lease of the reversion had all become vested in Hamptons, while the freehold was vested in the predecessors in office of the Jones trustees.

By a letter dated Feb. 9, 1950, and addressed to the appellants, Messrs. Gerald Eve & Co. submitted an application on behalf of Hamptons as lessees

D for planning permission to re-build the said premises. By a letter dated May 2, 1950, addressed to Hamptons and a refusal of permission to develop enclosed therewith, the appellants refused planning permission for the said development. The reason stated for refusal was that the proposed development would prejudice the new lay-out of the area of extensive war damage in which the said premises were situated, including the provision of a roundabout at the junction of Ludgate

E Hill, New Bridge Street, Fleet Street and Farringdon Street.

On Aug. 17, 1950, Hamptons served notice on the appellants under s. 19 (1) of the Act requiring the appellants to purchase the lease of the reversion, the appellants being, by virtue of s. 114 (2) of the Act, the proper recipients of such a notice. By a letter dated Nov. 9, 1950, the Minister of Town and Country Planning confirmed the said purchase notice. On Nov. 27, 1951, Hamptons,

F at the instance of the appellants, served on the Jones trustees a notice of retention under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, in respect of the lease of the reversion. By virtue of s. 10 (1) (a), (b), of the said Act of 1939, the effect of the said notice of retention was (inter alia) that rent was no longer payable under the lease of the reversion until the said premises were rendered fit, and that there was implied in the lease of the reversion a covenant

G by the tenant with the landlord that the said premises should be rendered fit as soon as was reasonably practicable. By a transfer dated Dec. 19, 1951, Hamptons, in consideration of the payment to them of £71,250, transferred the lease of the reversion to the appellants. The appellants, by the transfer dated Dec. 19, 1951, became bound in their capacity as leaseholders to reinstate the premises although, by reason of their refusal of planning permission, the

H appellants well knew that there were no prospects of it becoming practicable for them as leaseholders to comply with their covenant by rendering the said premises fit.

By letter dated Mar. 24, 1952, addressed to the appellants, Messrs. Craig Hall & Co., chartered surveyors, submitted on behalf of the Jones trustees, an application for planning permission to re-build the said premises. By letter

I dated Apr. 4, 1952, addressed to Messrs. Craig Hall & Co. and enclosing a statutory acknowledgment dated Mar. 27, 1952, by the appellants, the appellants stated that planning permission had already been refused and a purchase notice confirmed, and that it was not proposed to take any action on the said application.

By a form of appeal dated June 3, 1952, the Jones trustees appealed to the Minister under s. 16 (1) and (3) of the Act and art. 11 (1) (c) of the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), against

the failure of the appellants to give notice of their decision within the period of two months after receipt of the said application as provided by art. 5 (8) (c) of the said order. The appellants agreed that the said premises had become incapable of reasonably beneficial use in their existing state. By a letter dated Aug. 22, 1952, addressed to the solicitors to the Jones trustees, the Minister dismissed the appeal on the grounds that the proposed development would prejudice the provision of the proposed roundabout at Ludgate Circus. A

By a notice dated Sept. 1, 1952, the Jones trustees required the appellants under s. 19 (1) of the Act to purchase their interest in the said premises, viz., the fee simple therein. By a letter dated Oct. 2, 1952, addressed to the solicitors to the Jones trustees, the Minister stated his intention of confirming the said purchase notice without modification unless the interested parties desired an opportunity of being heard. By letter dated Oct. 22, 1952, addressed to the Minister, the appellants expressed a desire to be given an opportunity of being heard by a person appointed by the Minister for that purpose, on the ground that the Jones trustees were not persons who could serve a purchase notice within s. 19 of the Act. On Dec. 1, 1952, one H. F. Summers, appointed by the Minister, heard representations by counsel on behalf of the appellants and by counsel on behalf of the Jones trustees. By a letter dated Dec. 31, 1952, the Minister confirmed the said purchase notice and, in pursuance of s. 19 (2) of the Act, directed that the appellants should be deemed to have served a notice to treat on Dec. 31, 1952, in respect of the interest of the Jones trustees in the said premises. B C D

Under a notice of motion dated Mar. 16, 1953, the appellants applied to a Divisional Court of the Queen's Bench Division for orders of certiorari and mandamus to remove into the High Court and quash the said decision of the Minister. The applications were heard on Apr. 28 and 29, 1953, by LORD GODDARD, C.J., LYNSEY and PARKER, JJ. On Apr. 29, 1953, the judgment out of which the present appeal arises was given that an order of certiorari should go and that the said decision of the Minister should be brought up and quashed with costs against the Jones trustees. By a notice of appeal dated May 13, 1953, the Jones trustees appealed to the Court of Appeal, and on Nov. 25 and 26, 1953, the appeal was heard by SOMERVELL, DENNING and ROMER, L.JJ., who reserved judgment. On Dec. 15, 1953, judgment was given allowing the appeal. E F

It was suggested in argument in your Lordships' House that a rent might become a rackrent, though not a rackrent when agreed on, by a change of circumstances in the premises, and that, the said premises having been destroyed in 1941, the rent of £750 per annum agreed in 1925, which was admittedly not a rackrent in 1925, became a rackrent in 1941. I cannot agree with this argument. G

On the main question, however, I am of opinion that the judgment of the Court of Appeal was right. It is, I think, clear that the definition of "owner" in s. 119 (1) contemplates only one owner at one time, and that it contemplates that a person either holding a freehold or leasehold interest may be an owner, since a freeholder may have let at a rackrent or be entitled to do so, and so may a leaseholder, but that they cannot both have let at a rackrent at the same time. If the freeholder either lets at a rackrent or does not let at all, he must, in my opinion, be the owner within the meaning of the definition. If, on the other hand, he lets at a rent less than a rackrent, then his lessee must, in my opinion, be the owner within the meaning of the definition since, being entitled to the premises for the period of his lease which, *ex hypothesi*, was not let to him at a rackrent, he alone can let the premises at a rackrent. It follows, in my opinion, that there can be only one person who is an owner within the meaning of the definition at one time, but that person may be either a freeholder or a leaseholder. Section 19 (1), on the other hand, cannot, in my opinion, be confined to one owner at one time since the words H I

A "any owner . . . may . . . serve . . . a notice . . . requiring that council to purchase his interest in the land "

B appear to me to refer to every owner who has an interest in the land, and, since the definition itself may apply either to freeholders or to leaseholders, there is nothing to prevent the word "owner" being understood in its widest sense. As ROMER, L.J., said, the phrase "any owner" and not "the owner" appears to me almost decisive of the question. If I am right in thinking that the word "owner", according to the definition, can refer to one person only at any one time, the words "any owner of the land . . . may . . . serve . . . notice . . ." in respect of his interest form a context which, in my opinion, requires a wider meaning to the word "owner" than the meaning stated in the definition. In my opinion, it is an unnatural use of words to say that any owner may serve a purchase notice when there is, and can be, only one owner at the time of service. There appears to me to be no possible reason for limiting the right of serving a purchase notice to the one person who has let, or can let, at a rackrent, and no reason has been suggested.

D In the present case, the appellants, who hold the property under a lease from the Jones trustees, claim to be entitled to refuse to develop or to re-instate the property and in the meantime to pay no rent. In my opinion, the words of the statute do not compel your Lordships to perpetuate such injustice. I would, therefore, dismiss the appeal.

E LORD PORTER : My Lords, the facts of this case present many complexities, but the ultimate question is a narrow one. The matter in question is, I think, sufficiently adumbrated if one neglects the position at an earlier time and considers only that now existing when the first-named respondents (hereinafter called "the Jones trustees") are owners of the fee simple of 69, Ludgate Hill, the appellants are lessees for a term of years ending in 1999, at a rent of £750 a year, and the property is conceded to be let for that period at less than a rackrent, unless the rent which could be obtained for it in its present condition is the relevant figure. The premises suffered extensive war damage and are now a bare site, and on Nov. 27, 1951, Messrs. Hampton & Sons, Ltd. (hereinafter called "Hamptons"), who were the predecessors of the present appellants as lessees, served on the Jones trustees a notice of retention under s. 10 of the Landlord and Tenant (War Damage) Act, 1939, whereby Hamptons were relieved from the payment of rent until it should be practicable for them to reinstate the premises. After the damage had been suffered, two applications under the Town and Country Planning Act, 1947, were made for planning permission to re-build the premises, one by Hamptons, and the other by the Jones trustees. Each was refused; the former on the ground that the proposed development would prejudice the new lay-out of the area of extensive war damage in which the site is situated, including the provision of a roundabout at the junction of Ludgate Hill, New Bridge Street, Fleet Street, and Farringdon Street; the latter on the ground that redevelopment had already been refused, that a purchase notice in respect of the owner within the meaning of s. 119 (1) of the Town and Country Planning Act, 1947, had been confirmed by the Minister of Town and Country Planning, and that, accordingly, it was not proposed to take any action on the second application for permission to redevelop the site.

I The first refusal was followed by a purchase notice under s. 19 of the Act, and, inasmuch as Hamptons were, in the appellants' view, the owners and the only owners of the site within the meaning of the Town and Country Planning Act, 1947, the appellants, acting on this view, then paid compensation amounting to £71,250 to them and took an assignment of their lease.

The Jones trustees did not accept the view that Hamptons or their successors, the present appellants, were the sole owners of the site and appealed to the Minister against the refusal of permission to develop the land. That appeal

was dismissed. Thereupon the Jones trustees in their turn served on the appellants a purchase notice. The appellants failed to give notice of the decision to which they had come in respect of this, but passed on the notice to the Minister, who signified to both parties that, unless notified by Nov. 3, 1952, that the Common Council of the City of London or the servers of the notice desired an opportunity of being heard, he would confirm the notice without modification. On this intimation, the appellants signified their wish to be heard by a person appointed by the Minister, and the matter was, accordingly, submitted to the consideration of Mr. H. F. Summers.

After receiving his report, the Minister confirmed the notice, holding that he was not concerned to determine whether the Jones trustees were owners or not, but that his only duty was to consider whether the conditions mentioned in s. 19 of the Town and Country Planning Act, 1947, had been fulfilled in relation to the land. Being dissatisfied with this decision, the appellants, on Mar. 16, 1953, applied for and obtained the leave of a Divisional Court to apply for an order of certiorari to bring up and quash the decision of the Minister confirming the purchase notice. The Divisional Court granted the order but, on appeal, the Court of Appeal reversed this decision. From their judgment no appeal has been taken to your Lordships' House by the Minister, but the present appellants have appealed and added the Minister as a second respondent. In your Lordships' House, however, the appellants were supported in argument by the Minister's advisers, who joined with them in contending that the Jones trustees were not owners within the meaning of Part III of the Act and, therefore, were not entitled to serve a purchase notice.

The sole, but none-the-less difficult, consideration for your Lordships' House is whether the Jones trustees are such owners or not. Before coming to grips with the matters in dispute, it is necessary to set out the wording of s. 19 of the Act and the definition of "owner" in s. 119 (1).

"19. (1) Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims— (a) that the land has become incapable of reasonably beneficial use in its existing state; and . . . (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'purchase notice') requiring that council to purchase his interest in the land in accordance with the provisions of this section. (2) Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in para. (a) to para. (c) of the foregoing sub-section are fulfilled, confirm the notice, and thereupon the council shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct: . . . (3) If within the period of six months from the date on which a purchase notice is served under this section the Minister has neither confirmed the notice nor taken any such other action as is mentioned in para. (a) or para. (b) of the last foregoing sub-section, nor notified the owner by whom the notice was served that he does not propose to confirm the notice, the notice shall be deemed to be confirmed at the

A expiration of that period, and the council on whom the notice was served shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served notice to treat in respect thereof at the expiration of the said period . . . (5) Before confirming a purchase notice, or taking any other action in lieu thereof, under this section, the Minister shall give notice of his

B proposed action—(a) to the person by whom the notice was served; (b) to the council on whom the notice was served; (c) to the local planning authority for the area in which the land is situated; and (d) to any other local authority whom the Minister proposes, under the foregoing provisions of this section, to substitute for the said council; and if within the period prescribed by the notice under this sub-section (not being less than twenty-eight

C days from the service thereof) any person or authority on whom that notice is served so requires, the Minister shall, before confirming the purchase notice or taking any such other action as aforesaid, afford to those persons and authorities an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose.”

D By s. 119 (1) of the said Act, it is provided, inter alia, that—

“In this Act, except so far as the contrary is provided or the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:— . . . ‘owner’, in relation to any land, means, except in Part VI of this Act, a person other than a mortgagee not in possession, who, whether in his own right or as trustee or agent for any other person, is entitled to receive the rackrent of the land or, where the land is not let at a rackrent, would be so entitled if it were so let . . .”

E

On behalf of the appellants it was contended that the definition in s. 119 (1) applied to the word “owner” when used in s. 19, and that the Jones trustees were not owners within that section. No one was an owner, it was said, unless he was either in receipt of a rackrent or entitled to receive it. The rent receivable by the Jones trustees, viz., £750, was not a rackrent, indeed, the land had been already let at a much enhanced figure before this sum was agreed on.

F

So far as I am able to ascertain, the suggestion that £750 was a rackrent when the purchase notice was served was not taken, or at any rate was not pressed, before the Minister, and I doubt if it was seriously argued in the courts below. It seems rather to have been accepted that it was not. Prima facie, having regard to the previous letting, this assumption was correct, and though, in the ramifications of letting and sub-letting which are to be found in the circumstances of the case, it is not possible to speak with absolute certainty, I do not think that, having regard to the treatment accorded to the point in the courts below, your Lordships ought to differ from their findings, or assume that it might have been a rackrent, or send back the case that the point might be determined. It is true that the bare site may have been worth no more and there is uncontradicted evidence to this effect, but, again, it was, I think, assumed below that whether a sum is a rackrent or not is to be determined, not according to the value of the land at the date of the notice to treat or to purchase, but at the time at which the letting took place. In any case, this assumption has the support of the Court of Appeal in *Borthwick-Norton v. Collier* (1), a decision which, in my view, rightly expounds the law in that matter and also is in accordance with the use of the words “any owner” and not “the owner” in s. 19 (1).

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H

I

Such an opinion necessarily leads to the conclusion that there may be more than one owner at a time and more than one rackrent, e.g., A lets to B in 1900 at what is then a rackrent, and B in turn lets to C in 1910 at a much enhanced figure which by that time is the rackrent of the premises. Both A and B would

then be owners under the definition. The appellants and the Crown, as I understood them, conceded this point, though counsel on behalf of the latter, would, were it not for earlier authority, have contended that there could only be one rackrenter, and that the last. This contention would, no doubt, simplify the matter, but I cannot, myself, think that a person who has once been a rackrenter can cease to be such because his lessee at a later date leases the property at a higher, or it may be, a lesser sum. In the present case, however, there is no person who, within the meaning of the definition, is entitled to receive the rackrent, because there is no rackrent to receive. As a result of this conclusion two questions arise—(i) Can it be said that the Jones trustees would be entitled to receive the rackrent if the premises were let at a rackrent? and (ii) Does the definition of the word “owner” apply to s. 19 (1)?

So far as the second point is concerned, I am not at the moment prepared to give an assured answer. *Prima facie*, the definition applies, but not in a case where the context otherwise requires, and there are certain indications in s. 19 itself that the definition does not fully apply. So far as the service of a notice is concerned, no doubt it would be convenient that a person who was an agent or trustee should be entitled to serve a purchase notice, but when the later provisions of the section are considered “owner” seems to be confined to a person having an actual interest himself, e.g., (a) s. 19 (1) “requiring [the] council to purchase his [e.g., the owner’s] interest in the land”; (b) s. 19 (2) “acquire the interest of the owner compulsorily”; (c) s. 19 (3) “authorised to acquire the interest of the owner compulsorily”. This phraseology does not accord well with the inclusion amongst “owners” of “trustees” or “agents”. Nor can I think that the confinement of the definition to cases where the context does not otherwise require entitles one to strike out part of the definition in one place in the same section, e.g., in the places quoted above, and to retain it in others, e.g., where a notice has to be given. The definition where applicable must, I think, be applicable in whole, and, to my mind, it is not legitimate to say that in some places the definition applies in part, e.g., in one place it means the person entitled to a rackrent and in another that person, his trustees and agents.

But, whatever answer is given to the second question, the first raises many difficulties both in substance and phraseology and requires careful consideration. Let it be assumed that the definition applies: Who, then, are the persons who would be entitled to receive the rackrent if the property were let at a rackrent? It has been suggested by DENNING, L.J., and, I think, is inherent in the opinions of all the members of the Court of Appeal, that the words are capable of and do bear two possible meanings and raise two questions, viz. (i) If the lease retains its present form and the land were now to be let at a rackrent, who would receive the rent? and (ii) If the present lease stipulated not for the sum for which, in fact, it stipulates but for a rackrent, who would receive that rackrent?

Obviously, in the first case the appellants would receive it, and in the second the Jones trustees. The appellants, therefore, contend for the first meaning and say it is the natural one: they are in possession as leaseholders, they alone can let and receive the rent until the lease is determined. Their argument is that they are the persons who would receive the rackrent if the premises were hereafter to be let at a rackrent, on the ground that they are the only persons who, for the next forty-seven years, are entitled to let the premises and receive the rent. On the other hand, the Jones trustees maintain that the definition has in mind a lease in different terms as regards rent—i.e., at a rackrent—and that, if the premises had been let at such a rent, the Jones trustees as owners would receive it.

On the face of it the language might bear either meaning or, indeed, both. I should hesitate to say it meant both were it not for the use of the expressions “any owner” in s. 19 (1) and “a person” in the definition in s. 119 (1). The first indicates the existence of more than one owner, and though, no doubt,

- A if, as I have indicated, there can be more than one person who has let at a rack-rent, yet the article "a" person, though appropriate in the first part of the definition which deals with one in actual receipt of a rackrent, is not apposite when the second part comes under consideration, viz., "a" person who would be entitled to receive the rackrent. In the latter case, one is faced with the difficulty that, if there is only one such person, it should be *the* person, not a
- B person. Therefore, just as there may be more than one person receiving a rackrent, so I see no reason why there should not be more than one person entitled to do so.

- The appellants, in answer, urge the difficulty that the language appropriate to such a result is that used in s. 20, s. 22 and s. 27, viz., those having an interest in land, and point forcibly to the definition contained in the Town and Country
- C Planning Act, 1944, s. 65 (1), which is for some purposes incorporated in the present Act and in terms includes both freeholder and leaseholder within the definition of "owner". Against this it may be pointed out that, if the premises were let by the freeholder at less than a rackrent and with a provision against sub-letting, there would be no owner within the meaning of the Act, no one who could give or receive notices and no one at the time entitled to compensation.
- D I agree that, whatever solution be adopted, one is faced with serious difficulties, but the interpretation which I suggest, viz., that in this case "owner" may include both freeholder and lessee, is, in my opinion, justified by the terms of the Act. On behalf of the appellants, it is said that the wording of the definition has a long history in the Public Health Acts and that it has been construed in a sense different from that which has been adopted by the Court of
- E Appeal in the present case—see *Truman, Hanbury, Buxton & Co. v. Kerslake* (2). The statement is true but that case has itself been doubted in *Rawlence v. Croydon Corpn.* (3), and in the present case a construction which would make both the freeholder and the lessee owners within the meaning of the section, appears to me in accord with the general object of the Act. To accept the other view would be to deprive the Jones trustees possibly for many years of their rent of
- F £750, though I agree that too much emphasis must not be laid on such a consideration, inasmuch as the hardship is occasioned rather by the Landlord and Tenant (War Damage) Act, 1939, than by the Act now under consideration. But, faced with difficulties on either hand, and with provisions which appear to have been passed without, at any rate, full appreciation of their result or apprehension of the circumstances in which they would have to be enforced, I prefer
- G to adopt what, to my mind, is a construction at least as accurate as that contended for by the appellants and more consistent with the apparent intention of compensating those whose interests have been impaired.

I would dismiss the appeal.

- LORD REID :** My Lords, at all relevant times the first-named respondents
- H (hereinafter called "the Jones trustees") have owned the freehold of the subjects at 69, Ludgate Hill, with which this case is concerned, and these subjects have been let at a rent of £750 per annum under a lease which expires in 1999. When the buildings were destroyed by enemy action the tenants were Messrs. Hampton & Sons, Ltd. (hereinafter called "Hamptons"). For a time they continued to pay the rent. Then they applied for planning permission to re-build. This was
- I refused because of a proposal to use the site as part of a traffic roundabout at Ludgate Circus. Hamptons then served a notice under the Landlord and Tenant (War Damage) Acts electing to retain the lease on the terms specified in the Acts, and required the appellants to purchase their interest in the lease under s. 19 (1) of the Town and Country Planning Act, 1947. The appellants purchased Hamptons' interest for a price of £71,250 and are now the tenants. By virtue of the notice served by Hamptons, the appellants are freed from payment of rent while the subjects are unfit for use, and they are bound to re-build as soon as that is practicable. But, so long as planning permission is withheld, there can

be no re-building, so the Jones trustees are not receiving any rent at present and A may not get any rent for an indefinite period.

The Jones trustees now seek to use s. 19 (1) of the Act of 1947 to compel the appellants to purchase their freehold, and the appellants' reply is that the Jones trustees are not entitled to invoke s. 19 (1): this section is only available to "any owner of the land", and the appellants contend that the Jones trustees are not owners of the land within the meaning of the section. They rely on B definitions contained in s. 119 (1) of the Act which are as follows:

"In this Act, except so far as the contrary is provided or the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say: . . . 'land' means any corporeal hereditament, including a building as defined by this section, and in relation to the acquisition of land under Part IV of this Act includes any interest or right in or over land; . . . 'owner', in relation to any land, means, except in Part VI of this Act, a person other than a mortgagee not in possession, who, whether in his own right or as trustee or agent for any other person, is entitled to receive the rackrent of the land or, where the land is not let at a rackrent, would be so entitled if it were so let, and, in Part VI of this Act, has the meaning assigned to it by s. 64 of this Act; . . ."

The case for the Jones trustees is that they are owners of the land within the meaning of these definitions, or, alternatively, that, if they are not, then the context requires that the definition of owner should not be applied, and, this definition being excluded, they are owners within the meaning of s. 19. It is, therefore, necessary first to consider what is the meaning of the definition.

Ownership within the meaning of the definition depends on whether or not a person is, or would be, entitled to receive the rackrent of the land. It is agreed that rackrent means (2 BLACKSTONE'S COMMENTARIES, at p. 43) "a rent of the full value of the tenement, or near it". But the letting value of land may vary greatly from time to time, and there is a dispute whether the definition requires one to look at the letting value when the lease was entered into or the value when a question arises, and the definition has to be applied to find who is an owner. Taking the ordinary meaning of the words, I think that, if land is let for a rent which is a rackrent at the date of the lease, the land does not cease to be let at a rackrent when, during the currency of the lease, the value of the land increases so that, if a new lease were then made, a higher rent could be got. I see no reason for supposing that rackrent has any different meaning in this definition. A, the freeholder, may let to B for a rent of £100 which is a rackrent at the date of B's lease, and later B may sub-let to C for a rent of £200 which is a rackrent at the date of C's lease. It appears to me that then both A and B are entitled to receive a rackrent of the land. If this is the proper interpretation of the definition, then no one was at any relevant time entitled to receive the rackrent of 69, Ludgate Hill. The lease under which the Jones trustees are entitled to a rent of £750 was made in 1925 and in 1922 there was a sub-lease at a rent of £1,136. There is nothing to show either that the rent of £1,136 was more than a rackrent or that the letting value had diminished in the period between 1922 and 1925.

The definition has two limbs, the first dealing with the case where a person is entitled to receive the rackrent, and the second with the case where the land is not let at a rackrent. I do not find much difficulty about the first limb. There may be only one lease or there may be a chain of lease and sub-leases: if any one of the lessors is entitled to receive a rackrent, then the first limb of the definition applies, and if only one is entitled to receive a rackrent, then he and he alone is the "owner". For example, if A, the freeholder, lets to B at less than a rackrent and B sub-lets to C at a rackrent, then it appears to me to be plain that B is an "owner" within the meaning of the definition but A is not. There is some difficulty if there are two rackrents at the same time. It was said that, in such a case, only the last rackrent comes within the definition: if, in the

- A instance which I have just given, A had let to B at a rackrent, it was said that still B alone would be an "owner" and A would not. It was said that "a person . . . who . . . is entitled to receive *the* rackrent" indicates that only one rackrent can be taken into account and only the person entitled to receive that rackrent can be an "owner". But the definition refers to "a person" and not "the person", and its second limb comes into operation "where land is not let at a rackrent." It would, in my judgment, be putting too much stress on the definite article in the phrase "entitled to receive the rackrent" to hold that this requires that there can only be one owner where the first limb of the definition is applicable, and I can find nothing else in the definition pointing to this interpretation. Moreover, this interpretation would lead to a strange result. If A lets to B at a rackrent and B either does not sub-let or sub-lets at less than a rackrent, then, undoubtedly, A is an "owner", but this interpretation would mean that, if B sub-let at a rackrent, A would thereby lose his status of "owner". I would only accept such a result if compelled to do so. I am, therefore, of opinion that there can be more than one "owner" under the first limb of the definition and that, if the freeholder lets at a rackrent, he is and remains an "owner" no matter what his tenant may do.
- D The second limb of the definition appears to me to be more obscure. It must deal with two cases: the one where the land is not let at all, the freeholder being the occupier, and the other where the land is let but the rents payable by the tenant and the sub-tenant if there is one are not rackrents. In each case it requires one to find a person who would be entitled to receive the rackrent if the land were let at a rackrent. In the case where the land is not let at all this can only mean that one must suppose that there is in existence a lease by the freeholder to a hypothetical tenant under which the rent is a rackrent. But where, as in the present case, the land is let but for less than a rackrent, the second limb is ambiguous. What has to be supposed is that the land is let at a rackrent, and one could suppose either that the rent of £750 under the existing lease was increased to what would have been a rackrent at the date of that lease, or that the land was let by the appellants to a new hypothetical tenant at what is now a rackrent. Simply taking the words of the definition, there is no very obvious reason for making the one supposition rather than the other. But the two would produce diametrically opposite results. If the first is the supposition which the definition requires, then the Jones trustees would be owners, because in this supposition they would be entitled to receive the rackrent, and the appellants would not be owners because they would only be paying rent and not entitled to receive any rent. But, on the other supposition, the appellants would be owners because they would be entitled to receive a rackrent from their hypothetical tenant, and the Jones trustees would not be owners being still only entitled to receive a rent which is not a rackrent. I cannot agree with the argument that, when anyone claims or is alleged to be an owner, each supposition must be made in turn and if, by either supposition, he would be an owner then the definition is satisfied. It appears to me that the second limb of the definition must have the one meaning or the other: it cannot have both.
- H My Lords, for several reasons I am of opinion that the latter is the supposition which the definition requires to be made. In the first place, as I have said, the supposition of a new hypothetical tenant paying a rackrent is the only possible one where there is no lease in existence, the freeholder being the occupier, and if the second limb of the definition requires supposition to be made in that case, it would seem likely that it requires the same supposition to be made in the other case to which it applies. Generally there is no difficulty in making this supposition: one looks for the person who, at the relevant date, would be entitled to make a new lease at a rackrent and supposes that he does so, and the only person entitled to make a new lease is the person in possession, in this case the appellants. No doubt there could be a case where the tenant or sub-tenant

in possession of the land is effectively prohibited from sub-letting, but such a case must be unusual and I do not think it necessary to deal with it: it might, perhaps, be solved on the lines of the decision in *Bouditch v. Wakefield Local Board* (4). Secondly, the other supposition would lead to a somewhat strange result. On this basis the Jones trustees would be owners, but only because Hamptons did not sub-let at a rackrent. If they had so sub-let before the relevant date, then the first limb of the definition would have applied, and I do not think that it is open to doubt that Hamptons would then have been "owners", being in receipt of a rackrent, but the Jones trustees would not have been "owners" because they were not entitled to receive a rackrent. Indeed, in this very case, a sub-lease was in existence from 1922 to 1940, and, if that sub-lease was at a rackrent and had still existed at the relevant date, I do not see how the Jones trustees could have maintained their claim to be owners within the meaning of the definition.

No doubt it would be wrong to prefer one interpretation of the definition merely because it fits s. 19 better. The word "owner" occurs in a number of other sections and, if the other interpretation fitted those other sections better that would be a very important consideration. But we were furnished by counsel with a list of the other sections and schedules where the word "owner" occurs, and I have found none where the other interpretation seems to be called for. I leave out of account those sections which refer to the owner of an interest in land or the owner of a tenancy, because the definition only applies where the word owner is used "in relation to any land", and, with an exception which is not here material, land means a corporeal hereditament. I do not intend to decide that the definition must apply to every one of these sections, because such a question might arise in a future case. It is enough for present purposes to say that, if the definition applies, the meaning which I prefer is at least as appropriate as the meaning which I reject.

Finally, it is, I think, important to observe that, for a very long time, the definition of owner in the Public Health Acts has been in substantially the same terms as the definition in this Act, and in a case under the Public Health (London) Act, 1891, *Truman, Hanbury, Buxton & Co. v. Kerslake* (2), where there were a lease and a sub-lease both at rents less than rackrents, it was held that the sub-lessee was the "owner". Where Parliament has continued to use words of which the meaning has been settled by decisions of the court, it is to be presumed that Parliament intends the words to continue to have that meaning. I do not think that, in this case, that is conclusive. Even if the case which I have cited were held to have conclusively settled the meaning of the definition in the Public Health Acts, there are slight differences in phraseology and, more important, it does not necessarily follow that, if Parliament uses the same words in quite a different context, they must retain the same meaning. But, at least, this is a consideration of some importance.

I cannot find any very solid argument to set against these considerations. It is true that one would not expect a definition of owner to exclude in many cases those who are undoubtedly owners by any ordinary meaning of the word. But, as I have said, I see no escape from the conclusion that the freeholder is excluded in cases where he has let at less than a rackrent and his tenant has sub-let at a rackrent, and, if that be accepted, it is not very surprising that such a freeholder is also excluded in cases to which the second limb of the definition applies. In my judgment, a freeholder who lets at less than a rackrent is excluded by the definition, both in cases where his tenant does not sub-let, and in cases where he does sub-let either at a rackrent or at less than a rackrent and, therefore, if the definition is applicable to s. 19 the appellants must succeed.

I now turn to the alternative contention of the Jones trustees that the definition of owner does not apply to s. 19. By s. 119 (1), the definition applies

A "except so far as the contrary is provided or the context otherwise requires",

and it is maintained that the context of s. 19 requires that the definition shall not apply to it. Section 19 applies to cases where land has become incapable of reasonably beneficial use in its existing state and permission to develop the land has been refused; and, admittedly, that is the case here. The section must have been passed in the knowledge and with the intention that it would apply to many cases where war damage is the cause of the land being useless in its existing state, and with the knowledge that, by reason of the provisions of the Landlord and Tenant (War Damage) Acts, many landlords would suffer loss of rent, as the Jones trustees are suffering in this case, and that refusal of planning permission would greatly increase such loss. In the ordinary case, where planning permission is not required, or is granted, the landlord only suffers loss of rent until the war damage is made good, and the tenant who elects to retain his lease must make good that damage as soon as reasonably practicable. But where planning permission to reinstate is required and is refused, as in the present case, the landlord may continue to suffer loss of rent for a long period after the time when the damage could have been made good if permission to reinstate had been granted. In such cases, s. 19 (1) affords a remedy to "any owner of the land" so affected: it entitles him to require the local authority to purchase his interest in the land. The owner then gets his capital out of the sterilised land and can use it for some remunerative purpose. But if the definition of "owner" in s. 119 (1) applies to this section and has the meaning which, in my judgment, must be attributed to it, the result is discrimination against these proprietors who, like the Jones trustees, have let their land for less than a rackrent. They are refused the remedy which s. 19 professes to afford to "any owner", and they get no compensation or relief in respect of the loss which they suffer by reason of the refusal of planning permission. The question is whether that intention must be attributed to Parliament by reason of the terms of the Act.

F Generally, one would be slow to attribute such an intention to Parliament, but in this case there are two matters which I think it necessary to note before dealing with the immediate context. The Act of 1947 affords a remedy of one kind or another in a variety of cases, but in most cases that remedy is afforded expressly to every person who has an interest in the land. I need only refer to s. 20, s. 22, and s. 27. But, in s. 9 and s. 19, and, so far as I can see, nowhere else, relief is given to any owner of the land. The word "owner" is not frequently used in the Act except in connection with service of notices, but an interest in land is an expression very frequently used. For example, the sections dealing with compulsory acquisition and compensation do not refer to the land or an owner, but to the acquisition of interests in land from persons having such interests. In my view, the expression "any owner of the land" must have been used deliberately in s. 9 and s. 19, and it must have been used because the usual expression "any person having an interest in the land" was inappropriate in these sections. And it could only be inappropriate if the intention was to exclude persons having some kinds of interest, and to restrict the benefits of these sections to some only of those having interests in the land. I would also draw attention to the fact that, in the Town and Country Planning Act, 1944, there is a different definition of owner, and that definition is set out for a limited purpose in Sch. 11 to the Act of 1947. That definition includes both persons entitled to dispose of the fee simple and persons holding under a lease which has more than three years to run. So the 1947 definition, on my interpretation of it, must have been inserted with the intention of excluding from the class of "owners" persons who would have been within that class under the earlier Act.

In these circumstances, there appears to me to be a very strong presumption that the word "owner" was inserted in s. 19 with the intention of excluding certain interests in the land from the benefit of the section, and with the intention

that owners should have the meaning attributed to that word by the new definition in s. 119 (1). Section 119 (1) enacts, *inter alia*, that the expressions there defined shall have the meanings there assigned to them, except so far as the contrary is provided, and it would have been easy to provide the contrary if that had been intended. Before it could be held that "the context otherwise required", it would, in my view, be necessary to show, not only that the application of the definition leads to a result which Parliament cannot be supposed to have intended, but also that, if the definition is excluded, the result will be a more reasonable result which Parliament can be supposed to have intended. Here, if the definition is excluded, the section will only apply to "any owner" and, in the absence of a definition, I do not see how a lessee can be held to be an owner of the land, particularly when land is defined as meaning a corporeal hereditament and only as including an interest in land in relation to the acquisition of land under Part IV of the Act. And this is not in relation to such acquisition. But no one can suggest that it would be reasonable or possible to exclude from the benefit of s. 19 a lessee under a ninety-nine year building lease who does not pay a rackrent to the ground landlord, but who receives a rackrent from his tenants. Yet I can see no way of including him if the definition of owner is excluded, for, as I have already said, I think it is impossible to hold that "any owner of the land" means any owner of any interest in the land.

I have not overlooked certain other arguments for the Jones trustees. It was said that the words "any owner", in s. 19 (1), show that there can be two owners at the same time: that would be an argument of some weight if there could only be one owner within the meaning of the definition, but I have stated my view that there can be two owners under the first limb of the definition and, if that is right, this argument loses its force. Then it was said that, under the definition, an agent can be an "owner", but that an agent could not be an owner within the meaning of s. 19 because he has no interest in the land which he could require the local authority to purchase: but, by s. 119 (1) the definition applies "*except so far as . . . the context otherwise requires*", and, even if the context requires that the reference to an agent shall not apply as regards s. 19, that does not prevent the application of the rest of the definition. So, in my opinion, the actual wording of s. 19 is in no way inconsistent with the application of the definition.

On the whole matter on a consideration of the terms of the Act, from which alone I am entitled to infer the intention of Parliament, I cannot avoid the conclusion that relief under s. 19 is not made available equally to all owners of interests in land who may suffer loss, and that the Jones trustees, though freeholders, do not come within the ambit of the section. The result in this case may seem unjust. Parliament may not have realised the full effect of what has been enacted. But such consideration cannot override the terms of the Act, and I am unable to construe those terms in such a way as to entitle the Jones trustees to the relief which they seek. I am, therefore, of opinion that this appeal must be allowed.

LORD TUCKER : My Lords, I think the Divisional Court came to the right decision in this case. The first question is whether or not the definition of "owner" in s. 119 (1) of the Town and Country Planning Act, 1947, is applicable to s. 19. Section 119 (1), which contains some fifty-four definitions of words and phrases occurring in the Act, is prefaced with the words

"In this Act, except so far as the contrary is provided or the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:—"

"Owner" "in relation to any land, means, except in Part VI of this Act, a person other than a mortgagee not in possession, who, whether in his own right or as trustee or agent for any other person, is entitled to receive

- A the rackrent of the land or, where the land is not let at a rackrent, would be so entitled if it were so let."

Section 19, so far as material for present purposes, reads:

- B " (1) Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act . . . then if any owner of the land claims—
 (a) that the land has become incapable of reasonably beneficial use in its existing state . . . he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'purchase notice') requiring that council to purchase his
 C interest in the land in accordance with the provisions of this section . . . "

- Before discarding the definition as contrary to the requirements of s. 19, it is desirable to inquire what meaning the section clearly requires to be assigned to the word "owner". "Freeholder" is the meaning which first suggests itself, but this must be discarded since its adoption would result in manifest injustice equal to, if not greater than, that which is said to flow from the definition, since
 D it would exclude all leaseholders whatever the duration of their leasehold interests. "The owner of any interest in the land" is the only substitute for the words "any owner" that would appear to satisfy the requirements of justice, but the legislature has deliberately chosen not to use those words which occur in other sections of the Act and to use instead the words "any owner". It seems to me quite impossible, in these circumstances, to give to the words "any owner" the
 E meaning "the owner of any interest in the land". This is to re-write the section. I can, therefore, find no justification for rejecting the definition contained in s. 119 (1).

What, then, is the proper construction of this definition? It is, I think, helpful to notice that, by s. 113 of the Act, it is provided in sub-s. (6),

- F "In accordance with the foregoing provisions of this section, the Act of 1944 shall, as from the appointed day, have effect as set out in Sch. 11 to this Act."

Schedule 11 contains a number of sections of the Act of 1944 which are unrepealed and are reprinted as amended by the Act of 1947. Included therein is s. 65 which contains the following definition:

- G "'owner', in relation to any building or land, means a person, other than a mortgagee not in possession, who is for the time being entitled to dispose of the fee simple of the building or land, whether in possession or in reversion, and includes also a person holding or entitled to the rents and profits of the building or land under a lease or agreement, the unexpired term whereof exceeds three years."

- H So that, when Parliament adopted the definition of "owner" contained in s. 119 (1) of the Act of 1947, they had before them an alternative definition which they restricted to the re-enacted sections of the Act of 1944. It is a definition which, if applied to s. 19, would give to the first-named respondents (hereinafter called "the Jones trustees") the remedy which they seek to extract from the very
 I different language of the definition in s. 119 (1), which follows very closely the familiar language of the Public Health Acts which the courts have had to construe from time to time. The definition is based on the test of rackrent—actual or hypothetical. The first limb deals with the situation where there is in existence a rackrent. The person entitled to receive it is the owner of the land. Whether there can be more than one owner, where there are several different rackrents issuing out of the same land under different leases is, I think, a question of difficulty. The words "the rackrent" favour the view that there can be only one rackrent. On the other hand, in construing the definition with reference to

s. 19, I think the words "any owner" are really decisive in favour of more than one owner where there are several rackrents. As in the present case there is no rackrent payable, unless the material date for determining whether a rent is a rackrent is the date of the purchase notice as distinct from the date of the lease, which, in the absence of authority, I cannot accept, it is necessary to consider the applicability of the second or hypothetical limb of the definition to the facts of this case. The land not being let at a rackrent, who would be entitled so to let it? There can, I think, be only one answer, viz., the tenant in possession, i.e., the appellants. A B

It is contended that, where there are in existence more than one lease at rents less than rackrents, you should apply the hypothesis to the existing leases, and in every case where there is a rent of whatever amount, including a ground rent, deem it to be a rackrent. If this had been the intention of Parliament, it would have been perfectly simple to discard all reference to rackrents and make the right to let or receive rent the test of ownership. It is in connection with this suggested construction that the presence in the Act of the 1944 definition referred to above appears to me so significant. With this definition before them it seems to me impossible to suppose that Parliament could have adopted the contrasted language of the definition in s. 119 (1) if they had intended to produce the result contended for by the Jones trustees. For these reasons, I would allow the appeal. C D

LORD KEITH OF AVONHOLM: My Lords, the question whether s. 19 of the Town and Country Planning Act, 1947, authorises the purchase notice that was served by the first-named respondents (whom I shall refer to as "the Jones trustees") depends on whether, in the circumstances as they existed at the date of the purchase notice, the Jones trustees were "owners", within the meaning of s. 19, of the land to which the purchase notice referred. This raises another question, viz., whether the word "owner" in s. 19 is to be construed by reference to the definition of "owner" in s. 119 (1) of the Act. The definition section requires the definition of "owner" to be applied E F

"except so far as the contrary is provided or the context otherwise requires."

There is nothing in s. 19 that expressly excludes the application of the definition, and it remains to ask whether the context of s. 19 requires its exclusion. In considering this question, I find it easier to consider first what the definition of "owner" itself means, for the definition presents certain difficulties of construction and, until these difficulties are resolved, it is not possible, in my opinion, to approach the question whether the definition is excluded by the context of s. 19. G

I need not repeat the words of the definition. It plainly has in view two cases, (i) land which is let at the rackrent; and (ii) land which is not let at a rackrent, because it is let at less than the rackrent, or is not let at all. Where the land is let at the rackrent, the person who is entitled to receive that rackrent is the owner, and that finishes the matter of ownership. There is a question, however, of how the rackrent is to be ascertained. Two views may be suggested. First, that there is to be a factual inquiry as to what would be the rackrent at the material point of time if a lease of the land were given then, irrespective of the rent in the existing lease; or second, that the inquiry should be confined to the question whether the rent in the existing lease was a rackrent of the land in question when the lease was granted. In my opinion, the latter view is to be preferred. Otherwise there would be no fixity in the matter. Every time that the application of the definition arose, the matter would have to be considered afresh, with all the expense attendant on what might be a matter of skilled valuation. The task might be of frequent occurrence in view of the numerous legislative provisions in the Act to which the definition applies and occasions H I

- A on which the provisions may have to be operated. On the other hand, if the date of the lease be the relevant date the matter is greatly simplified. If there is nothing to suggest that ordinary commercial considerations did not apply, that the rent was not a full rent fixed in the open market, and if what was let was the subjects in their present shape let by a person in actual possession, the stipulated rent could readily be assumed to be the rackrent. That it should continue
- B to be the rackrent during the currency of the lease, at least if no underlease is later negotiated, is only reasonable, as no occasion to test the market afresh has arisen. To say that a person who was an owner by virtue of having originally let at a rackrent has ceased to be an owner merely because of a change in values, would result in administrative inconvenience and, at the lowest, great uncertainty as to who was, or was not, the owner, and as to the individual's rights and duties.
- C In my opinion, with one possible qualification, it can be said that once a rent is a rackrent, it is always a rackrent during the currency of the lease. Conversely, what is not a rackrent at the beginning of a lease and remains the rent throughout the lease, cannot become a rackrent during the currency of the lease. The question of a qualification arises where a lease at a rackrent has been followed by an underlease also at a rackrent. There is much to be said for the view that the
- D underlease displaces the lease as the criterion of ownership within the meaning of the definition, and that the grantor of the underlease becomes the sole owner. He must be at least an owner. The reference in the definition to "the rackrent" and not to "a rackrent" in the first alternative limb is certainly suggestive of the fact that the definition contemplated only one owner. Whether there can be more than one owner at a time in the sense of the definition is not, however, a
- E question that arises in the circumstances of this case, although it arises as quite a different question in considering s. 19, and I would reserve my opinion on this point.

The second alternative limb of the definition does not, in my opinion, give rise to the same difficulties of construction. If the land is not let at a rackrent there is no room, in my opinion, for more than one owner at a time. I cannot agree

F with DENNING, L.J., that the words "if it were so let" can be given two meanings to suit the circumstances of the case. In my opinion, for reasons which I shall elaborate later, the person who would be entitled to receive the rackrent of the land if it were let at a rackrent would be the person in possession under a lease or underlease.

- G To apply the definition, then, to the facts of the present case, the appellants, as assignees of Hamptons, are in possession of the land in question, and, but for the notice of retention served by Hamptons on Nov. 27, 1951, under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, would be paying a rent of £750 to the Jones trustees. The matter may be looked at as it was before Nov. 27, 1951. Hamptons were then lessees in possession. The rent of £750 which they paid to the Jones trustees was, in my opinion, less than the rackrent.
- H It was not seriously suggested that it was the rackrent at the date of the lease, and the fact that the land was let on an underlease, three years before, at a rent of £1,136 per annum, is practically conclusive of the matter. If, therefore, the definition is to be applied in the circumstances of this case, we have land let at less than the rackrent. As I have indicated, the owner, in my opinion, was Hamptons and is now the present appellants. They, in my view, are the only
- I persons who would be entitled to receive the rackrent if the land were let at a rackrent. They are the only persons entitled at the moment to let the land at a rackrent. I cannot accept the view which commended itself to DENNING, L.J., and ROMER, L.J., that the definition can be divorced so far from actuality as to cover the case of a person who could have let the land in the past at a rackrent, if he had not chosen to let it at less than a rackrent. The natural way to construe the definition in its application to an actual case is, in my opinion, to ask, who is entitled to let the land at a rackrent as things are today? I am strengthened in

my view by the fact that this was the construction put on a substantially similar definition in the case of *Truman, Hanbury, Buxton & Co. v. Kerslake* (2), and that, whereas an entirely different definition of owner was introduced into the Town and Country Planning Act, 1944, and the Acquisition of Land (Authorisation Procedure) Act, 1946, the legislature, in 1947, reverted to a definition which has appeared repeatedly in earlier legislation. It must be assumed that Parliament knew of the judicial interpretation that had been put on the old definition.

When I turn to s. 19 of the Act of 1947, I find no compelling reason to think that the context of the section requires the exclusion of the definition of owner in applying that section. It is said that the definition includes an agent, and that a purchase notice served by an agent does not fit into the concept of the section. I am not satisfied that that is so. The definition refers to an "agent for any other person" and, if an agent makes a claim or serves a purchase notice under s. 19 (1), I assume he could only do so for his principal, and that it is his principal's interest that would be affected by the claim and notice. On any other view, the only result would be that the context of s. 19 requires the exclusion of an agent from among the persons entitled to claim as owners.

The point most strongly pressed for the Jones trustees was that the reference to "any owner" and to the purchase of "his interest" showed that more than one owner was covered by s. 19 and that, accordingly, the definition did not apply. This only creates further difficulties. If the definition does not apply, what meaning is to be given to owner? There would be only one person clearly covered and that would be the freeholder. But in many cases he would be the person least affected by refusal of permission to develop the land. It is not possible, in my opinion, without the aid of a definition, to stretch the word owner to cover other interests in land, or all interests in land. I agree also that the inference from other sections of the Act in which the word owner is used in conjunction with other persons interested in the land and, particularly, s. 27, is adverse to the view that owner, in s. 19, can have any such extensive meaning.

In my opinion, the words "any owner" in s. 19 (1) can receive full effect if the definition is applied and the words are taken to refer to different owners at different times. As leases fall in, other persons who qualify as owners under the definition will become entitled to have their interest in the land purchased if permission to develop is still refused and the other conditions of the section are satisfied. In the result, I reach the conclusion that the judgment of the Divisional Court was right.

I would allow the appeal.

Appeal allowed.

Solicitors: *Comptroller and City Solicitor* (for the appellants, the Corporation of London); *Boxall & Boxall* (for the respondents, the Jones trustees); *Solicitor, Ministry of Health* (for the respondent, the Minister of Housing and Local Government).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A RICHMOND (SURREY) CORPORATION v. ROBINSON AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Streatfeild, J.J.), January 18, 1955.]

B Highway—Private street works—Apportionment of cost—Objection—Footpath—Repairable by inhabitants at large—Distinction between road and footpath—Highway Act, 1835 (5 & 6 Will. 4 c. 50), s. 5, s. 23—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 7 (b).

C By s. 23 of the Highway Act, 1835, "No road or occupation way made or hereafter to be made by and at the expense of any individual or private person . . . shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless . . ." certain conditions are fulfilled.

D At some time after 1938 and before December, 1949, a footpath was trodden along a strip of land lying between a street and the premises now belonging to the respondents. This footpath became dedicated to and used by the public as a highway. In 1953 the appellants proposed to make a foot pavement on the site of the public footpath. In accordance with the Private Street Works Act, 1892, s. 6, estimates and provisional apportionments were prepared and approved by resolution of the appellants with a view to making the pavement and charging the respondents, as frontagers, with apportioned costs. The respondents objected on the ground, provided by s. 7 (b) of the Act of 1892, that the footpath was a highway repairable by the inhabitants at large.

E Held : section 23 of the Highway Act, 1835, did not apply to footpaths, and, accordingly, the footpath, being dedicated to the public as a highway, had become repairable by the inhabitants at common law, and the respondents, by virtue of s. 7 (b) of the Act of 1892, were not liable to bear the costs of the proposed private street works.

F Appeal dismissed.

[As to Highways repairable by Inhabitants at large and the effect of the Highway Act, 1835, s. 23, see 16 HALSBURY'S LAWS (2nd Edn.) 279, para. 346 (3); and for cases on the subject, see 26 DIGEST 361-363, 869-886.]

G As to the Dedication of Footpaths, see 16 HALSBURY'S LAWS (2nd Edn.) 393. For the Highway Act, 1835, s. 5, s. 23, see 11 HALSBURY'S STATUTES (2nd Edn.) 37, 46; and for the Private Street Works Act, 1892, s. 6 (1), s. 7 (b), see *ibid.* 184, 186.

For the Public Health Act, 1875, s. 146, see 19 HALSBURY'S STATUTES (2nd Edn.) 67.]

H Case Stated.

This was an appeal by the Richmond (Surrey) Borough Council by way of Case Stated by the Appeal Committee of the Court of Quarter Sessions for the county of Surrey.

I Prior to 1938 Petersham Road and Ham Street were connected by a highway repairable by the inhabitants at large and known as Sandy Lane. The said lane was thirty-nine feet ten inches wide. On Sept. 13, 1938, the council made an order under the Public Health Act, 1925, s. 30 (1) declaring a part of Sandy Lane to be a new street for the purpose of the application of their bye-laws with respect to new streets, one of which bye-laws prescribed a width of thirty-six feet. On that date the owners of the land abutting on the south side were Park Estates, Ltd. They sold the land in plots, but by arrangement with the council the boundary fences of the plots were set back fourteen feet from the lane so as to leave a strip of land between the fences of the plot and the lane. No part of the

strip was conveyed to any of the purchasers of the plot. Part of the strip nearest to the lane and eight feet in width had at all material times consisted of a hedge planted with trees and shrubs. The land, other than the strip belonging to Park Estates, Ltd., was divided into seventeen premises each abutting on the southern side of the strip, and belonging to the various frontagers. In course of time there was trodden down on the strip a footpath between the frontagers' premises and the carriageway. By resolution of July 21, 1953, the Richmond (Surrey) Borough Council under the provisions of the Private Street Works Act, 1892, s. 6, approved an amended estimate and provisional apportionment in respect of certain private street works to be carried out on part of Sandy Lane forming part of the length of Sandy Lane which had been declared to be a new street. All requisite steps laid down by the Private Street Works Act, 1892, were duly taken. The proposed works consisted of a foot pavement of a width of six feet on the strip between the boundary fences and the hedge. The frontagers objected to the proposed works. On Mar. 11, 1954, a court of summary jurisdiction sitting at Richmond heard the objections (under s. 8 (1)) and approved the specification, estimate and provisional apportionment. The frontagers appealed to the Appeal Committee of Surrey Quarter Sessions. It was contended by the frontagers that the part of Sandy Lane in question was a highway repairable by the inhabitants at large. It was contended by the council (i) that the part of Sandy Lane in question was not a highway repairable by the inhabitants at large, (ii) that the strip of land fourteen feet wide was a street within the meaning of the Private Street Works Act, 1892, and (iii) that the original highway known as Sandy Lane did not constitute "premises" within the meaning of the Private Street Works Act, 1892. The appeal committee was of opinion that by the development of Sandy Lane a new street came into existence which was a footpath and nothing more, and was divided from the highway by a strip of land owned by Park Estates, Ltd., the developers, or some other persons; that the new street or footpath was in existence prior to Dec. 16, 1949, and was a street for the purposes of the Private Street Works Act, 1892, that the whole of the new street or footpath was a highway repairable by the inhabitants at large under common law and was not removed from that class by virtue of the Highway Act, 1835, s. 23, or the National Parks and Access to the Countryside Act, 1949, s. 47 and s. 49 and by reason of the fact that the provisions of s. 50 of the Act of 1949 did not apply thereto so as to reserve to the council any right to make up the same under the provisions of the Act of 1892; the committee, therefore, allowed the appeal. The council appealed.

R. Hughes for the appellants.

D. G. H. Frank for the respondents.

LORD GODDARD, C.J.: This case raises a new and curious point under the Highway Act, 1835, and under the Private Street Works Act, 1892. The Private Street Works Act, 1892, s. 6 (1) enables a local authority to resolve to "sewer, level, pave, metal, flag, channel, or make good" a new street and to apportion the expenses thus incurred "on the premises fronting, adjoining, or abutting on such street". Section 7 provides that any owner of premises liable to be charged may object to the resolution on the ground, *inter alia*:

"(b) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large."

The facts found by the appeal committee of quarter sessions seem to be these: There is an old highway at Petersham called Sandy Lane. When Sandy Lane was ripe for development, the developers intended that between the houses and the old highway of Sandy Lane there should be a strip of land which would be used, no doubt, for access to the houses, and along which the public could walk as, indeed, they have walked. The appeal committee found, and there is ample evidence to support this finding, that this strip of land was dedicated to and

A used by the public and, therefore, became a highway, and it is well known that at common law as a highway it would be repairable by the inhabitants at large.

Anybody could dedicate as a highway a road or footpath or bridle path and, if the public accepted the dedication, as it was called, by using what the land-owner offered, the highway became repairable at the expense of the inhabitants at large. The Highway Act, 1835, was passed because this was found to be
 B very inconvenient. There were a great many highways in different parts of the country where no doubt building was going on and because the public found that they were saddled with the expense of repairing these highways although it might be they were only there for the convenience of two or three people. The Highway Act, 1835, was intended to provide that the mere act
 C of dedication and acceptance of the dedication would not cast the burden of repairing the highway on the public. By s. 23 the highway would only become repairable by the inhabitants at large if three months' notice was given by the dedicator that he intended to dedicate and if, before dedication, he made the road in a substantial manner and in other respects as the section provides. That having been done the road would become repairable by the inhabitants at large in the same way as if the provisions of the Public Health Act, 1875,
 D s. 146, or the Private Street Works Act, 1892, s. 6, had been carried out.

The difficulty that has arisen in the present case is that the appeal committee has found that this footpath existed as a footpath since at any rate 1938 and was, therefore, a highway. The council now, in the purported exercise of their powers under the Private Street Works Act, 1892, s. 6 (1), call on the frontagers to pay for the making up of this footpath. The frontagers say: "No, it is a
 E highway which has become repairable by the inhabitants at large and, therefore, we cannot be called on under the Private Street Works Act, 1892, to pay for this work". The question is whether or not this footpath is a highway to which the Highway Act, 1835, applies, as this would prevent it becoming repairable by the inhabitants at large merely by dedication. It may be that it was intended it should be, but it seems to me that the words of the Act of 1835
 F are not wide enough to catch it. In the interpretation section, s. 5, it is provided:

"... the word 'highways' shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements ..."

G All those are highways but it will be observed that "highways" includes roads and also footpaths, so the Act is distinguishing between roads and footpaths. It says that a road can be a highway and a footpath can be a highway, but the road and the footpath are not the same things. Section 23 reads:

H "When new highways are to be kept in repair by parishes.—No road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an Inclosure Act shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair ..."

I That section applies to a road, an occupation way, a driftway or a horsepath.

The appeal committee held that footpaths were not included in s. 23. If it was intended to apply to every form of highway, it would have been easy to have said: "No highway made or hereafter to be made shall be deemed to be repairable by the inhabitants at large"; but the words used obviously exclude footpaths and, therefore, if the committee find that this footpath was dedicated to the public and that the public accepted the dedication, it follows that it became a highway at common law and is repairable by the inhabitants at large and, therefore, is exempt under the Private Street Works Act, 1892, s. 7 (b).

I think the appeal committee were right in the conclusion to which they came, A
and for these reasons the appeal must be dismissed.

CASSELS, J.: I agree.

STREATFEILD, J.: I also agree.

Appeal dismissed. B

Solicitors: *Town clerk*, Richmond (for the appellants); *Caporn & Campbell*
(for the respondents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*] C

NOTE. D

LANE v. LONDON ELECTRICITY BOARD.

[QUEEN'S BENCH DIVISION (Parker, L.J., sitting as a judge of the Division),
January 17, 18, 1955.] E

*Factory—Electricity regulations—Definition of danger—Construction—Alleged
inadequate lighting to prevent danger—Regulations for the Generation, etc.,
of Electrical Energy, 1908 (S.R. & O. 1908 No. 1312), reg. 26.*

[For the Electricity (Factories Act) Special Regulations, 1908 and 1944,
S.R. & O. 1908 No. 1312 as amended by S.R. & O. 1944 No. 739, see 8 HALSBURY'S
STATUTORY INSTRUMENTS 86.] F

The plaintiff, an electrician employed by the defendants, was instructed to
install additional lighting in one of their sub-stations, which was being recon-
structed. While moving through a passage between two pieces of equipment
in the sub-station, to inspect certain machinery, his foot missed the edge of an
open duct, measuring approximately twenty-one inches deep and eighteen
inches wide, and he fell and sustained injuries. The plaintiff claimed damages G
from the defendants for breach of their common law duty towards him on the
grounds that there was no grill or checker plate over the duct and that the
lighting was inadequate. The plaintiff also alleged that the defendants were
in breach of their statutory duty under the Electricity (Factories Act) Special
Regulations, 1908 and 1944, reg. 26, in that the part of the premises where H
the accident occurred was not adequately lighted to prevent danger. The case
is reported only as regards the claim for breach of statutory duty.

Humfrey Edmunds for the plaintiff.

W. L. Mars-Jones for the defendants.

PARKER, L.J., having held that no breach of duty at common law was
proved, continued: Lastly, there remain the regulations. The wording of the
Electricity (Factories Act) Special Regulations, 1908 and 1944, reg. 26, is: I

"All those parts of premises in which apparatus is placed shall be
adequately lighted to prevent danger."

That, of course, is an absolute obligation, irrespective of questions which arise
at common law of reasonable care.

A The defendants say, however, that although they admit that that regulation applied because this sub-station was working, at any rate in part, the injury to the plaintiff did not result from any danger within the meaning of that regulation. Danger is defined by the regulations in these terms:

B “ ‘ Danger ’ means danger to health or danger to life or limb from shock, burn, or other injury to persons employed, or from fire attendant upon the generation, transformation, distribution, or use of electrical energy.”

C In my opinion the words “ or other injury ” must be read in this context strictly ejusdem generis with “ shock or burn ”, viz., as, “ or other injury ” due to electrical energy. The reason for this is that whenever the phrase “ so as to prevent danger ” and the like appear in these regulations, for example in regs. 2, 3, 5, 7, 8, it is, in each case, clearly referring to danger from electricity. On the other hand there are certain regulations where that form of words is not used. For example in reg. 6 which says:

D “ Every electrical joint and connection shall be of proper construction . . . ” and reg. 30 which says:

E “ Every sub-station shall be substantially constructed, and shall be so arranged that no person other than an authorised person can obtain access thereto otherwise than by the proper entrance, or can interfere with the apparatus or conductors therein from outside; and shall be provided with efficient means of ventilation and be kept dry.”

E These regulations, of course, are dealing with matters quite apart from the risks from the use of electricity.

In my view the plaintiff cannot bring himself within reg. 26, although, as I have said, if he could, he has not satisfied me that the lighting in this case was inadequate.

Judgment for the defendants.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Gardiner & Co.* (for the defendants).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

BENMAX v. AUSTIN MOTOR CO., LTD. A

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow), November 8, 9, 10, 11, 1954, January 20, 1955.]

Appeal—Judge without jury—Perception and evaluation of facts—Principles on which appellate court acts. B

An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge. C

Appeal dismissed.

[As to the Principles on which the House of Lords act on hearing Appeals, see 9 HALSBURY'S LAWS (3rd Edn.) 364, para. 846. D

As to the Principles on which the Court of Appeal acts on hearing Appeals, see 26 HALSBURY'S LAWS (2nd Edn.) 122, para. 241; and for cases on the subject, see DIGEST (Practice) 769-771, 3348-3362.]

Cases referred to:

(1) *Montgomery & Co. v. Wallace-James*, [1904] A.C. 73; 73 L.J.P.C. 25; 90 L.T. 1; Digest (Practice) 770, 3354. E

(2) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 36 Digest (Repl.) 15, 60.

(3) *Watt (or Thomas) v. Thomas*. [1947] 1 All E.R. 582; [1947] A.C. 484; 1947 S.C.(H.L.) 45; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp. F

(4) *Riekmann v. Thierry*, (1896), 14 R.P.C. 105; 36 Digest (Repl.) 679, 313.

Appeal.

Appeal by the registered proprietor of letters patent in respect of an invention from an order of the Court of Appeal dated Nov. 17, 1953, reversing an order of LLOYD-JACOB, J., dated May 8, 1953. The appellant, Sydney Benmax, claimed an injunction restraining the respondents, the Austin Motor Co., Ltd., whether by themselves or by their agents, from infringing letters patent No. 586058 dated Sept. 4, 1944, granted to the appellant in respect of an invention for "Improvements in or relating to the upholstering of furniture". The respondents denied that they had infringed the letters patent and alleged that they were invalid. They counterclaimed for the revocation of the letters patent and for an injunction restraining the appellant from threatening proceedings for their infringement and for a declaration that such threats were unjustifiable. LLOYD-JACOB, J., held that the letters patent were valid and that the claims relied on by the appellant at the trial had been infringed. The Court of Appeal held that the letters patent were invalid because the alleged invention was obvious having regard to the combined effect of three specific prior disclosures. On appeal to the House of Lords, the appellant contended, among other contentions, that the existence of an inventive step was a question of fact which the trial judge had decided in the appellant's favour, and, therefore, the Court of Appeal should not have reversed his decision on this point, except for certain reasons, which were not present in the case. This report is confined to this point. G
H
I

K. E. Shelley, Q.C., and J. N. K. Whitford for the appellant.

Charles Russell, Q.C., Kenneth Johnston, Q.C., and G. W. Tompkin for the respondents.

A The House took time for consideration.

Jan. 20. The following opinions were read.

VISCOUNT SIMONDS : My Lords, I have had the privilege of reading the opinion which my noble and learned friend, LORD MORTON OF HENRYTON, is about to deliver, and I agree so fully with it that I think it necessary to add
B nothing except on one question of general importance which has once more been raised on this appeal.

Learned counsel for the appellant urged in the forefront of his argument that the existence of an inventive step was a question of fact which had been decided by the trial judge, LLOYD-JACOB, J., in favour of the appellant, and, therefore,
C that the Court of Appeal should not have reversed his decision except for certain reasons which clearly were not present in this case. I think it convenient, therefore, to state my view on this question, though I am aware that it does not entirely agree with observations made in this House by noble Lords for whose opinion I have the highest regard. Fifty years ago in *Montgomerie & Co. v. Wallace-James* (1), LORD HALSBURY, L.C., said ([1904] A.C. at p. 75):

D “But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.”

And in *Mersey Docks & Harbour Board v. Procter* (2), VISCOUNT CAVE, L.C., said
E ([1923] A.C. at p. 258):

“The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes
F into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.”

It appears to me that these statements are consonant with R.S.C., Ord. 58, r. 1, which prescribes that

G “All appeals to the Court of Appeal shall be by way of re-hearing”
and r. 4:

“The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made . . .”

This does not mean that an appellate court should lightly differ from the finding
H of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this
I distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence. A jury finds that the defendant has been negligent and that is an end of the matter unless its verdict can be upset according to well-established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant

had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem.

In a case like that under appeal where, so far as I can see, there can be no dispute about any relevant specific fact, much less any dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge. I ought not to conclude this opinion without saying how much I have owed in the preparation of it to certain writings by PROFESSOR GOODHART.

I would dismiss this appeal.

LORD MORTON OF HENRYTON having considered the question of the validity of the patent and concluded that the invention was obvious and involved no inventive step, having regard to the prior user of the same device and the absence of any evidence that the application of that device to upholstered material involved any inventive step, continued: My Lords, counsel for the appellant pointed out that the existence or non-existence of an inventive step is a question of fact decided in favour of the appellant by the trial judge, who had the advantage of seeing and hearing the witnesses. They suggested that your Lordships should hesitate long before overruling his decision. My Lords, this is an argument of great weight if the credibility of witnesses has come in question; but in the present case it would appear that the learned judge did not doubt the credibility of any witness, and formed his view by inference from the evidence as a whole. The Court of Appeal formed the opposite view by the same method and I agree with that court.

My last observations were prepared before I had the privilege of reading in print the speech which has just been delivered from the Woolsack. It will be apparent from these observations that my views on the subject of appellate courts in no way differ from those which have just been expressed by my noble and learned friend **VISCOUNT SIMONDS**. I would dismiss the appeal.

LORD REID : My Lords, I have had an opportunity of reading the speech which my noble and learned friend, **LORD MORTON OF HENRYTON**, has just delivered. I agree with it and I cannot usefully add anything to it. I have also had an opportunity of reading the speech of my noble and learned friend, **LORD SIMONDS**. I am also in agreement with it but, in view of the general importance of the question with which he has dealt, I think it right to express my views in my own words.

Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be

A satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to
B evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations.

The authority which is now most frequently quoted on this question is the speech of LORD THANKERTON in *Watt (or Thomas) v. Thomas* (3), and particularly
C the passage which I now quote ([1947] 1 All E.R. at p. 587):

"I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
D II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has
E not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

F *Watt (or Thomas) v. Thomas* (3) was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by LORD THANKERTON. But in cases where there is no question of the credibility
G or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion. In *Riekmann v. Thierry* (4), LORD HALSBURY, L.C., said (14 R.P.C. at p. 116):

H "The hearing upon appeal is a re-hearing, and I do not think there is any presumption that the judgment in the court below is right."

And later in the same speech he said (*ibid.*):

I "Upon appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision."

My Lords, there may be a difference of emphasis between this view and that expressed in the quotations given by my noble and learned friend, LORD SIMONDS, on the one hand, and the view expressed by LORD THANKERTON and by other noble Lords and learned judges to the same effect on the other hand, but I can find

no essential difference between the two views, and, plainly, the present case is not one in which any question of credibility, even in its widest sense, can be said to arise. I, therefore, agree that the appeal should be dismissed. A

LORD TUCKER : My Lords, for the reasons which have been stated by my noble and learned friend, LORD MORTON OF HENRYTON, I agree that this appeal should be dismissed. I also desire to state my concurrence in the observations which have been made by your Lordships with regard to the functions of your Lordships' House and the Court of Appeal when dealing with the findings of fact of a trial judge. B

LORD SOMERVELL OF HARROW : My Lords, I agree for the reasons given by my noble and learned friend, LORD MORTON OF HENRYTON, that this appeal should be dismissed. I would wish to add a few sentences on the point dealt with by my noble and learned friend, LORD SIMONDS. I would, as does he, respectfully differ from those who have suggested that an appeal on fact from a judge sitting alone is the same as, or should be assimilated to, an appeal from a jury. Apart from the fact that, in the former case, the appeal is a re-hearing, juries do not, and judges in varying degree do, give reasons for their conclusions. In a negligence action, it may be clear on an appeal from a judge alone how he has found what have been conveniently called the primary facts. An appellate court must be free to consider whether the judge, who has, I will assume, found for the plaintiff, applied the standard of the reasonable man, as our law prescribes, or the standard of a man of exceptional care and prescience. C

The advantages enjoyed by the trial judge have often been stated and are, I am sure, familiar to all appellate courts. The difficult cases are those where there are circumstances on which appellant and respondent can each rely. The judge has based his decision on the way in which witnesses give their evidence. Unless there is no dispute at all he always does this. On the other hand, there are sentences in his judgment which indicate very probably, but not certainly, that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness he has relied on, or his general conclusion. I only refer to this in order to emphasise the impossibility, in my opinion, of laying down anything in the nature of a code as to the circumstances in which an appellate court should interfere either by reversing the trial judge or ordering a new trial. I agree that the appeal should be dismissed. D

Appeal dismissed. E

Solicitors: *Oscar Mason & Co.* (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Ryland, Martineau & Co.*, Birmingham (for the respondents). F

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*] G

A HARPER AND ANOTHER v. SECRETARY OF STATE FOR THE HOME DEPARTMENT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), December 20, 1954.]

- B *Elections—Parliamentary—Redistribution of seats—Discretion of the Boundary Commission—Number of constituencies in England to be increased from 506 to 511—Method employed in determining number of constituencies stated in report—Draft Order in Council giving effect to commission's recommendations approved by both Houses of Parliament—Validity of report challenged by two electors—Application to restrain draft order from being submitted to Her Majesty in Council—House of Commons (Redistribution of Seats) Act, 1949 (12 & 13 Geo. 6 c. 66), s. 2 (1) (a), (5), s. 3 (4), Sch. 2.*
- C *Crown—Relief against the Crown—Injunction against Secretary of State—Redistribution of seats in the House of Commons—Crown Proceedings Act, 1947 (10 & 11 Geo. 6 c. 44), s. 21.*

In November, 1954, the Boundary Commission for England presented a report to the Secretary of State for the Home Department and Minister for Welsh Affairs (referred to in this report as "the Secretary of State"), pursuant to the House of Commons (Redistribution of Seats) Act, 1949, s. 2. In para. 8 of the report, the commission, after referring to r. 1 of Sch. 2 to the Act, said: ". . . we were advised that it was unlikely that the Boundary Commissions for Scotland and Wales would find it necessary to allocate more than the existing number of seats, viz., seventy-one in Scotland and thirty-six in Wales. We thus proceeded on the basis that the number of constituencies available for distribution in England was to be not substantially greater or less than 506 and we allocated seats provisionally to administrative counties with their associated county boroughs on the basis of one seat for each complete unit of electors, the unit representing the average electorate in England, namely, 57,122, determined by dividing the total English electorate, viz., 28,904,108, by 506." In para. 9 the commission said that their aim was to create 506 constituencies, each of which would be at or near the electoral quota, without cutting across local government boundaries; that, while in some cases the task was simple, other cases called for special consideration, the choice lying between departing substantially from the quota or disregarding boundaries. Their recommendation was that the number of constituencies in England should be increased from 506 to 511, and, according to the re-arrangement recommended by them, the figures of the electorate in more than eighty per cent. of the constituencies would be between forty-five thousand and sixty-five thousand, of which the electoral quota, namely 55,670, formed the mean. Pursuant to s. 2 (5) of the Act, the Secretary of State laid the report before Parliament, together with draft Orders in Council for giving effect to the recommendations contained in the report. Among the draft orders was one entitled "Draft Parliamentary Constituencies (Manchester, Oldham and Ashton under Lyne) Order, 1954," which provided for the alteration of the number and boundaries of the wards of the county borough of Manchester. This draft order was approved by both Houses of Parliament. Two electors who would be affected if the order came into force obtained an ex parte injunction restraining the Secretary of State from submitting the draft order to Her Majesty in Council on the ground that the report of the commission did not comply with the rules set out in Sch. 2 to the Act of 1949 and was not a report under the Act, within the meaning of s. 2 (5), in that the commission had misdirected themselves. The ground of alleged misdirection was that, if the calculation of the number of constituencies required for England had been carried out in accordance with the rules in Sch. 2, there should be 519 constituencies, not, 506, and that the calculation mentioned in para. 8 of the report ought

to have been made on the footing that the number of constituencies available was 519. On appeal, an injunction having been granted *ex parte*,

Held: on the true construction of the Act of 1949, in so far as the discretion over the division of England into parliamentary constituencies, which was conferred by the rules for the redistribution of seats in Sch. 2 to the Act of 1949, was not the discretion of the Boundary Commission for England, on whom it was primarily conferred, the exercise of the discretion was a matter for Parliament, and it was not competent for the court to determine whether a particular line of approach, which commended itself to the commission, was the best; in the present case the recommendations of the commission were not manifestly at variance with the Act of 1949, the resolutions of the Houses of Parliament approving the draft Order in Council were not affected by any invalidity, and the injunction should not have been granted.

Quaere, whether, having regard to the Crown Proceedings Act, 1947, the plaintiffs were entitled to bring proceedings of this nature against the Secretary of State, and whether, having regard to s. 21 of the Act of 1947, the plaintiffs could, in any event, have obtained an injunction against the Secretary of State (see p. 340, letter B, post).

Appeal allowed.

[**Editorial Note.** This case illustrates incidentally an unusual procedural point, viz., an appeal against the granting, as distinct from the refusal, of an injunction *ex parte*. If an *ex parte* application has been refused, an application for a similar purpose may be made to the Court of Appeal under R.S.C., Ord. 58, r. 10 (compare *Ex parte Fry*, [1954] 2 All E.R. 118); but that rule does not apply to cases where the *ex parte* application has been granted. Section 27 of the Supreme Court of Judicature (Consolidation) Act, 1925 (5 HALSBURY'S STATUTES (2nd Edn.) 355) confers on the Court of Appeal jurisdiction to hear appeals from orders of the High Court, subject to such restrictions as are imposed by other provisions of that Act or by the Rules of the Supreme Court, which seem not to exclude an appeal against the granting of an injunction *ex parte*. The circumstances of the present case were, however, exceptional; and in other circumstances, if an *ex parte* injunction were likely to continue for a substantial time, any application against its continuance would, presumably, be made to the High Court to discharge the injunction (see per SIR RAYMOND EVERSHED, M.R., at p. 334, letter B, post).

For the House of Commons (Redistribution of Seats) Act, 1949, see 8 HALSBURY'S STATUTES (2nd Edn.) 564.

For the Crown Proceedings Act, 1947, s. 21, see 6 HALSBURY'S STATUTES (2nd Edn.) 61.]

Cases referred to:

- (1) *Hammersmith Borough Council v. Boundary Commission for England. Fulham Borough Council v. Boundary Commission for England*, (Dec. 14, 1954), Unreported.
- (2) *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 20 Digest 197, 1.
- (3) *A.-G. for New South Wales v. Trethowan*, [1932] A.C. 526; 101 L.J.P.C. 158; 147 L.T. 265; Digest Supp.
- (4) *R. v. Treasury Lords Comrs.*, (1872), L.R. 7 Q.B. 387; 41 L.J.Q.B. 178; 26 L.T. 64; 36 J.P. 661; 16 Digest 303, 1160.

Appeal.

Pursuant to s. 2 (1) of the House of Commons (Redistribution of Seats) Act, 1949, the Boundary Commission for England submitted to the Secretary of State for the Home Department their first periodical report, dated Nov. 10, 1954, showing the constituencies into which they recommended that England should

- A be divided in order to give effect to the rules set out in Sch. 2 to the Act of 1949. On Nov. 18, 1954, the Secretary of State laid before Parliament the report and draft Orders in Council giving effect to the recommendations contained therein. Among the draft orders was the draft Parliamentary Constituencies (Manchester, Oldham and Ashton under Lyne) Order, 1954, which altered, among other things, the number and boundaries of the wards of the county borough of Manchester.
- B This draft order was approved by both Houses of Parliament. The Manchester City Council having unsuccessfully protested against the recommendations of the commission, an action against the Secretary of State for the Home Department was commenced by Richard Stevenson Harper (the lord mayor of the city of Manchester) and Forrester Lord (a councillor of the city of Manchester), as electors of wards in the city which were to be removed from their existing
- C constituencies. By the writ, which was issued on Dec. 17, 1954, the plaintiffs claimed: (i) a declaration that the report of the Boundary Commission for England dated Nov. 10, 1954, was not made in accordance with and did not comply with the rules set out in Sch. 2 to the Act of 1949, and that the report was not a "report under the said Act" within the meaning of s. 2 (5) of the Act;
- D (ii) a declaration that the defendant, the Secretary of State, was not bound by s. 3 (4) of the Act to submit, and ought not to submit, to Her Majesty in Council the draft Parliamentary Constituencies (Manchester, Oldham and Ashton under Lyne) Order, 1954, giving effect to the recommendations contained in the report; and (iii) an injunction restraining the defendant from submitting the draft order to Her Majesty in Council.

- On the morning of Dec. 17, 1954, the plaintiffs applied ex parte to ROXBURGH, J., for an interlocutory injunction in the terms of para. (iii) of the writ. The learned judge adjourned the hearing of the application until the afternoon so as to give the defendant an opportunity to appear. It was, however, impossible for the defendant to be represented by counsel at the hearing that afternoon, and, owing to the urgency of the matter, ROXBURGH, J., dealt with the matter as an ex parte application and made an order, ex parte, restraining the defendant
- F from presenting the draft order to Her Majesty in Council until after Dec. 21, 1954, or until further order, or until the Boundary Commission for England had reported in accordance with the Act of 1949, with liberty to the plaintiffs to serve notice of motion for Dec. 21, 1954, together with the writ of summons. As it was inconvenient to postpone the submission of the draft order to the Privy Council to a day later than Dec. 21, 1954, the defendant applied to the Court of
- G Appeal to discharge the order of ROXBURGH, J., granting the injunction.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and N. S. S. Warren for the defendant, the Secretary of State.

Sir Andrew Clark, Q.C., J. V. Nesbitt and R. L. McEwen for the plaintiffs.

- SIR RAYMOND EVERSLED, M.R. :** This case comes before us in very
- H unusual circumstances, and it is right that I should first make clear as a matter of procedure what it is that we are being called on to determine. The writ in the action was issued I think last Friday, the plaintiffs being two individuals, a Mr. Harper and Mr. Lord, who are electors at the moment in one of the parliamentary divisions of Manchester. The defendant as described in the writ is the Secretary of State for the Home Department. The relief sought in the writ is, first,
- I a declaration that the report of the Boundary Commissioners dated Nov. 10, 1954, and submitted to the defendant, that is the Secretary of State, under the House of Commons (Redistribution of Seats) Act, 1949, was not made in accordance with that Act, and was, therefore, not a report as stated in that Act. The writ proceeded to seek a further declaration that the Secretary of State was not bound to submit and ought not to submit to Her Majesty in Council a draft Order in Council giving effect to the report and then seeks an injunction.

The plaintiffs moved, as I understand, before ROXBURGH, J., on Friday morning for an ex parte injunction ; and though the learned judge, apprehending

the seriousness of the matter, gave an opportunity so that the defendant could be before him in the afternoon, it was not in fact practicable, as may well be understood, for the defendant then to be represented by counsel. The judge accordingly dealt with the matter as an *ex parte* application. He made an order *ex parte* restraining the Secretary of State until after Tuesday (that is tomorrow) or further order, from presenting to Her Majesty in Council a draft Order in Council as intimated in the indorsement to the writ. In the ordinary course the procedure would be, I do not doubt, that if the interval before the motion came on to be heard in the ordinary way were substantial, and if at the same time the defendant thought on any sufficient ground that the *ex parte* injunction ought not to be continued, then he would apply to discharge the *ex parte* injunction. In this case, as I have intimated, the *ex parte* injunction only runs until tomorrow. It might, therefore, have been thought the more natural course to wait until tomorrow in order that the learned judge might hear the motion *inter partes*, make a decision, and then if either party were dissatisfied with that decision, there could be an appeal to this court. Through no fault or malice on anybody's part, however, this matter has come before the court very late in the term, and the case being obviously one of substance and some urgency, to put it no higher, it has been thought proper on behalf of the Secretary of State to come today to this court to appeal against the making of the injunction *ex parte*. We are therefore only concerned with the question whether that *ex parte* injunction was rightly granted. I think it right to emphasise these procedural matters because the course which has been followed, and which learned counsel have both thought it right to pursue here, is one which owes its existence, owes the fact of its having been followed, to the special circumstances, particularly as to time, in which the court is now placed. I do not, however, forget that it is only with the *ex parte* injunction that the court is now concerned. Yet if we reach a conclusion that the *ex parte* injunction should not have been granted on grounds which affect the declarations sought in the writ, it is obvious that, as a practical matter, our decision is likely to govern what will hereafter occur on the hearing of the motion tomorrow and, I dare say, of the action itself.

After that preamble I turn to some references to the Act of 1949 which is involved. First, however, it is plain that the form of the action is an unusual one. The defendant is the Secretary of State, and, as is apparent from the indorsement, what it is sought by the plaintiffs to achieve is an injunction to restrain the Secretary of State from presenting to Her Majesty in Council a draft order which has already received the approval of both Houses of Parliament. It is therefore obvious that the court is concerned with matters which at any rate come somewhat near to touching on the relative spheres of Parliament and the courts. I shall have something later to say about the defendant and the name by which he is sued, "Secretary of State for the Home Department"; but I will first recite the necessary parts of the Act of 1949. It was an Act passed to replace an earlier Act, and as I follow it, to consolidate earlier enactments. Its long title is

"An Act to consolidate the enactments which make permanent provision for the redistribution of seats at parliamentary elections . . ."

Section 1 established Boundary Commissions for the four parts of the United Kingdom of Great Britain and Northern Ireland, viz., England, Scotland, Wales and Northern Ireland. After stating how these commissions were to be constituted, s. 2 (1) provides:

"Each Boundary Commission shall keep under review the representation in the House of Commons of the part of the United Kingdom with which they are concerned and shall, in accordance with the next following subsection, submit to the Secretary of State reports with respect to the whole of that part of the United Kingdom, either—(a) showing the constituencies

- A into which they recommend that it should be divided in order to give effect to the rules set out in Sch. 2 to this Act; or (b) stating that, in the opinion of the commission, no alteration is required . . .”

We are concerned with alternative (a). I can pass over the next three subsections. Then s. 2 (5) provides:

- B “As soon as may be after a Boundary Commission have submitted a report to the Secretary of State under this Act, he shall lay the report before Parliament together, except in a case where the report states that no alteration is required . . . with the draft of an Order in Council for giving effect, whether with or without modifications, to the recommendations contained in the report.”

- C Section 3 (2) provides:

“The draft of any Order in Council laid before Parliament by the Secretary of State under this Act for giving effect, whether with or without modifications, to the recommendations contained in the report of a Boundary Commission may make provision—(a) for any matters which appear to him to be incidental thereto or consequential thereon . . .”

- D and there are certain other provisions, which I need not enumerate. Then s. 3 (4) says:

“If any such draft is approved by resolution of each House of Parliament, the Secretary of State shall submit it to His Majesty in Council.”

- E Before I pass to Sch. 2 which sets out the rules to give effect to which, as will be recalled, s. 2 provides that the recommendations be directed, I pause to re-state this fact. In the present case, the Secretary of State, having received the report, to which I shall later advert, laid it before Parliament, together with a draft Order in Council, and each of the Houses of Parliament approved that Order in Council. Prima facie, therefore, the Secretary of State must now submit the draft Order in Council to Her Majesty. I have said that the case is, therefore, a striking one, coming near (at the least) to involving the privileges and powers of Parliament; but let me say at once that the courts have never been reluctant or afraid to exercise their powers where they are satisfied that such powers reside in the courts, and that some one or more of the subjects of Her Majesty are in danger of finding their rights imperilled.

- F I come now to Sch. 2, containing the rules which are to be the guide of the Boundary Commission in making and presenting their reports. The rules in Sch. 2 are described as “Rules for redistribution of seats”. Rule 1 is:

“The number of constituencies in the several parts of the United Kingdom set out in the first column of the following table shall be as stated respectively in the second column of that table.”

H <i>Part of the United Kingdom.</i>	<i>No. of Constituencies.</i>
Great Britain	Not substantially greater or less than 613
Scotland	Not less than 71
Wales	Not less than 35
Northern Ireland	12

- I It is convenient to pause in order to say that (the figure for Wales having risen to thirty-six) from the figure of 613 opposite “Great Britain” one should deduct the figure of 107, so that in considering the English representation one may say for practical purposes that the figure is not to be substantially greater nor less than 506.

Rule 2 says: “Every constituency shall return a single member”. Rule 3 relates to the city of London. Rule 4 opens with the words: “So far as is practicable having regard to the foregoing rules”, and then there are provisions directing the commissioners that counties or parts of counties shall not be

included in constituencies which are included in the whole or parts of other counties. Then there is a rule particularly directed to the inter-relations of parliamentary representations and local government. Rule 5 says: A

"The electorate of any constituency shall be as near the electoral quota as is practicable having regard to the foregoing rules; and a Boundary Commission may depart from the strict application of the last foregoing rule if it appears to them that a departure is desirable to avoid an excessive disparity between the electorate of any constituency and the electoral quota . . ."

B

Rule 6 is:

"A Boundary Commission may depart from the strict application of the last two foregoing rules if special geographical considerations, including in particular the size, shape and accessibility of a constituency, appear to them to render a departure desirable."

C

Then, to complete my reading of the schedule, the phrase, "electoral quota", used in r. 5, is defined to mean, so far as Great Britain is concerned,

"a number obtained by dividing the electorate for Great Britain by the number of constituencies in Great Britain existing on the enumeration date."

D

I need not take time to state what is meant by "enumeration date".

Before I proceed to consider what has been done, I venture to draw attention to one feature of these rules which seems to me to be striking, and that is that within certain broad lines plainly a measure of latitude or of discretion is conferred. It is primarily conferred, I think, on the commission. It would be difficult to think of any other way in which such a body would work. To take examples, in r. 1 a figure is mentioned "not substantially greater or less". Then in r. 4 is the phrase "so far as is practicable having regard to the foregoing rules"; and in r. 5 it is stated "the electorate of any constituency shall be as near the electoral quota as is practicable having regard to the foregoing rules", and the E

"Boundary Commission may depart from the strict application of the last foregoing rule if it appears to them that a departure is desirable to avoid an excessive disparity . . ."

F

And in r. 6 again: "A Boundary Commission may depart from the strict application" if it appears to them "desirable", and so forth. It is, however, a fact that some primacy is obviously given to the first three rules; particularly, for example, Scotland's representation is to be "not less than 71", and for Great Britain as a whole the number of constituencies is to be not substantially greater or less than 613. In r. 2 again "every constituency shall" be a single member constituency. G

I turn now to see how the commission in this case have gone about their task. The authority for the procedure adopted was stated in para. 8 of their report. They said that they were advised that it was unlikely that their opposite numbers, so to speak, i.e., the Boundary Commissions for Scotland and Wales, should want to add to Scottish and Welsh representation and they—now I am quoting—"proceeded on the basis that the number of constituencies available for distribution in England was to be not substantially greater or less than 506". Pausing there, it seems impossible to suggest that the Boundary Commission have done anything so far to which anybody could take the smallest exception. They then added this sentence, which has brought on them the criticism of acting outside their proper sphere. They said: H

"... we allocated seats provisionally to administrative counties with their associated county boroughs on the basis of one seat for each complete unit of electors, the unit representing the average electorate in England, namely, I

A 57,122, determined by dividing the total English electorate, viz., 28,904,168 by 506."

In para. 9 it was stated:

B "Our aim was to create 506 constituencies each of which would be at or near the electoral quota without cutting across local government boundaries."

C They said that in some cases that would be easy enough, and then they said that in others it would require special consideration, and in those cases what they had to do was to decide between departure from quota or disregard of boundaries. After considering all those cases accordingly, their recommendation was that they would increase the number of constituencies in England from 506 to 511; but they show that their final suggested re-arrangement was such that in more than eighty per cent. of the whole they did achieve a range of figures of electorate which was close to the electoral quota, the electoral quota as defined by the Act being a total of 55,670.

D Now the challenge to the validity of that report (for that is what is said, and must be said) is that in the sentence which I read in para. 8 referring to a provisional allocation on the basis of a unit of single member constituencies, every unit containing 57,122, there was a misdirection of themselves so fundamental as to disable all the later calculations. It is said that what they ought to have done was to work out and discover what the electoral quota was (as indeed they did), viz., 55,670, and if by that figure they had divided the total English electorate, 28,900,000 odd, they would have found out that the arithmetical answer was 519. Counsel for the plaintiff suggests that 519 could not be said to be a substantial increase above 506. They should have, therefore, started on the basis that there were going to be 519 seats. By placing far too much emphasis on the originating figure of 506 constituencies, he says, they got the whole thing wrong and have produced a report which so far departs from the authority vested in them that he, counsel, can say it is not a report at all.

G On this matter I confess that I have come myself to a clear conclusion that there is no ground for saying that this report was such a substantial departure or was indeed any departure from the rules which the commission were required to have in mind. The commission plainly placed emphasis on r. 1, that the number of English seats was to be not substantially greater or less than 613 minus the Scottish and Welsh; and on the rule, r. 2, that they were to be single member constituencies. What they proceeded to do was to say that, if every constituency was ideally such that you had one member for an equal number of electors, then you would have 506 constituencies of 57,000 odd each; but they also said that what they aimed to do was to create 506 constituencies having a number of electors as near as possible to the electoral quota, and, that being impossible, they then had to decide according to their discretion whether the quota should give way to boundaries or vice versa. The whole method was exposed on the face of the report, and, if the method they adopted was one which Parliament itself did not like, it no doubt would have modified or rejected it.

H I am, I am afraid, quite unable to accept, with all respect to him, the view which commended itself to ROXBURGH, J. He said:

I "It is perfectly true that there is an overriding provision in r. 1 that the allocation of seats to Great Britain, excluding Northern Ireland, was not to be substantially greater or less than 613, but I think that it would be difficult to say that 626 "

—and that, of course, is the same figure, with the Scottish and Welsh constituencies put in, as the 519 that I mentioned earlier—

"was substantially greater or less than 613, and therefore it would appear

to me that the Boundary Commission ought to have approached the problem in accordance with the rule along those lines." A

My reading of these rules and of the whole Act is that it was quite clearly intended that, in so far as the matter is not within the discretion of the commission, it was certainly to be a matter for Parliament to determine. I find it impossible to suppose that Parliament contemplated that on any of these occasions when reports were presented it would be competent for the court to determine and pronounce on whether a particular line which had commended itself to the commission was one which the court thought the best line or the right line—one thing rather than another to be regarded as practicable, and so on. If it were competent for the courts to pass judgments of that kind on the reports, I am at a loss to see where the process would end and what the function of Parliament would then turn out to be. B C

If that is the right view, then, as I think, everything else follows. Counsel for the plaintiffs indeed conceded that, unless one could say that the report was vitiated by misdirection of themselves by the commissioners so as to be in effect no report at all, then his cause of action was in limine destroyed. I find it unnecessary to say what the court would say or should do if the commission on the face of a report made recommendations which were manifestly in complete disregard of the Act of 1949 and of the rules thereunder. I find it difficult to think that Parliament would pass them by unnoticed; but, if Parliament none the less adopted them, I find it unnecessary to say what view the court might take. D

In another case arising out of the same report, *Hammersmith Borough Council v. Boundary Commission for England* (1), which came before HARMAN, J., where the remedy sought by representatives of certain other constituencies was against the Boundary Commission itself, not the Home Secretary, the learned judge said: E

"This is not a matter in which I ought to be asked to interfere or in which any good purpose would be served by my seeking to do so. I do not think questions of jurisdiction really need be debated at this stage. I shall assume that I can, if necessary, express an opinion as to the proceedings of the Boundary Commission, without going beyond the functions of this court, but I am satisfied that I should certainly serve no useful object by doing so, and that the machinery set up under this Act does not leave any room which makes it appropriate for the court to intervene either at this or at any other stage." F G

I find myself in agreement with the view that obviously commended itself to HARMAN, J.

Counsel for the plaintiffs referred us to some cases, and on those I ought to say one or two words. In *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (2) the court granted a writ of prohibition or mandamus against the Electricity Commissioners. But in that case what the Electricity Commissioners were told to do was to prepare certain schemes which would become orders on their confirmation first by the Minister and later by the resolution of the House. They would always be the orders of the commissioners, and the Act which imposed on them the duty of making these schemes plainly imposed on them quasi judicial functions. In that case it was discovered that, whilst they were proceeding and before they had reached the stage of preparing and presenting an order, they had gone altogether outside the functions which were committed to them by Parliament. ATKIN, L.J., said ([1924] 1 K.B. at p. 210): H I

"If the above construction of the Act is correct the Electricity Commissioners are themselves exceeding the limits imposed upon them by the legislature, and so far from seeking to diminish the authority of Parliament

A we are performing the ordinary duty of the courts in upholding the enactments which it has passed."

YOUNGER, L.J., said (*ibid.*, at p. 212):

B "That Act in my judgment contemplates that the commissioners' order, which, when approved by a resolution passed by each House of Parliament, is to have effect as if enacted in the Act, embodies only a scheme which under the Act the commissioners are given power either to approve or formulate. Every scheme under the Act remains the scheme of the commissioners even after it is confirmed . . ."

C Both YOUNGER, L.J., and ATKIN, L.J. in an earlier passage (*ibid.*, at pp. 207 et seq.) had observed that the commissioners were given limited quasi judicial functions, and that it had been established that the commissioners had exceeded those functions. If the Boundary Commission had been given similar functions, and, if it had become manifest at some stage or on any occasion that they were exceeding them, it might well be that the court would think it right to make a prerogative order of prohibition or mandamus to compel them to perform their functions properly. I observe that ATKIN, L.J., forebore from expressing any view what the court would do if, notwithstanding, Parliament had in fact approved the order which the commissioners had been restrained from proceeding to make.

D The other case to which counsel for the plaintiffs referred was that of *A.-G. for New South Wales v. Trethowan* (3), for the purpose of showing that the court will in appropriate cases grant injunctions and grant them *ex parte* to prevent someone in the position of a Minister from taking a bill or order, whatever it might be, to the sovereign or the sovereign's representative for the purpose of its becoming law. But that was a case where the legislature concerned, viz., the legislature of New South Wales, had under the Australian constitution strictly limited legislative functions; and, it having been shown that the proposed Act of Parliament had disregarded the provision in the constitution which required a particular sanction on the part of the electorate, the courts in Australia (and the Privy Council affirmed them) restrained members of the legislative council, other than the plaintiffs who were suing, from proceeding to take the measure for the approval of the governor-general. That seems to me quite a different case from the present. We are in no sense here concerned with a Parliament or legislature having limited legislative functions according to the constitution.

E I have, therefore, not thought that those two cases carry counsel for the plaintiffs any further on his road. Counsel for the defendant said that, apart from the question of the effect of the report and the proposed Order in Council, the courts in any case had no more power to grant the injunctions against the Secretary of State than they would have to prevent a Minister, or whoever are the other appropriate persons concerned, from taking to the sovereign a bill that has duly passed its third reading in each of the two Houses for the royal assent; and a reference was made by him to *R. v. Treasury Lords Comrs.* (4). I do not find it necessary to express any view on that broad proposition, save to say that in my judgment *R. v. Treasury Lords Comrs.* (4), seems to me to be of a wholly different character from the case with which we are now concerned.

I I return at the end of my judgment to the point which I mentioned earlier and on which I would say one final word, viz., the question of the defendant to this action. I have said that the defendant is "the Secretary of State for the Home Department"—sued, that is to say, by his official title as a Minister of the Crown. It is said by counsel for the plaintiffs that, since the report disregarded the rules in the Act of 1949, therefore it is not a report within the meaning of the Act, and that the Secretary of State has neither the duty to the House or to anyone else nor the power or authority to take this proposed Order in Council

to Her Majesty. I am not myself satisfied that counsel for the plaintiffs is not in this respect on the horns of a dilemma. If the whole thing is a nullity and all he seeks to do is to restrain a particular individual, who happens at the moment to be the Secretary of State, I am not satisfied that he ought not to sue him in his personal capacity as for an ordinary wrong—though in that case it would not be clear to me what breach of duty to the plaintiffs he was engaged on committing. On the other hand, if he does sue him, and rightly sues him, in his capacity as Secretary of State, then I am not satisfied, though I express no final view on it, as we have not heard full argument, that the case is one which, having regard to the terms of the Crown Proceedings Act, 1947, will lie. Moreover I am not satisfied, having regard to s. 21 of that Act, that on this alternative the plaintiffs could in any event obtain an injunction; but I find it unnecessary to do more than mention that caution on this point, for, in my judgment, the answer to this case is that the plaintiffs have not established a *prima facie* case to my satisfaction that the report which was presented and which has formed the basis of all that subsequently happened was otherwise than in accordance with the powers vested in the Boundary Commission; and more particularly that the resolutions which the Houses of Parliament passed and under which the Secretary of State has acted and is purporting to act contained in them, so to speak, any infection of invalidity. Therefore, I think that this *ex parte* injunction ought not to have been granted and I would allow the appeal against it.

JENKINS, L.J.: I agree and find nothing that I can usefully add to the reasons my Lord has given for holding that this appeal should be allowed.

HODSON, L.J.: I also agree.

Appeal allowed.

Solicitors: *Treasury Solicitor; Sharpe, Pritchard & Co., agents for Town clerk, Manchester (for the plaintiffs).*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

LAWSON v. LAWSON.

[COURT OF APPEAL (Lord Goddard, C.J., Hodson, L.J., and Vaisey, J.), October 27, 28, 1954.]

Justices—Husband and wife—Cruelty—Persistent cruelty—Sodomy with wife—Corroboration.

The wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, against the husband on the ground of his persistent cruelty to her. At the hearing she alleged that against her wish the husband on two occasions had committed sodomy on her; on many occasions had tried to force her to submit to sodomy; and on Nov. 25, 1953, had insisted on the wife's masturbating him. The justices directed themselves that corroboration of the wife's evidence was desirable but not absolutely necessary and accepted the following as corroboration: (i) the wife's evidence that after the second act of sodomy the husband told her "if she bought Vaseline it would not hurt so much", coupled with an explanation by the husband in evidence of another reason why he told her to buy Vaseline, which explanation the justices rejected as false; (ii) a statement made by the wife in the presence of a police officer "Look what you made me do on Wednesday night before I went to my mother's" and the husband's reply "That is personal between us", which the justices accepted as referring to the act of masturbation and not to a discussion about money as stated by the husband, and (iii) that the husband had offered to buy two single beds if the wife would return to him. The justices found that the husband had been guilty of persistent cruelty.

Held: if the wife had been a consenting party her evidence in support of the allegation of her husband's persistent cruelty might not have been sufficient, in the same way as the evidence of an accomplice may not be sufficient in a criminal case, without corroboration; but in fact she was not a consenting party, and accordingly no rule for corroboration applied in the present case, and the findings of the justices, as modified by the Divisional Court, should stand.

Statham v. Statham ([1929] P. 131) distinguished.

Semble: the false explanation given by the husband relating to the purchase of Vaseline was capable of constituting corroboration, but the other matters found by the justices to constitute corroboration did not amount to corroboration.

Appeal dismissed.

[**Editorial Note.** The present case may be compared with *Davidson v. Davidson* ([1953] 1 All E.R. 611), where a new trial was ordered, the justices not having referred to the question of corroboration in their reasons. The law concerning corroboration in such cases as the present was stated by SIR BOYD MERRIMAN, P., in *D.B. v. W.B.* ([1935] P. at p. 83) as follows—"Justices should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, if possible; but when that warning has been given and given in the fullest form, then there is no rule of law which prevents the tribunal finding the matter proved in the absence of corroboration". In the present case there was, on the findings of the justices, no need of corroboration although they directed themselves regarding corroboration. The facts that they so directed themselves and then found corroboration wrongly in certain particulars, did not stultify their decision that the wife had proved her case (see particularly p. 345, letter B, post).

As to Persistent Cruelty, see 10 HALSBURY'S LAWS (2nd Edn.) 838, para. 1339; and for cases on the subject, see 27 DIGEST (Repl.) 699-701, 6692-6702.]

Case referred to:

- (1) *Statham v. Statham*, [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292; 27 Digest (Repl.) 294, 2394.

Appeal.

This was an appeal by the husband from a judgment of a Divisional Court of the Probate, Divorce and Admiralty Division (LORD MERRIMAN, P., and BARNARD, J.) confirming a decision of a magistrates' court that the husband had been guilty of persistent cruelty to the wife.

In proceedings by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, against the husband on the ground of his persistent cruelty the justices found that the husband: (a) in April, 1953, and June, 1953, committed sodomy on the wife against her wish; (b) on many occasions up to and including November, 1953, tried to force the wife to submit to sodomy; and (c) on Nov. 25, 1953, had insisted on the wife masturbating him against her wish. The justices also found, as a separate finding, that the wife had not consented to the acts of sodomy or to being a party to the act of masturbation. The wife gave evidence that after the second act of sodomy the husband told her "if she bought Vaseline it would not hurt so much", and the husband's explanation that the Vaseline was required for some other purpose was rejected by the justices. Evidence was also given (i) that the wife said to the husband in the presence of a police officer "Look what you made me do on Wednesday night before I went to my mother's" and the husband replied "That is personal between us" (which, the justices found, referred to the act of masturbation and not to a discussion about money as alleged by the husband); (ii) that the husband had offered to buy two single beds if the wife would return to him; and (iii) that on Nov. 28, 1953, the day on which the wife left the matrimonial home, the husband tried to pull her upstairs. The magistrates, having directed themselves that there was a desirability but not an absolute necessity for corroboration of the wife's evidence, accepted her evidence as true, and further accepted that the evidence as to the Vaseline and evidence set out as heads (i) and (ii), last mentioned, constituted corroboration. The husband appealed, and the Divisional Court, though differing on the question whether the evidence stated constituted corroboration, held that the magistrates were justified on the evidence in coming to the conclusion that the wife had proved her case, and dismissed the appeal. The husband appealed.

Joseph Jackson for the husband.

D. R. Ellison for the wife.

LORD GODDARD, C.J., stated the facts and continued: These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution, and a jury would always be directed, in a case of this sort, if it were a trial on an indictment, that, whether the person was or was not to be regarded as an accomplice, it would be undesirable or dangerous to convict on the evidence of that person alone, but that it was open to the jury to convict, if satisfied with the evidence.

The question of corroboration very often arises. It comes up in three different ways. First, it arises where there is the unsworn evidence of a child. Although the unsworn evidence of a child may be taken in certain cases, if a man is being tried for an offence against the child, there can be no case to go to the jury unless the evidence is corroborated. Then, of course, it is for the judge to say whether there is any evidence that can amount to corroboration, and it is for the jury to say whether they are satisfied with the evidence that is tendered as corroboration. That is the first case.

The second case where the question of corroboration arises is where the witness is an accomplice. An accomplice is a person who, in a matter of crime or in a matter of this description, is a consenting party or a participant. A jury is always directed that it is unsafe to convict on the uncorroborated evidence of an accomplice; but there again, if the jury are satisfied that the evidence of the accomplice has established the case and if they feel that they can, without doubt,

A trust that evidence, it is within their province to convict, and they do convict quite often.

The third case is the ordinary sexual case, where a woman complains of an indecent assault or a rape. It has been the practice of judges for many years to warn juries that they should be reluctant to convict on the uncorroborated evidence of the woman, because it is so easy to make and so extremely difficult to rebut a charge of that description.

B Therefore, in substance, the warning given to a jury is the same whether it is about the evidence of an accomplice or whether it is about the evidence of a woman in a sexual case, and it makes no difference, of course, whether the act which the woman alleges has been committed is what I may call a natural act or, as it is in this case, an unnatural act.

C Here, after a full and careful analysis of the evidence, the Divisional Court held that the justices were entitled to come to the conclusion that the woman's evidence was true and that she had made out her case. Indeed, I think both judges in the Divisional Court came to the conclusion that her evidence was true. They had not seen the witnesses any more than we have, but I think it would be a very strong thing for this court now to say that, in their opinion, the evidence was not such as the justices were entitled to rely on.

D Counsel for the husband, who put every conceivable point that could be put for his client, and put them very clearly, commented that it was unfortunate that the two justices in this case were both women. I do not think, myself, that that was a disadvantage in this case, because, in the first place, one of the great advantages of lay magistrates is that they live, work and act amongst the people in their district. They know their characteristics, their trials, their difficulties, and so forth, and are often in a very good position to determine whether the person with whom they are dealing is telling the truth. Women justices can often be very valuable judges of fact where they have to consider whether women are telling the truth. Very often, I think, a woman may be able to come to a better conclusion whether women are more likely to be telling the truth than a man, though there is the risk of mistakes, which cannot be helped in human justice.

E In the present case the justices found that the wife was not a consenting party. That means that the wife, being forced by her husband, submitted to these acts, but that she was not a willing party. That seems to me to put her out of the category of an accomplice.

F If the justices came to the conclusion that these acts had been committed on her, and if she was not a consenting party in the sense of having voluntarily allowed her husband to satisfy himself in this unnatural way, I do not see how it could be said that she was not assaulted and that she is not entitled to say that these were acts of cruelty on her, or, at any rate, attempted acts of cruelty which she resisted so that her husband could not consummate them. That, surely, would be a case of persistent assaults on her.

G I do not propose to say more about the question of corroboration than this, that I think the acts here which the justices say corroborated her evidence are not very strong. LORD MERRIMAN, P., thought—and, on the whole, I agree with him—that, the justices having come to the conclusion that her story about buying Vaseline was correct, that would afford some corroboration of her evidence that she complained that these acts of her husband hurt her and that he told her to go and buy Vaseline, because that would make it easier. He denied telling her that, but admitted that he did tell her to buy Vaseline. That is the point which corroborates. The justices rejected the reason which he gave for telling her to buy the Vaseline, and I think that thus this matter did amount to some corroboration.

H The second matter was the statement which the husband made in front of the police officer, when the wife made what was obviously intended to be a reproach and complaint about the husband. He said: "That is personal between us";

in other words he said: "Something very private that took place between us." A
 The justices thought that corroborated her story about masturbation. That in
 itself, however, is not corroboration with regard to the masturbation, but it did
 enable the justices, in my opinion, to determine whether she was telling the truth
 in giving as one reason why she left her husband that he made her masturbate
 him shortly before. When she went back to the house with the police officer, B
 she said something which could be interpreted as relating to this incident and the
 husband then said: "That is personal between us." I do not think it goes any
 further than this, that it would enable the justices to come to the conclusion that
 this woman was a truthful witness; that in some of the things she said she was
 telling the truth and was not inventing these shocking stories. The evidence
 about the husband offering to buy two single beds is irrelevant, as is the allegation C
 that he attempted to pull her upstairs; but, as I have said, corroboration,
 although most desirable in these cases, is not necessary in point of law. I do not
 think the case of *Statham v. Statham* (1), to which we have been referred, lays
 that down. The important thing to remember about that case is that it depended
 on very peculiar and special facts. There is no doubt that there the husband
 explained to his wife what he desired to do to her and she readily consented to
 place her body to him in the way he wanted and thereby became a principal in D
 the felony. That is a very different case from the present case, where the justices
 have expressly found, as I think that they were well justified in finding, that
 the woman, although she may have submitted, was not a consenting party.

For these reasons, I can find no reason why we should disturb the decision of
 the Divisional Court, and, therefore, the appeal fails and must be dismissed.

HODSON, L.J., agreeing, referred to the facts and continued: I think E
 there has been some confusion of thought in this case, at any rate, in argument,
 because the argument has been conducted in this court on the footing that the
 wife was an accomplice, involving, to my mind, that she was what the justices
 found she was not, namely, a consenting party to the acts of sodomy and the
 specific act of masturbation.

I think it was open to the justices, on the evidence in this case, to find, as they F
 did and as the Divisional Court agreed they were entitled to do, that the wife
 was not a consenting party and that the acts were inflicted on her against her
 will. In those circumstances, no particular rule relating to an accomplice
 applies.

The case of *Statham v. Statham* (1), to which my Lord has referred, does not, G
 however, assist the husband, because that was a case in which the wife alleged
 sodomy against her husband, and an insufficient direction had been given to the
 jury who tried the case. The facts in that case showed clearly that the husband
 had explained to her the exact physical act which he wished to do to her, that she
 consented and placed her body at his disposal for the act to be committed and H
 that no compulsion of any kind was put on her. Her only reason for not allowing
 her husband to do it again was because she said it hurt her too much and she
 could not stand it again. That is not this case.

The law is, as I understand it, that in cases of cruelty, just as much as in other I
 sexual cases, corroboration is looked for. That does not say that the court cannot
 act without corroboration. In the case of this kind of unnatural offence, one looks
 more anxiously for corroboration, and in the present case the justices decided,
 on one view, in favour of the wife without any corroboration at all. I respect-
 fully agree with what LORD MERRIMAN, P., said in his judgment in dealing with
 this point. He said:

"The justices having, as I think properly, directed themselves about the
 warning which a court must give to itself in these matters, have considered
 the evidence of the parties and accepted the wife's evidence as true."

A He continued:

“It is true that they have gone further; they think that it was corroborated in that way; but they were entitled to accept her evidence as true even if they had not thought that this particular matter afforded corroboration.”

B Counsel for the husband has said that that will not do, because, when the justices have found sodomy and also in their findings have found corroboration where none existed, that must necessarily stultify their decision. I do not agree with that. I think that the decision based on the evidence of the wife, believing her and disbelieving the husband, can stand with a proper direction.

C In the Divisional Court there was a difference of opinion as to corroboration in regard to the Vaseline. I, for my part, take the view that the story about the Vaseline told by the wife, having regard to the false explanation that the husband gave, as the justices found, is capable of constituting corroboration.

D So far as the statement referring to masturbation is concerned, I think there is difficulty about that, because it is not capable of being related to the sodomy, and one has to be rather careful, in considering questions of corroboration, to see to what part of the case the corroboration is capable of being directed. It is quite true that it is capable of being used as corroboration of the act of masturbation, but I do not attach much importance to that in this case. It seems to me that this is essentially a case in which this woman was complaining of what she believed to be completed acts of sodomy, but which the Divisional Court thought more likely to have been attempts at sodomy, not completed acts. That conclusion seems to me the more probable, having regard to the careful analysis of the evidence of the wife which each of the judges gave. The finding of fact of the justices, modified as it is by the Divisional Court, is, I think, quite unassailable.

E I agree that the appeal should be dismissed.

VAISEY, J. : I fully concur with every word that has fallen from my Lords, and I can add nothing. I agree that this appeal fails.

Appeal dismissed.

F Solicitors: *Craigien, Hicks & Co.*, agents for *Patrick Bennett, Maddison & Wainwright*, Newcastle-on-Tyne (for the husband); *Peacock & Goddard*, agents for *Donald Harvey & Co.*, South Shields (for the wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

McINNES v. CLARKE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Streatfeild, JJ.), January 19, 1955.]

Estate Agent—Commission—Illegal commission—Payment in consideration of supplying addresses of houses to let—Accommodation Agencies Act, 1953 (1 & 2 Eliz. 2 c. 23), s. 1 (1) (b).

By the Accommodation Agencies Act, 1953, s. 1 (1): "Subject to the provisions of this section, any person who, during the continuance in force of this Act . . . (b) demands or accepts payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let . . ." shall be guilty of an offence.

The appellant's business, which was that of an estate agent, consisted substantially in the finding of furnished accommodation. On a person making an inquiry for accommodation, he would be asked his requirements and what rent he was willing to pay. He would then be told that the fee payable by him, if accommodated, was a sum equal to one week's rent of the premises taken by him, and that a deposit of approximately half of the weekly rental which he was willing to pay would be asked for. In the event of the client being willing to pay the deposit, an agreement would be entered into and signed by both parties. Sometimes before, and sometimes after, such an agreement was signed, the client would be given a list of addresses. After a client had obtained accommodation, he would return and pay the balance of the fee due. Unsatisfied clients who asked for a return of their deposit received it back in full. Two applicants who went to the appellant both entered into such agreements, paid such deposits, were given lists of addresses, found themselves accommodation and paid further sums to the appellant which made the total amount which they each paid equal to the amount of one week's rent of the premises which each of them took.

Held: the deposits were, in fact, paid for the addresses being supplied, and, accordingly, the appellant had accepted payment in consideration of supplying addresses to his clients, and was guilty of an offence against s. 1 (1) (b) of the Act of 1953.

Appeal dismissed.

[For the Accommodation Agencies Act, 1953, s. 1, see 33 HALSBURY'S STATUTES (2nd Edn.) 2.]

Case Stated.

This was an appeal by Case Stated from one of the metropolitan magistrates sitting at West London Magistrate's Court.

On June 1, 1954, the respondent, Stanley Clarke, preferred an information against the appellant, Douglas George McInnes, that, on Feb. 18, 1954, at 15, Hogarth Place, London, S.W.5, he accepted a cheque for £3 from Hazel Phyllis Berens, in consideration of supplying, or undertaking to supply, to her addresses or other particulars of houses to let, contrary to the Accommodation Agencies Act, 1953, s. 1 (1) (b); and further, that, on Mar. 1, 1954, at 15, Hogarth Place, London, S.W.5, he demanded £4 from Derick Eustace Adkins, in consideration of supplying, or undertaking to supply, to him addresses or other particulars of houses to let, contrary to s. 1 (1) (b) of the Act.

The information was heard on July 26, 1954, and the following facts were found. The appellant carried on the business of an estate agent at 15, Hogarth Place, S.W.5, in the firm name of Douglas West, and his business was that of finding furnished accommodation. His method of business was as follows. On a person making an inquiry for accommodation, he would be asked his requirements and what rent he was willing to pay. He would then be told that the fee payable by him, if accommodated, was a sum equal to one week's rent of the premises taken by him, and that a deposit of approximately half of the weekly

- A rental which he was willing to pay would be asked for. In the event of the client being willing to pay the deposit, an agreement would be entered into, and signed by the client and for and on behalf of the firm. Sometimes before, and sometimes after, the agreement was signed, a list of addresses would be given to the client. After a client had obtained accommodation, he would return, and pay the balance of the fee due. Unsatisfied clients who asked for a return of their deposit received it back in full. On Feb. 18, 1954, Hazel Phyllis Berens, being in need of somewhere to live, went to 15, Hogarth Place, and applied to the firm for accommodation. She was interviewed by one Stait, a servant or agent of the appellant, who produced a form of agreement which she read, and which was subsequently signed. She paid £3 to the firm in pursuance of this agreement as fifty per cent. of the approximate weekly rental referred to in the agreement. She was then given a list of addresses, probably before the agreement was signed, and thereafter received other lists daily for two weeks, from one of which she found accommodation for herself. She received no other assistance from the firm than the delivery of the lists. Having obtained accommodation, she later, in pursuance of the agreement, paid the firm a further £3 6s., making in all £6 6s., being equal to the amount of one week's rent of the premises taken by her. On Mar. 1, 1954, Derick Eustace Adkins, being in need of somewhere to live, went to 15, Hogarth Place, and applied to the firm for accommodation. He was interviewed by Stait, who produced another form of agreement which was read over to him, and which was subsequently signed. Before it was signed, Stait said that a deposit would be required, and Adkins paid the firm £4 as fifty per cent. of the approximate weekly rental referred to in the agreement. At some stage in the transaction, whether before or after the signing of the agreement was not clear, Adkins received a list of addresses from which he found accommodation for himself. He received no other assistance from the firm than the delivery of the list. Having obtained accommodation, he later paid the firm, in accordance with the agreement, a further £3, making in all £7, being one week's rent of the premises taken by him. F The appellant was carrying on an honest business.

- It was contended on behalf of the appellant in each case that one must look at the transaction as a whole and consider whether it was within the mischief of s. 1 (1) (b) of the Act, and that there was every difference between evasion and avoidance of an Act of Parliament. The mischief at which s. 1 (1) (b) was aimed, was the demanding or accepting of money by one person in return for giving to another person addresses or other particulars of houses to let, with the result that the other person might get a list of addresses which was quite useless, and might have paid money to no purpose. On looking at the transaction as a whole, and on the proper construction of the agreements between the appellant and Berens and Adkins, respectively, the effect was that, if the appellant should obtain living accommodation for them, and if they should take a tenancy of it, G they would pay the appellant, by way of commission, a sum equal to one week's rent of the premises taken, with the further provision that they would, on the making of the agreement, pay the appellant, as a deposit, a sum equal to approximately half the weekly rent which they were willing to pay, and would pay the balance on taking the premises obtained for them. If no premises were obtained for them by the appellant, the deposit would be repayable to them. H On this basis, the supplying of addresses or other particulars of houses to let was only incidental to the agreement, and was not the consideration for the demanding and accepting of the respective sums of money, the true consideration for which was the obtaining of living accommodation by the appellant for Berens and Adkins. It was contended on behalf of the respondent that the appellant was guilty of the offences with which he was charged, in that, as the payment of money was a condition precedent to the supplying of lists of accom- Imodation, the money demanded and accepted in each case was in consideration

of the supplying, or undertaking to supply, addresses or other particulars of houses to let. A

The magistrate was of opinion that it was clear that, unless the sums described as deposits were first paid, neither applicant could obtain any list of addresses, and that the only assistance given by the appellant to the applicants was the delivery of the lists of addresses from which they had to seek accommodation for themselves, and that, therefore, the transactions were contrary to s. 1 (1) (b) of the Act. He found the appellant guilty, and the appellant now appealed. B

Melford Stevenson, Q.C., and R. B. Willis for the appellant.

J. C. Phipps for the respondent.

LORD GODDARD, C.J.: This is a Case Stated by a metropolitan magistrate, before whom the appellant was summoned for breaches of the Accommodation Agencies Act, 1953. Section 1 (1) of that Act provides: C

“Subject to the provisions of this section, any person who, during the continuance in force of this Act,—(a) demands or accepts payment of any sum of money in consideration of registering, or undertaking to register, the name or requirements of any person seeking the tenancy of a house; (b) demands or accepts payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let . . .” D

shall be guilty of an offence.

[HIS LORDSHIP stated the facts and continued:] The two agreements show that what the appellant did was to say this to a person: E

“If you give me a deposit of approximately half the week’s rent I will send you some names and addresses, particulars of houses, and if you take one of them you have to pay me the rest of the sum, which is to be equivalent to a week’s rent. If I cannot satisfy you, I will give you your deposit back.” F

When I have read those facts and when I have read the section, I should have held that it was unarguable, though I am sure that no case is ever unarguable if counsel for the appellant is instructed to argue it, because it seems to me that what the appellant has clearly done is to accept payment in consideration of supplying addresses or other particulars of houses to people who have applied to him. That he has also undertaken to give back the money which has been deposited if the transaction does not result in the client getting anything, does not seem to me to be material. The statute might have made some provision for the position of a man who is honestly conducting a business, but the statute has not done that. What s. 1 (1) (b) says is that a man must not demand or accept payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let. The appellant did this. That was why he received the deposit, and the deposit was to be treated as part payment if the person took one of the houses supplied. I do not think there is any doubt about it. I think the magistrate was right and this appeal fails and must be dismissed with costs. G H

CASELS, J.: I agree. Evidently the practice which has been adopted by the appellant, in order to avoid the application of the Act to his method of carrying on his business, is to require a commission from the client who is seeking accommodation. That commission is said to be a sum equivalent to the first week’s rent. Then he further requires that there shall be a deposit of one half, and, as soon as the client has put down the deposit of one half, the appellant agrees to supply the client with a list of addresses. In one of these cases it is said that the person should get a daily list for every working day for the next eighteen days. What was the consideration for that? Payment of the money, I

A the payment of half of the first week's rent, not to be credited against the rent, but to be credited against the demand which was being made by the appellant. Section 1 (1) of the Act distinctly says:

“ . . . any person who, during the continuance in force of this Act,—
(a) demands or accepts payment of any sum of money in consideration of registering, or undertaking to register, the name or requirements of any person seeking the tenancy of a house; (b) demands or accepts payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let . . . ”

B shall be guilty of an offence.

C It seems to me that, so far from avoiding this Act, this particular practice was within it, and that any client who had approached the appellant and had walked out with a list of addresses would not be far from telling the truth if, in answer to an inquirer's question, “ What have you paid for them ? ”, that is for the list of addresses, the client had said “ I have paid £3 ”. Yet, in the ordinary way of business, if one goes into a house agent's office and asks him if he has any houses, one expects to walk out with particulars of those houses on his books, and does not expect to walk out minus a sum of money.

D I think the magistrate came to the right conclusion on the facts, and I agree that the appeal fails.

E **STREATFEILD, J.:** I agree. I have only to add that, in view of the finding of the magistrate that, unless the sums described as deposits were paid, neither of the applicants could obtain any list of addresses, which, in fact, was the only assistance which the appellant afforded them, it seems to me idle to contend that the wording of these contracts in which the consideration is expressed to be a client accepting accommodation, can be regarded as other than a colourable evasion or attempted evasion of this Act of Parliament. I think that, in view of the finding of the magistrate, it is quite clear that the real consideration, looking at the facts of the case, was that this money was paid in consideration of the supply of addresses to these clients. In those circumstances, I agree that that is within the mischief aimed at by this Act of Parliament, and this appeal must fail.

Appeal dismissed.

Solicitors: *Willis & Willis* (for the appellant); *Director of Public Prosecutions* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

WATSON v. MURRAY & CO.

A

[QUEEN'S BENCH DIVISION (Hilbery, J.), November 22, 23, 24, 25, 26, 29, December 6, 7, 1954, January 11, 1955.]

Execution—Writ of fieri facias—Seizure of goods—"Walking possession" agreement—Excessive seizure—Exclusion of debtor from own premises—Sale on debtor's premises without permission—Trespass.

B

Trespass—Sheriff—Writ of fieri facias—Seizure of goods—Excessive seizure—Exclusion of debtor from own premises—Sale on debtor's premises without permission.

Detinue—Sheriff—Writ of fieri facias—Seizure—Sale on debtor's premises—Goods lost during view—Negligence of sheriff in leaving goods unattended during view.

C

On Jan. 7, 1952, the defendants, who were sheriff's officers, having received a writ of fi. fa. in respect of a judgment debt due from the plaintiff, attended by their agent, M. at the plaintiff's shop and M. informed the plaintiff that he must take charge of everything in the shop. The plaintiff protested, and M. produced, and the plaintiff signed, a printed form of "walking possession" agreement. M. then left the shop. Under the agreement the plaintiff undertook, in consideration of the defendants not keeping their agent in close possession of the goods seized, to allow him to re-enter the shop at any time, using force if necessary. The value of the contents of the shop was greatly in excess of the amount required to satisfy the debt. The same procedure was followed by the defendants in relation to each of a series of writs of fi. fa. issued against the plaintiff between January and June, 1952. Some of the debts in respect of which the writs were issued were paid off, but on June 21, 1952, the defendants instructed an auctioneer to attend at the plaintiff's premises to prepare an inventory for the purposes of the sale of sufficient of the plaintiff's stock to meet the debts. The auctioneer tried to arrange for the sale to take place at certain auction rooms, but could not do so. On June 24, 1952, the defendants' representative attended at the plaintiff's premises and prepared lots for sale. On leaving the shop he locked it and took possession of the keys, so excluding the plaintiff from her own premises. On July 2, 1952, posters announcing the sale were exhibited on the windows of the shop, despite the plaintiff's protests. On July 3, 1952, the defendants kept the shop open to permit the goods to be viewed. The defendants' representatives did not keep a continuous watch on the goods during the view, and it was subsequently found that two garments, value £18, were missing. After the viewing, the defendants locked the shop and retained the keys. On July 4, 1952, the shop was opened by the defendants for the purposes of the sale, but the necessary money was paid on the plaintiff's behalf and no sale was held. The plaintiff sued the defendants for damages for trespass to the land and goods and in detinue or conversion for damages to the value of the two lost garments.

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Held: (i) the procedure for walking possession adopted by the defendants through their agent on Jan. 7, 1952, amounted in law to a seizure, the sheriff retaining notional possession by virtue of the walking possession agreement.

I

Dictum of BRAMWELL, B., in *Gladstone v. Padwick* (1871) (L.R. 6 Exch. at p. 212) applied.

(ii) when the defendants by their agent took walking possession, the seizure was excessive, but no damage resulted therefrom to the plaintiff.

(iii) the defendants were negligent in leaving the plaintiff's goods unattended at times during the view on July 3, 1952, and the plaintiff was entitled to recover the value of the goods which subsequently were missing.

(iv) the defendants had committed a trespass on June 24, 1952, in taking

A exclusive possession of the shop by locking it against the plaintiff and taking possession of the key.

(v) the defendants, in the circumstances of the present case, committed trespass when they did acts on the plaintiff's premises solely for the purpose of holding a sale there, and were liable in damages for the consequential loss.

B Per CURIAM: it may be that, if a sheriff can show that it was not possible to sell the goods except on the debtor's premises, it would be lawful for him to sell them there (see p. 360, letter D, post).

[As to Seizure under a Writ of fieri facias, see 14 HALSBURY'S LAWS (2nd Edn.) 47, 65, paras. 86, 111. As to Sale by Sheriff, see 14 HALSBURY'S LAWS (2nd Edn.) 67, para. 115; and for cases on these subjects, see 21 DIGEST 471, 472, 475-480, 513-531, 556-595.]

As to the Liability of the Sheriff for the Acts of his Officers, see 30 HALSBURY'S LAWS (2nd Edn.) 138, para. 266; and for cases on the subject, see 41 DIGEST 108, 652 et seq.]

Cases referred to:

- D** (1) *Bissicks v. Bath Colliery Co., Ltd.*, (1877), 2 Ex.D. 459; 46 L.J.Ex. 611; *affd.* C.A., (1878), 3 Ex.D. 174; 47 L.J.Q.B. 408; 38 L.T. 163; 42 J.P. 708; 21 Digest 609, 1979.
- (2) *Mortimore v. Cragg*, (1878), 3 C.P.D. 216; 47 L.J.Q.B. 348; sub nom. *Re Surrey, Sheriff, Mortimore v. Cragg*, 38 L.T. 116; 21 Digest 609, 1977.
- (3) *Gladstone v. Padwick*, (1871), L.R. 6 Exch. 203; 40 L.J.Ex. 154; 25 L.T. 96; 21 Digest 476, 564.
- E** (4) *Lumsden v. Burnett*, [1898] 2 Q.B. 177; 67 L.J.Q.B. 661; 78 L.T. 778; 21 Digest 510, 857.
- (5) *Gawler v. Chaplin*, (1848), 2 Exch. 503; 18 L.J.Ex. 42; 13 J.P. 154; 154 E.R. 590; sub nom. *Gwaller v. Chaplin*, 11 L.T.O.S. 68; 21 Digest 523, 966.
- F** (6) *Ash v. Dawnay*, (1852), 8 Exch. 237; 22 L.J.Ex. 59; 20 L.T.O.S. 103; 17 J.P. 183; 155 E.R. 1334; 21 Digest 508, 843.
- (7) *Reed v. Harrison*, (1778), 2 Wm. Bl. 1218; 96 E.R. 717; 21 Digest 508, 840.
- (8) *Re Purcell*, (1884), 13 L.R. Ir. 489; 21 Digest 612, c.

G **Action** for damages for trespass to goods and land of the plaintiff and also for detinue or conversion of goods, the property of the plaintiff. The facts appear in the judgment.

Leonard Caplan, Q.C., and *W. Frankel* for the plaintiff.

Sir Frank Soskice, Q.C., and *Michael Lee* for the defendants.

Cur. adv. vult.

H Jan. 11. **HILBERY, J.**: This is a claim for damages for alleged trespasses to goods and land of the plaintiff by the defendants acting as officers of the Sheriff of Surrey, coupled with a claim for £18 as damages for detinue or conversion of two women's dresses, the property of the plaintiff, alleged to be of that value. The alleged trespasses complained of by the plaintiff were all acts said to have been done by the defendants acting as sheriff's officers in the course of executing writs of fi. fa. delivered to them. The plaintiff alleges that in January, 1952, in March, 1952, and in May, 1952, there were excessive seizures by the defendants when executing writs of fi. fa. and that the defendants thereby trespassed on the plaintiff's goods. Next, the plaintiff alleges and complains that in the course of executing the writs the defendants took possession of her shop and excluded her from the control thereof on two occasions, viz., on Jan. 15 and Jan. 16, 1952, and on June 25, and during part of July 1 and July 2, and the whole of July 3, 1952.

I The material facts, in outline only, are as follows. In March, 1951, the plaintiff bought the business of a ladies' and children's outfitter then being carried on

under the name of Augusta at 48, High Street, Camberley, Surrey, for £7,014, made up of £2,000 for the lease and goodwill, £4,514 for stock and £500 for fittings, etc. The living premises over the shop were included in the lease and the plaintiff went there to live and lived there until the business was finally closed. The plaintiff was without any previous experience in the ownership and control of such a business and by January, 1952, through overbuying of stock, she was beginning to be in grave financial difficulties. On Jan. 2, a firm called Seton Cotterall signed judgment against her for £393 2s. 6d. On Jan. 5 the plaintiff executed a bill of sale on a large number of the articles comprising the stock of her shop to secure a loan of £500, the lender of the £500 being Mr. Mitchener. On Jan. 7, the defendants, having received a writ of fi. fa. in respect of the judgment debt and costs, called at the plaintiff's shop, by Mr. May their employee and representative, to demand payment of the amounts due or failing payment to levy execution. Whether what took place amounted to a seizure by the sheriff and, if so, whether such seizure was excessive, are matters which are in issue and fall to be decided.

The plaintiff signed a form of "walking possession" agreement offered for her signature by the defendants' representative, Mr. May. Taking this "walking possession" agreement so signed by the plaintiff with him, Mr. May left the plaintiff's premises. On Wednesday, Jan. 16, at about 1.45 p.m. Mr. Mitchener, the holder of the bill of sale, paid the amount then demanded by the defendants as representatives of the sheriff. On Feb. 20, 1952, a firm called Portenay signed judgment against the plaintiff for £235 5s. 2d. and £13 costs. Having received a fi. fa. in respect of this judgment and costs, on Mar. 3, the defendants sent their same representative, Mr. May, to the plaintiff's premises for the same purposes as on the occasion of his call in January. Again the plaintiff signed the same form of walking possession contract as she had signed in January with the same result, viz., that the sheriff's man did not remain on the premises. On Mar. 18, the defendants removed 120 garments from the plaintiff's stock for sale by auction. On Mar. 24, the money required by the sheriff was found and paid by the plaintiff. Again whether there was a seizure on this occasion and, if so, whether such seizure was excessive, are questions which fall to be decided.

On May 15, a firm called Hubert Gowns, Ltd., obtained judgment against the plaintiff for £132 10s. On May 16, having received a writ of fi. fa. in respect of this judgment, the defendants again sent their representative, Mr. May, for the same purpose as on the previous occasions and again the plaintiff signed the same form of walking possession agreement. Exactly similar calls were made by the defendants' representative, Mr. May, on May 27, June 10, June 13, and June 20, the defendants having received prior to each of such calls writs of fi. fa. in respect of judgments against the plaintiff for £210 1s. 6d., £60 11s., £102 8s. 6d. and £51 6s. respectively, making a total of indebtedness on the judgments of £556 17s. in addition to which there were sums for costs and sheriff's fees, charges and expenses.

On June 24 or June 25, the defendants put "lot" tickets on a number of articles in the plaintiff's shop with a view to holding an auction sale thereof at the plaintiff's shop. It is now conceded that they locked the shop, excluding the plaintiff therefrom, from about 4.30 of June 24, until the morning of June 25. The defendants prepared and published posters advertising this proposed sale and advertised it in the press. The poster and the advertisements announced that the sale was to be without reserve at 48 High Street, Camberley, on July 4, and was to be a sale of "the valuable stock of a high class costumier and ladies' outfitter". Then followed a list of what was announced for sale concluding with a statement that the articles were to "be sold by auction by Messrs. H. W. Smith & Moon on the premises as above on Friday, July 4, 1952, at 12 o'clock noon".

The defendants posted more than one of these posters on the window of the

A plaintiff's shop. They were found in that position when the plaintiff returned from London during the afternoon. Mr. Bond's evidence was that on July 2, when he and Mr. Greer left the premises the shop was again locked up for the night. The plaintiff's evidence was that the defendants' representatives had been at the premises all day on July 1, and had closed the shop during that day. I think the plaintiff has here been confused about the exact sequence of events

B because Mr. Bond's evidence, and I thought him reliable, was that he was not in fact at the premises between June 24 and July 2, and could not therefore have been one of the defendants' representatives there on July 1, as the plaintiff asserted. On July 2, he and Mr. Greer, the sales foreman, who was with him, found that forty-eight of the lot numbers which had previously been put on various garments, were missing. They had obviously been removed by the

C plaintiff. Mr. Bond and his colleague then re-lotted the selected garments while the plaintiff continued her business in the shop. Four rails of garments were lotted and put aside as also were the garments in one show case. Mr. Bond saw the plaintiff interfere with the first rail of garments which they had so re-lotted. The next day, July 3, the defendants opened the premises again, this being the day advertised for viewing the goods which were to be sold.

D I cannot accept the plaintiff's evidence that Mr. Moon was at the premises on Thursday, July 3, in face of his denial that he was there on July 2 and 3. It is the fact that on July 3 the defendants were exercising complete control over the premises and the goods which had been lotted, and were inviting viewers to come in and inspect the goods which were in the catalogue for the sale. On July 4, the day fixed for the sale, the defendants' own evidence given by Mr. Moon

E was that their posters were outside the premises and that there were people arriving for the sale at 11.15. However, Mr. Moon, at the premises, was informed by his partner Mr. Coombs by telephone that all moneys due had been been paid and that the sale must be stopped. It was announced to those outside the shop, who were there waiting for the sale to begin, that the sale would not take place. The plaintiff asserts that Mr. Moon then stood outside the shop, and

F when asked why there would be no sale said "she has paid her debts". Mr. Moon denied that he ever said this and I am not satisfied that these were the words that were used. After the sale was stopped it was found that two of the garments which had been included in the catalogue were missing. It is clear not only from the evidence of the plaintiff but also in my view from the evidence given by Mr. Moon that the plaintiff at all times objected, and made it clear to the

G defendants that she objected, to their holding a sale on her premises.

The first question to be considered is whether what took place when Mr. May went to the premises on Jan. 7, armed with the writ of *fi. fa.*, amounted in law to a seizure of the plaintiff's goods. Mr. May is now dead, but his report on his visit is in evidence. He states that on calling he informed the plaintiff of the nature of his visit and was told by her that there was a bill of sale on all the stock

H and fittings in the shop in favour of Mr. Mitchener; she stated that her solicitor had tried evidently unsuccessfully to arrange for payment of the debt by instalments and that she was not in a position to pay anything on account that day. Mr. May reported that it was a very good class shop and fairly well stocked with ladies' dresses, suits, gloves, stockings, etc. The plaintiff's evidence was that Mr. May came at about 10.30 a.m. on Monday, Jan. 7, handed the plaintiff the defendants' card showing that they were sheriff's officers and he was their representative, and said that he must take charge of everything in the shop; that she said she did not want him in the shop and asked what right he had to stay there, that Mr. May then produced a printed form and said that if she signed it and guaranteed to pay him the money which she took, except whatever was required for staff wages, he need not stay all the time. Thereupon the plaintiff signed the printed form which the defendants regularly use and which is known as a "walking possession" agreement. It is in the following terms:

I

"Dated (blank) To the Sheriff of the County of Surrey and to Messrs. Murray & Co., his officers. (Blank) v. (Blank). In consideration of your not keeping the man in charge of the goods seized herein in close possession, and allowing him to leave each night and attend each day (or as may be arranged) I hereby authorise and empower you and your representative to re-enter my house and premises, No. (blank) [address] at any time you may think proper, under a writ of fi. fa. in the above action dated (blank) and if necessary to use force for that purpose, and I also undertake not to remove, or allow to be removed, any of the goods in the meantime, and to pay the possession money day by day."

It was argued for the defendants—these being the facts, and I think the plaintiff's evidence here is substantially accurate—that there was no seizure: that all that Mr. May did and said only amounted to an explanation by him of what the legal situation would be if the plaintiff did not either satisfy the judgment debt or sign the walking possession agreement and that as the plaintiff thereupon signed the agreement no seizure was made and the defendants contented themselves with the notional possession which resulted from the agreement. I am unable to accept this contention.

On the subject of what is sufficient to constitute a levy or seizure by the sheriff in execution of a writ of fi. fa. there is fortunately some authority. In *Bissicks v. Bath Colliery Co., Ltd.* (1), where the sheriff's officer went to the plaintiff's premises and told him he had a warrant to execute a writ of fi. fa. for £28 7s. 2d. and that he required immediate payment, otherwise further proceedings would be taken and the man must remain in possession, the plaintiff paid the sums demanded, including poundage and levy fees, the court held that the sheriff was entitled to both these items. COCKBURN, C.J., said (2 Ex.D. at p. 462): "We must look to see if the writ has been virtually executed", and CLEASBY, B., said (*ibid.*): "... I think in this case there was in substance an actual levy . . ." On appeal from that decision BRAMWELL, L.J., said (3 Ex.D. at p. 175):

"The question is whether, upon the facts, there was a seizure . . . upon the whole I think there was a seizure, for the officer did threaten to leave a man in possession."

BRETT, L.J., said (*ibid.*):

"I agree that there must be a seizure; but upon the facts I think there was a seizure. The sheriff's officer went to the plaintiff's house with a man, he obtained entry into the house, and whilst he was there the plaintiff's goods were under his control; he spoke as if he had made a seizure, and he treated what he was doing as if it was a seizure . . ."

In addition it has been expressly stated by BRETT, L.J., in *Mortimore v. Cragg* (2) (3 C.P.D. at p. 219) that

"... Where an execution issues the transaction may be divided into four parts: 1. The delivery of the writ to the sheriff: 2. Seizure: 3. The possible payment of money after seizure: 4. If no payment, sale."

There can be no doubt that Mr. May went on each occasion armed with a warrant for the purpose of executing a writ of fi. fa. When he says in his report that he informed the plaintiff of the nature of his visit, and the plaintiff, as I believe, asked what right he had to stay there and expressed her objection to his staying, and when I find that he took an agreement in the form in which he did take it, I am satisfied that there was what amounted to a seizure. The opening words of the agreement are "in consideration of your not keeping the man in charge of the goods seized herein in close possession". Those are words chosen and put forward by the defendants themselves. They are only consistent with the fact that goods have been seized. Furthermore, by the concluding words of the

A agreement the plaintiff undertook "not to remove, or allow to be removed, any of the goods in the meantime, and to pay possession money day by day". Again, those words are only consistent with there having been a seizure. In *Gladstone v. Padwick* (3), one of the questions was whether what was done by the sheriff's officer on a certain date amounted to an actual seizure, and BRAMWELL, B., said in the course of his judgment (L.R. 6 Exch. at p. 212):

B "It is admitted, and it is clear, that it is not necessary for the sheriff to lay his hand on a single article . . . I am of opinion that, where property is all one holding, as it was here, if the sheriff goes and makes known . . . that he is come to seize, and does, so far as words and intention can go, seize all the goods on that holding, he has done enough . . ."

C Those words are applicable to what took place on each of the occasions in January, March, May and June when Mr. May called at the plaintiff's shop and premises to execute the several writs of fi. fa. which figure in this case.

D It was urged for the defendants that the position of the sheriff which resulted from what was done and said on each of the occasions when Mr. May called on the plaintiff, and entered her premises for the purpose of executing the writ, was not that the defendants as sheriff's officers had seized, but that they had obtained contractual rights under the several walking possession agreements which the plaintiff signed the result of which was to give them a notional possession. It is true that in *Lumsden v. Burnett* (4), A. L. SMITH, L.J., spoke of such an agreement as giving only a constructive possession and CHITTY, L.J., spoke of it as giving a possession merely constructive or notional. In that case, the court

E held that the existence of such an agreement was strong evidence to show that the officer leaving the premises in the terms of such an agreement was not abandoning possession. In that case, as in this, after leaving the premises having obtained the walking possession agreement, the officer paid a subsequent visit or visits to the premises to see that the goods were not being removed. I think it is right to say that after seizure the sheriff may continue in possession either actually by leaving a man in the premises or notionally under such a walking possession agreement as was obtained on each occasion from the plaintiff in this case.

F Since therefore in my view there was on each occasion a seizure, it becomes necessary to consider whether in January and March or in May and June the seizures were excessive so as to give rise to an action on the case against the sheriff. That an excessive seizure gives such a cause of action was decided in G *Gawler v. Chaplin* (5). In that case the first alleged breach of duty on the part of the sheriffs was that they had wrongfully seized goods of the plaintiff of greater value than sufficient to pay the debt, interest, poundage and expenses, although they well knew part would be sufficient. On motion in arrest of judgment after verdict the question was whether that alleged breach was good in law. It was held that it was. In giving the judgment of the court PARKE, B., H said (2 Exch. at p. 507):

" . . . in the first instance, the duty of the sheriff is confined to seizing goods that would be reasonably sufficient, if sold, to pay the sum endorsed on the writ—that is, the debt, interest upon the debt, poundage, and expenses; and if the sheriff seizes more, prima facie he is a wrongdoer . . ."

I There can be no doubt on the evidence that the stock in the plaintiff's shop was far more extensive than it was necessary to seize to satisfy the judgment debt in respect of which either of the writs of fi. fa. in hand in January and February was issued even including the other charges enumerated by PARKE, B.

There was therefore in my judgment a seizure on each occasion which was excessive; but it resulted in no damage to the plaintiff. She was allowed to carry on her business as before and did so until the sheriff was paid. With regard to the alleged seizure in March on the fi. fa. issued in respect of the Portenay judgment for £235 odd and £13 costs, I am satisfied that when May called to

execute the writ of fi. fa. substantially the same course was followed, and that there was therefore what amounted in law to a seizure in the first place of all the plaintiff's stock at her shop, and this was an excessive seizure. Again, however, there was an exactly similar walking possession agreement signed by the plaintiff and again she was allowed to carry on her business without interruption and with power to dispose of any of the items which formed part of the stock by way of sale until Mar. 18. On Mar. 18, however, the defendants took actual possession of 120 dresses and removed them for sale, and it was conceded in the course of the case that this actual seizure and removal was not excessive. The only claim therefore which remains is for the technical seizure of the whole stock, prior to the selection and removal of the 120 garments made on this occasion when the defendants' man Mr. May called to execute the writ of fi. fa. on Mar. 3. True that general seizure was in law effective until the particular seizure of the 120 garments only was made on Mar. 18, but again it resulted in no damage to the plaintiff inasmuch as she was left by agreement with power to deal with the whole of that stock in the ordinary course of her business. The sale of the goods so collected and removed was arranged for Mar. 25, at the auction rooms of Messrs. E. Reeves, Ltd. at 114, Church Street, Croydon, but on Mar. 24, the execution was paid out and the sale was abandoned.

I turn now to the happenings in May and June. On May 16, the defendants having received a writ of fi. fa. in respect of judgment for £132 10s. obtained against the plaintiff, sent their representative Mr. May to the plaintiff's shop to execute the writ. Once again, from the plaintiff's evidence and Mr. May's written report, I find that substantially the same procedure was gone through between Mr. May and the plaintiff as on the previous occasions and I am satisfied that he then made what amounted in law to a seizure of the contents of the shop. That the defendants themselves regarded what Mr. May did on that date as a seizure there can be no doubt for there is a letter from them to the judgment creditors' solicitors dated May 28, headed "Hubert Gowns, Ltd. v. Watson" which begins: "We duly seized under this execution on the 16th instant". On May 26, being in possession of a writ of fi. fa. in respect of a judgment for £210 1s. 6d. obtained by a firm called Stafford, Ltd., the defendants again sent Mr. May to execute the writ. Mr. May's written report as to what passed, using the same language as before, says that he informed the plaintiff of the nature of his visit. Again, I can only conclude that he purported to make a seizure.

On May 27, through her solicitor the plaintiff pleaded with the defendants to defer action, saying there were funds due to the plaintiff which he hoped would become available to satisfy the two executions. By a letter of May 30, Mr. Mitchener, the holder of the bill of sale, wrote that with regard to these two executions he made no claim against "their goods", whatever that may mean. It was apparently taken to mean that he abandoned any claim he might have under the bill of sale. On June 10 there was a third execution in respect of a judgment obtained by Lennox Knitwear, Ltd., for £60 11s. On June 13 there was another execution in respect of a judgment obtained by Sidney J. Lindsay, Ltd., for £102 8s. 6d. Again in his reports Mr. May uses the same language as before to describe what passed between him and the plaintiff when he called to execute each of the writs of fi. fa. issued in respect of these two judgments.

On June 20 the defendants received yet another writ of fi. fa. in respect of a judgment obtained by Wallace Thorn, Ltd., for £51 6s. and armed with the appropriate warrant Mr. May called on the plaintiff and informed her, as he reported, of this judgment. Again, I think that he intended what he did when he called as execution of the writ of fi. fa. and there is no doubt that the plaintiff regarded and accepted it as such. In view of what subsequently transpired, it is not unimportant to notice that in response to the plaintiff's solicitors' plea to them to defer the actual sale of the plaintiff's goods to satisfy the executions of May 16 and 26, the defendants not only delayed action for the seven days asked

A for but agreed by a letter of June 3 to refrain from taking any steps towards auction until June 6, and that the plaintiff's solicitor wrote on June 4 in reply that he appreciated their consideration in these matters. The plaintiff's solicitor, Mr. Barnes, in a telephone conversation on June 10, agreed that, if the necessary money was not forthcoming by June 11, the defendants must proceed with a sale. Again on June 11, by which time there were, as I have pointed out, B these several executions current, Mr. Barnes was writing that funds were expected and would undoubtedly come into his hands very shortly, but that he appreciated that the defendants could not refrain from carrying through the executions indefinitely and must therefore proceed.

In addition to being a partner in the defendant firm Mr. Moon owns and conducts the business of an auctioneer under the name of H. W. Smith & Moon. C Mr. Coombs, who is Mr. Moon's partner in the defendant firm, had all the executions in question in his hands. On June 21, writing in the name of the defendant firm, he instructed H. W. Smith & Moon, that is to say Mr. Moon, his partner, in his capacity as the auctioneer, to attend at the plaintiff's premises as soon as possible to make an inventory and catalogue of sufficient effects to realise the sum of £608 plus 8s. 6d. per day after June 23 and Mr. Moon's charges. He D informed Mr. Moon in the same letter that there was no claim being made any longer by Mr. Mitchener. He then concluded the letter as follows:

E "We leave it to you as to whether it is best to either remove for sale or sell upon the premises. If the latter course is decided upon by you we must ask you to hold the sale at the very earliest moment, in any event not later than July 2 or 3, next. Furthermore, if the sale is being conducted on the above premises, particular care must be taken to safeguard the effects and stock, that is, the premises must be closed and the keys held. If there is any risk of goods being disposed of by the [plaintiff], they had better be removed for sale."

On receipt of that letter Mr. Moon by telephone tried to arrange as before with F Reeves, Ltd., for auction rooms for a sale of whatever articles he decided must be taken from the plaintiff's stock to satisfy the current executions and charges. Reeves, Ltd., however, refused facilities for the sale. On June 23 they wrote giving their reasons, saying:

G "Our auction rooms are open for the reception of goods for absolute sale at any convenient time, but where goods have to be withdrawn after the sale has been advertised and prepared it entails not only pecuniary loss as on the last occasion, but upsets the timing of the sale of other lots besides putting us in disfavour with the trade."

H Pursuant to his instructions Mr. Moon attended to prepare for a sale, deciding in his own mind that in the circumstances the sale must be held on the premises. I am satisfied that he decided he must hold the sale on the premises in good faith, and not with any malice towards the plaintiff. By the delays which the defendants had conceded, they were in danger so far as the several judgment creditors were concerned. It was urgently necessary that they should sell and satisfy the several writs and executions then in hand before what had occurred constituted an act of bankruptcy on the part of the plaintiff. From experience I they knew that it would be most difficult to find any auctioneer with an auction room which could accommodate the goods for sale who would be willing to hold the sale. From experience they knew that any such auctioneer would make the same objection as Reeves, Ltd. had made when refusing to undertake the sale, more especially as all auctioneers knew that the remuneration allowed them on a sheriff's sale was much less than that which they ordinarily charged and received. Any auctioneer would know that he might be allowed only seven per cent. if the sheriff's bill was taxed, as against their ordinary remuneration of twelve and a half per cent. The defendants had delayed selling the plaintiff's goods at the

request of the plaintiff to give the plaintiff time to get in hand the moneys which her solicitor was saying were expected and which would enable her to pay out the executions. The consequence was that the selling of the goods had become a matter of extreme urgency. It was for these reasons that Mr. Moon decided to sell on the premises. He attended at the premises on June 23, and went over the whole stock intending to sell something of everything to an extent which would provide the amount required and to leave stock which would enable the business to be carried on. He prepared a posting bill and sent it to the printers that day in order to announce the sale as soon as possible. He informed the plaintiff that he intended to hold the sale on the premises. That the plaintiff objected there is no doubt, and that Mr. Moon knew that she objected I have no doubt. A B

On June 24 Mr. Moon again attended all day at the shop and lotted for catalogue purposes about 280 lots. He made a rough assessment of what they might fetch under the hammer. He calculated that they might make an overall average of 50s. a lot. That afternoon, when he left, he caused the shop to be locked up thereby excluding the plaintiff from her own premises because, he said, he felt an element of risk. If there was an element of risk the duty of the sheriff was to leave a man in possession or to remove the goods which he intended to sell. It is no answer to say that today he cannot obtain a man who will do this at the scale fee allowed to a sheriff for a man in possession. In my view it was a trespass on the plaintiff's property to put himself into exclusive possession of her premises by locking them against her and taking possession of the keys. Either on that day or on June 25, 1952, the defendants kept the shop locked all day. C D E

On July 2 posters were stuck on the windows of the shop on the defendants' instructions. On July 3 some of the defendants' men were at the premises keeping the premises open for viewing but allowing the plaintiff to carry on her business so far as she could in such circumstances. The goods for sale which were there to be viewed were put at the back of the shop and in one show case. The defendants' representatives did not keep a continuous watch on the viewers and the goods which they had thus lotted and separated. It was admitted by the defendants that they left the premises for meals. The result was that the next day after the executions had been satisfied and the proposed sale abandoned it was found that two of the lotted garments were missing. Apparently they had been stolen. There is no evidence that the plaintiff had sold them, and I am satisfied that the plaintiff is not dishonest and would not have insisted as she did on having a written acknowledgment by the defendants' man on the premises that these two garments were missing if she had been conscious that she had herself taken them and sold them. Even if, as it was argued for the defendants, the plaintiff can only recover the value of these lost garments if she proves that they were lost through the defendants' negligence, I am of opinion that she has shown that. If the defendants were keeping the shop open for anyone to come in and view the garments lotted for sale and taken by them into their possession and control, they were guilty of negligence if they left those garments unattended. The plaintiff's claim for £18, the value to her of these lost garments, is, therefore, in my view well founded. F G H

After the viewing was over the defendants again locked up the premises and kept the keys. On July 4 the premises were opened by the defendants for the holding of the sale but it was stopped, and no sale took place because the necessary moneys were paid on the plaintiff's behalf. I

The questions which have to be decided in connection with these happenings in June and July are first, did the defendants trespass by preparing for this sale on the premises and by using the premises for their preparations for the sale and by posting the bills announcing the sale on the plaintiff's premises without her permission and in spite of her objection of which they knew, and second, did

A the defendants on this occasion make an excessive seizure in taking for sale what appears in the catalogue.

On the second question there was much evidence on both sides. The plaintiff's contention that the seizure was excessive is mainly based on evidence that at such a sale you might ordinarily expect to realise a certain fraction or percentage of the retail prices of the articles and on the fact that at a later date the fixtures
B which were included in the catalogue sold for a comparatively large sum and the other articles realised, when sold by tender, about twenty-five per cent. of their retail price. On the other hand the defendants' evidence and contention was that it is in the highest degree uncertain what such goods will fetch under hammer, much depending on whether there is a good or a poor attendance at the sale: that a sale such as this will be likely to realise less if held in the country than
C if held in a London auction room; that such a sale largely depends on the weather and on the trade buyers attending, and that the sheriff must always allow a margin as he has a duty to the execution creditors to execute the writ so as to make of the goods sufficient to satisfy the executions.

I am satisfied that the defendants, in lotting and cataloguing what they did, acted in good faith, and I am not satisfied, having regard to the hazards attending
D such a sale, that there was an excessive seizure. It must be remembered that most of the goods in question were seasonal and fashion goods. Moreover, it by no means follows that anything like all the lots would necessarily have got a bid at all.

The serious question which remains is the question whether the defendants had any right in law to insist on using the plaintiff's premises as they did for the purposes connected with holding this sale there. It is clear that the writ of *fi. fa.*
E does not require or authorise the sheriff to seize the land or premises of a debtor. It requires him to make of the goods of the debtor sufficient to satisfy the execution creditors' judgment debt. It gives the sheriff a right to remain on the debtor's premises for a reasonable time and no longer (see *Ash v. Dawney* (6)), and it empowers him to sell sufficient of the debtor's goods to satisfy the debt in
F respect of which the writ was issued. *Reed v. Harrison* (7) is authority for saying, as the headnote to that case expresses it, that on attachment of goods, the officer cannot legally continue in possession of the defendant's house, or keep the goods therein for a long and unreasonable time, but must remove them to a place of safe custody: else he is a trespasser *ab initio*.

At common law the sheriff's duty is to remove the goods to some place where
G they can be safely kept until they are sold, but I cannot find any English authority which decides that he can, if he chooses, use the debtor's premises for the purpose of holding a sale there. It does not appear to me that in this case it is established that it was impossible to hold the sale anywhere else than on the plaintiff's premises. It was no doubt extremely difficult in the particular circumstances to arrange for it elsewhere, and no doubt the defendants decided that it was
H expedient to hold the sale at the plaintiff's shop, but the plaintiff objected and they knew that she objected. They must in those circumstances, it seems to me, show that they had a legal right to do what they did notwithstanding the plaintiff's objection.

In MATHER ON SHERIFF AND EXECUTION LAW (3rd Edn. at p. 126) there is
I reference to an Irish case in which, it is said, it was held that a sale should as a rule take place on the execution debtor's premises (*Re Purcell* (8)), but the learned editor immediately goes on to say:

"It would certainly be better that the sheriff should obtain the debtor's licence to hold the sale upon his premises, as there appears to be some doubt as to his authority to use the premises for the purpose of a sale."

In my view an examination of the facts and the judgment in the Irish case shows that the statement that it was there held that a sale should as a rule take place

on the execution debtor's premises is an over-statement. That opinion was expressed *passim* by MILLER, J., when he said (13 L.R.Ir. at p. 496):

"... he (the sheriff) does not allege that he made any attempt whatever to make any sale of the goods upon the premises of the execution debtor, which was his primary duty: ..."

This statement was made in a part of his judgment when the learned judge was commenting on the sheriff's claim to his expenses in removing and returning goods of the debtor to the debtor's premises, but after he had already decided that the sheriff could recover only the fees and expenses which were provided for him by the Act 6 Anne c. 26, s. 16 and s. 23, and by the Act 43 Geo. 3 c. 46, s. 5, and that these expenses of removal and of return of the goods were not provided for the sheriff by those statutes. The case is not, therefore, in my view a direct authority for the proposition that it is the duty of the sheriff to sell the debtor's goods on the debtor's premises. Counsel before me in this case have not found (nor have I been able to find) any authority which decides that such is the duty of the sheriff acting under a writ of *fi. fa.* The defendants' evidence in this case shows that the practice is to remove and sell in an auction room such goods as were here seized. It may be that if the sheriff can show that it was not possible to sell the goods except on the debtor's premises, it would be lawful for him so to do. Part of his duty is to sell the goods so as to make of them sufficient to satisfy the debt which is the subject of the writ of *fi. fa.* which he has to execute and the law will not require of him that which is impossible. But the defendants in this case have not established that it was impossible to remove and sell the goods away from the plaintiff's premises. They have shown that by the concessions they had made to the plaintiff it had become extremely difficult for them so to do before an act of bankruptcy by the plaintiff was committed, but their evidence does not amount to more than this.

There were, therefore, in my view trespasses on the plaintiff's property committed by them when they did those acts which were solely done for the purposes of and incidental to the holding of the sale on the plaintiff's premises. The acts which in my view were such trespasses were the locking of the plaintiff's premises so as to exclude her therefrom when they had lotted the goods; the opening of the plaintiff's premises to the public for the viewing of the goods catalogued and the admission by them to the plaintiff's premises of all who chose to come in for the ostensible purpose of viewing the goods; and the posting of their posters on the plaintiff's premises.

What damage the plaintiff suffered in consequence it is difficult to say, but the poster certainly was in terms which would convey to anyone reading it that the plaintiff's stock and the fixtures in her shop were being sold, and anyone reading it might reasonably have concluded that the business life of the shop was ended. The result was said to have been that the plaintiff's takings thereafter were so prejudicially affected that she was obliged finally to sell up and close down. That her takings afterwards were trifling compared with what they formerly had been was shown by the accounts of the business, but to what extent this would inevitably have been the case owing to her grave financial difficulties it is not possible to decide. But I do not think it can be doubted that the posting on the premises of such bills as were put there must have been damaging to her chances of making a business recovery. Moreover the fact that the bills were there on the viewing day and on the morning of the day of the intended sale in spite of her protests and in spite of the fact that she had once before then abated the trespass by removing the poster bills amounted to conduct which aggravated the damage and which may properly be taken into consideration. I assess the damages for these trespasses, therefore, as more than nominal and award £300.

Judgment for the plaintiff.

Solicitors: *Harold Kenwright & Cox* (for the plaintiff); *Wigan & Co.* (for the defendants).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

A **BAXTER v. KELDON.**

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Streatfeild, JJ.), January 18, 1955.]

Gaming—Betting house—Assisting in conducting the business of a betting house—Money and betting slips received in street and delivered at betting house—Betting Act, 1853 (16 & 17 Vict. c. 119), s. 3, s. 4.

B The respondent received money and betting slips in the street as agent for the keeper of a betting house. He delivered the money and slips at the betting house but took no part in the work done inside the betting house. The respondent was charged with assisting in conducting the business of the betting house, contrary to s. 3 of the Betting Act, 1853.

C **Held:** if the respondent had committed an offence, his offence was against s. 4 of the Act of 1853, and he was not guilty of an offence against s. 3.

Dicta of LORD MAUGHAM, L.C., in *Milne v. Comr. of Police for City of London* ([1939] 3 All E.R. at p. 403) applied.

Appeal dismissed.

[As to Offences under the Betting Act, 1853, see 15 HALSBURY'S LAWS (2nd Edn.) 512, para. 918; and for cases on the subject, see 25 DIGEST 442-447, 361-399, and DIGEST Supps.]

D For the Betting Act, 1853, s. 3, s. 4, see 10 HALSBURY'S STATUTES (2nd Edn.) 763, 765.]

Case referred to:

E (1) *Milne v. Comr. of Police for City of London. Leonard v. Same. Boundford v. Same*, [1939] 3 All E.R. 399; [1940] A.C. 1; 108 L.J.K.B. 625; 161 L.T. 65; 103 J.P. 299; 2nd Digest Supp.

Case Stated.

This was an appeal by way of Case Stated from the decision of a metropolitan magistrate sitting at Lambeth.

F On Nov. 14, 1953, an information was preferred by the appellant against the respondent that he on divers days between and including Oct. 14 and Oct. 29, 1953, did assist in conducting the business of a certain place situate at 354 Kennington Road, London, S.E.11, which was then being used by one Thomas Brindle for the purpose of money being received on his behalf as the consideration for an undertaking to pay thereafter money on events and contingencies relating to horse or dog races, contrary to s. 3 of the Betting Act, 1853. The information was heard on Feb. 23, Mar. 1, Mar. 24, and Apr. 21, 1954, and the following facts were found.

G During the whole of the relevant period one Thomas Brindle, a brother-in-law of the respondent, was conducting a betting business at 354 Kennington Road, S.E.11, and in the course thereof was using that place for the purpose of money being received on his behalf as the consideration for an undertaking to pay thereafter money on events and contingencies relating to horse and dog races. Money and betting slips were accepted on Brindle's behalf by his agents at a number of different sites (known as "pitches") in the streets, brought to the office at 354 Kennington Road, and there sorted and recorded in a set of books. On Oct. 14, 15, 16 and 17, 1953, the respondent was at one of the said pitches, that at Sumner Street, S.E.1, with two other men for between one and a half and two hours, leaving on each occasion a few minutes after 2 p.m. On each occasion the respondent received from men money and betting slips. At other times when the respondent was not present one of the other two men accepted money and betting slips. In accepting the money and betting slips, the respondent was acting on behalf of Brindle and in the course of the latter's betting business. On leaving the pitch the respondent drove on each occasion in his van to the office for the purpose of delivering the money and betting slips to Brindle. The respondent went inside the office and remained there for periods

of fifteen minutes and upwards. He was also at the office on Oct. 28 and Oct. 29, arriving in his van a few minutes after 2 p.m. He never took any part in the work done inside the office. A

It was contended by the appellant that the respondent, by assisting in the carrying on of Brindle's betting business, was assisting in conducting it. The respondent contended that, in accepting money and betting slips on behalf of Brindle, he had offended against s. 4 and not against s. 3 of the Betting Act, 1853. B The metropolitan magistrate was of opinion that the contention of the respondent was right and, accordingly, dismissed the information.

H. F. Cassel (E. J. P. Cussen with him) for the appellant.

J. M. G. Griffith-Jones for the respondent.

LORD GODDARD, C.J., stated the facts and said: This case is a striking instance of the curiously unsatisfactory state in which the betting laws are. No one blames or would think of blaming the police for having brought this prosecution under s. 3 of the Betting Act, 1853, but, in my opinion, the point taken by the respondent is perfectly good, though he has really no merits. If the respondent has committed an offence, it is under s. 4 of the Act. C

The point arises in this way. First, it is made an offence under s. 1 of the Betting Act, 1853, to keep a house for ready-money betting. Then s. 3 of the Act imposes a maximum penalty of £100, or six months' imprisonment, on the owner or occupier of a betting house. That section provides: D

"Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned [i.e., ready-money betting]; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place . . . shall, on summary conviction thereof . . ."

 E

be liable to the penalty which I have mentioned. That section deals with the person who opens the house, keeps it, or permits it to be kept, or assists in conducting the business there. What the respondent did was to act as the bookmaker's runner in the streets. He took money from people who wanted to bet with the betting-house keeper, that is, ready-money betting. Section 4 of the Act provides: F

" . . . any person acting for or on behalf of any such owner or occupier or . . . in any manner assisting in conducting the business thereof, who shall receive, directly or indirectly, any money . . . as a deposit on any bet . . ."

 G

shall be liable to a penalty, not of £100 or six months' imprisonment, but of £50 or three months' imprisonment. In the present case it was found that the respondent was acting on behalf of the owner or occupier. When an Act makes it a substantive offence by a person to do a certain thing and the evidence shows that the respondent has done that very thing, it seems to me that, by all the canons of construction, one must prosecute him for that offence and one must not, by inference, try to make him liable to a more severe penalty by saying that, in doing what he did, he in some way aided and abetted—because that is what the argument comes to—the commission of the offence under the previous section. H

The matter is put beyond doubt by the speech of LORD MAUGHAM, L.C., in *Milne v. Comr. of Police for City of London* (1), where the Lord Chancellor analysed these two sections with great care. After analysing with care what persons could commit an offence under s. 3, he dealt with s. 4 and said ([1939] 3 All E.R. at p. 403): I

"Some points on these somewhat artificial provisions are worth noting.

- A Section 1 deals with the user of the place for one of two defined purposes, and the user is made a common nuisance and illegal. The sanctions are in s. 3 and s. 4, and they both refer to the user of the place for one or other of the purposes mentioned, but the sanctions are more severe under s. 3 than under s. 4. It may be noted in passing that, under s. 3, the persons mentioned in six of the categories above-mentioned (the owner, occupier, keeper, the person using, the person managing, and the person conducting the business) are made liable, but it omits the persons procured, and the persons employed on behalf of the owner, etc., and the agent of the manager. Section 4 inflicts the lower penalty on all the nine classes or categories who receive money, etc., as a deposit or on a promise to pay, or who give an acknowledgment or receipt."
- B
- C That seems to me to show that, in the opinion of the House of Lords in that case, the two sections, s. 3 and s. 4, are quite distinct, and if the acts which are relied on as a breach of the statute in the present case, namely, the acts of receiving money on behalf of the owner of the house, are proved, then the respondent has committed an offence under s. 4, and not under s. 3. For these reasons I think that the magistrate was perfectly right in the decision to which he came, and this
- D appeal is dismissed.

CASSELS, J.: I agree.

STREATFEILD, J.: I also agree.

Appeal dismissed.

- E Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Henry I. Sydney & Co.* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

F WORRALL v. REICH.

[COURT OF APPEAL (Jenkins and Morris, L.JJ.), January 11, 1955.]

Discovery—Production of documents—Documents relating solely to defendant's case—Medical reports—Order for exchange—Validity—R.S.C., Ord. 30, r. 6 (1), (4).

- G *Practice—Medical reports—Order for exchange—Validity—R.S.C., Ord. 30, r. 6 (1), (4).*

On a summons for directions in an action for damages for personal injuries, the master has no power under R.S.C., Ord. 30, r. 6 (1), to order the parties to exchange medical reports, since the medical report obtained by a party is a document privileged from disclosure and so is excluded from the operation of the rule by para. (4) thereof.

- H On a summons for directions in an action for damages for personal injuries, the master made an order "that medical reports be exchanged and if not agreed the medical evidence be limited to two witnesses for each party."

- I **Held:** the order should be varied to read that "A medical report be agreed, if possible, and that, if not, the medical evidence be limited to two witnesses for each party", following R.S.C., appendix K, form 3A, para. 23. Appeal allowed.

[As to Documents relating solely to the Case of the Party, see 10 HALSBURY'S LAWS (2nd Edn.) 400, para. 482; and as to the Powers of a Master on a Summons for Directions, see 26 HALSBURY'S LAWS (2nd Edn.) 51, para. 83; and for cases on the subject, see 18 DIGEST 148, 149, 983-990, and DIGEST (Practice) 506-508. 1795-1816.]

Appeal.

The defendant appealed against an order of GLYN-JONES, J., dated Dec. 13, 1954, dismissing an appeal from an order of Master CLAYTON dated Dec. 3, 1954, on a summons for directions in an action for damages for personal injuries, ordering:

“That medical reports be exchanged and if not agreed the medical evidence be limited to two witnesses for each party.”

The defendant contended that his medical report was a document privileged from disclosure and so excluded from the operation of R.S.C., Ord. 30, r. 6 (1) by virtue of r. 6 (4).

J. Ritchie for the defendant.

I. F. Reuben for the plaintiff.

JENKINS, L.J.: This is an appeal by the defendant in an action for personal injuries, with leave obtained from the learned judge, from an order of GLYN-JONES, J., dismissing an appeal from the order for directions made by the master. The sole matter in issue in the appeal is whether the second paragraph of the order was rightly made by the learned master in the form in which it was made. That part of the order follows the terms of para. 23 of the summons for directions. The summons is based on form 3A in appendix K to the Rules of the Supreme Court, but para. 23 has been altered in this way. The paragraph as printed reads:

“A medical report be agreed, if possible, and that, if not, the medical evidence be limited to witnesses for each party.”

In the present summons the words “A medical report be agreed, if possible, and that, if not,” are struck out and in lieu thereof these words are inserted:

“Exchange medical reports if not agreed the medical evidence be limited to two witnesses for each party”,

and the order under appeal adopts this altered term or direction. I take it to mean that, as in the printed form, a medical report is to be agreed if possible, but, failing agreement, then there is to be an exchange of medical reports, and medical evidence given at the trial is to be limited to two witnesses for each party.

The order under appeal was made under the new Ord. 30, which deals with summonses for directions, and was adopted in 1954* to give effect to the recommendations of the Evershed Report. There is no doubt that the order gives ample powers to the master with a view to saving expense and delay in the trial of actions. For the present purpose I think I need refer only to r. 6 of the order, which so far as material provides as follows:

“(1) No affidavit shall be used on the hearing of the summons for directions except by the leave or direction of the court or judge, but, subject to the provisions of para. (4) of this rule, it shall be the duty of the parties to the action and their advisers to give all such information and produce all such documents to the court or judge on any hearing of the summons as it or he may reasonably require for the purposes of enabling it or him properly to deal with the summons. The court or judge may, if it appears proper so to do in the circumstances, authorise any such information or documents to be given or produced to the court or judge without being disclosed to the other parties but, in the absence of such an authority, any information or documents given or produced under this paragraph shall be given or produced to all the parties present or represented on the hearing of the summons as well as to the court or judge . . . (3) If the court or judge on any hearing of the summons for directions requires a party to the

* See R.S.C. (Summons for Directions, etc.), 1954, S.I. 1954 No. 761, r. 4.

- A action or his solicitor or counsel to give any information or produce any document and that information or document is not given or produced, then, subject to the provisions of para. (4) of this rule, the court or judge may—
- (a) cause the facts to be recorded in the order with a view to such special order, if any, as to costs as may be just being made at the trial; or (b) if it appears to the court or judge to be just so to do, order the whole or any part of the pleadings of the party concerned to be struck out, or, if the party is plaintiff or the claimant under a counterclaim, order the action or counterclaim to be dismissed upon such terms as may be just.”
- B

The object of these provisions clearly is to ensure so far as possible that the parties (to use a colloquialism) put all their cards on the table, so that the real issues between them emerge and the amount of evidence necessary to be given, whether documentary or oral, may be limited to matters which are really in issue and seriously contested by the parties. But r. 6 is subject to this important limitation in para. (4), which, as will be seen, is expressly referred to in its earlier provisions. Paragraph (4) is in these terms:

- “Notwithstanding anything in the preceding provisions of this rule, no information or documents which are privileged from disclosure shall be required to be given or produced under this rule by or by the advisers of any party otherwise than with the consent of that party.”
- C
- D

- Counsel for the defendant says that the second paragraph of the order on the summons for directions in the form in which it now stands is in direct conflict with the express provisions of para. (4) of r. 6, inasmuch as medical reports made on behalf of either party on the advice of their legal advisers and for the purpose of preparing their case for trial are privileged documents, and as such are within the exception contained in that paragraph and cannot properly be made the subject of an order for exchange. He says, further, that an order for directions in this form is a new departure in that it, in effect, compels a party to commit himself in advance to calling a particular witness, inasmuch as it compels him to put in evidence a document amounting to the proof of the evidence which a particular medical adviser will give on his behalf.
- E
- F

In my view, the objection on the ground that medical reports such as these are privileged from discovery is a valid objection, and it follows that the order should not have been made in this form, but should follow the printed form of summons which asks that

- G “A medical report be agreed, if possible, and that, if not, the medical evidence be limited to [two] witnesses for each party.”

- Accordingly, although I can see that in some circumstances it may be desirable from the practical point of view that medical reports should be exchanged, and although it may be highly expedient that the parties should by agreement adopt that course in many cases, it does not seem to me that it can properly be made the subject of an order. For these reasons I would allow this appeal and modify the order under appeal in the way I have indicated.
- H

- MORRIS, L.J.:** I am of the same opinion. Having heard the arguments on both sides, I am persuaded that the view which my Lord has just expressed is the correct one. When an order is made in terms that a medical report be agreed if possible, doubtless certain difficulties may arise. For example, if the plaintiff submits his medical report and asks that it be agreed, the medical advisers of the defence may take a more serious view of the plaintiff's injuries than the plaintiff's medical advisers; perhaps because they have appreciated certain matters overlooked by the plaintiff's medical advisers. In such a case the defence might well agree the medical report submitted to them, with the possibility, if the plaintiff established the defendant's liability, of an unjust result in that the plaintiff might receive damages of less amount than the medical facts would have warranted, if they had been fully appreciated.
- I

The plaintiff might say that he would submit his medical report or reports, provided the defendant at the same time submitted his. I think that would be a desirable state of affairs, since in cases of personal injuries it is proper and desirable that medical reports should be exchanged to the greatest possible extent. But if a plaintiff does refuse to submit his report unless the defendant at the same time submits his, the deadlock may result in medical witnesses being called on both sides, although in the event it emerges that there is little difference between the respective medical opinions. In such a situation it would be unfortunate if costs were incurred, and the time of medical men was spent in court when their services might have been insistently required in the performance of their professional duties. All these considerations indicate that it is helpful and desirable that medical reports should be exchanged. The language of Ord. 30, r. 1 (1), particularly in sub-para. (b), indicates the correct approach in these matters:

"(1) . . . the plaintiff shall, with a view to providing an occasion for the consideration by the court or a judge of the preparations for the trial of the action, so that—(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof . . ."

The words "just, expeditious and economical" give clear guidance as to the way in which the court expects parties to proceed in the preparation of their cases.

It may happen that some medical reports contain views, comments or statements which, though linked to the medical aspects of the case, are not entirely limited to those aspects, and such reports might not conveniently be the subject of exchange. Moreover, though I have indicated my personal view that it is helpful that the parties should to the greatest possible extent exchange medical reports, the question that arises on this appeal is whether it was possible for the learned master to make a compulsory order that they should be exchanged. There is merit in the procedure under Ord. 30, r. 6 (1), under which the court can ask one side for a document and then examine it without that document being necessarily shown to the other side. But that procedure is subject to, and limited by, the express provision of Ord. 30, r. 6 (4):

"Notwithstanding anything in the preceding provisions of this rule, no information or documents which are privileged from disclosure shall be required to be given or produced under this rule by or by the advisers of any party otherwise than with the consent of that party."

This shows that the protection which relates to privileged documents is not affected. Hence, I can see no warrant for ordering that medical reports be exchanged if those medical reports are privileged documents. Once they qualify as privileged documents in accordance with well-recognised principles, I cannot see that there is power to order that they be compulsorily exchanged. I think, therefore, that this appeal must succeed.

Appeal allowed. Order of Glyn-Jones, J., varied.

Solicitors: *Barlow, Lyde & Gilbert* (for the defendant); *Bryan O'Connor & Co.* (for the plaintiff).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

NOTE.

COWLISHAW v. CHALKLEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Streatfeild, JJ.),
January 20, 1955.]

Case Stated—Procedure—Desirability of submitting justices' draft to parties.

Case Stated by Middlesex justices.

On July 20, 1954, at a magistrate's court sitting at Harrow, an information was preferred by the appellant, John Cowlishaw, a police sergeant, against the respondent, Donald Edward Chalkley, that he did drive a motor vehicle on a road (i) in a manner dangerous to the public contrary to the Road Traffic Act, 1930, s. 11 (1), (ii) without due care and attention contrary to the Road Traffic Act, 1930, s. 12 (1). The information was heard on Aug. 6, 1954. After the evidence for the prosecution had been given the respondent went into the witness-box. After he had taken the oath but before he had given any evidence the justices stated that in their opinion no case had been made out by the prosecution and they dismissed the information. At the request of the appellant they stated a Case, but they did not submit the draft to the parties. In the Case the justices set out the alleged contentions of both parties. It was admitted, however, before the Divisional Court that in fact no contentions had been put forward by either party, nor had the respondent submitted that there was no case to answer.

Paul Wrightson for the appellant.

C. G. L. Du Cann for the respondent.

LORD GODDARD, C.J., stated the facts and said: As counsel for the appellant agrees that the Case is improperly stated, we have decided that the only thing to do is to send the Case back with a direction that it be re-heard before other justices than those who stated the Case. We also desire to say that as a rule it is better practice, though it cannot be insisted on, that where justices agree to state a Case, if they state it themselves or cause their clerk to draft it, it should be submitted to both parties, and in case of any complication it should be left to the parties themselves to draft the Case and submit it to the justices for their consideration, and then a point like this would not arise. We make no order as to costs.

Appeal allowed. Case remitted.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Pierron & Morley* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A

NOTE.

R. v. ROSSI.

[COURT OF CRIMINAL APPEAL (Cassels, Streatfeild and Slade, JJ.), January 24, 1955.]

B

Criminal Law—Sentence—Corrective training—Preventive detention—Need for date of prisoner's birth in police reports and prison reports.

Appeal against sentence.

The appellant, Robert Rossi, was convicted at Middlesex sessions of shop breaking and was sentenced to three years' corrective training. He had previously been convicted in 1939 of larceny and in 1943 of receiving. Evidence was put before the court that he was aged thirty-one years but, in fact, he was aged thirty-two years.

C

J. Yahuda for the appellant.

H. F. Cassel for the Crown.

D

CASSELS, J., delivering the judgment of the court, said that, in the circumstances of the case, the sentence would be reduced to one of eighteen months' imprisonment, and that there was one other observation which the court desired to make: Where age was of importance for the consideration of the court, it was necessary that, in police reports or prison reports which were presented to the court, the date of the birth of the prisoner should be stated lest any mistake should be made in calculating what was the age of the prisoner at the time when he received the necessary qualifying conviction. If the date of the birth was not stated, but merely his age, which, in this case, was stated to the court to be thirty-one years, it was very easy for the court to make a mistake in calculating what his age really was at a particular time. This seemed to the court to be of great importance, as the Criminal Justice Act, 1948, made provision for many different types of sentences to be passed, many of which depended on the actual age of the prisoner at the time of sentence. They, therefore, suggested that, in future, no report about a prisoner should omit the date of his birth if the prisoner was being put before the court as one requiring a sentence either of corrective training or preventive detention.

E

F

Sentence reduced.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

A **STERLING ENGINEERING CO., LTD. v. PATCHETT.**

[HOUSE OF LORDS (Viscount Simonds, Lord Porter, Lord Reid, Lord Tucker and Lord Somervell of Harrow), December 2, 6, 7, 8, 9, 1954, January 20, 1955.]

B *Patent—Employee's inventions—Patents registered in name of employer and employee—Understanding as to payment to employee but no agreement—Apportionment of benefits of inventions—Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), s. 56 (2).*

Master and Servant—Invention of servant—Right of master to benefit of invention—Understanding but no agreement.

C In January, 1942, the respondent entered the employment of the appellant company, who, at that time, were exclusively employed on armaments. In December, 1941, before any contract of service was made, there was an exchange of views between the parties in regard to any patentable inventions the respondent might make while in the appellant company's employment, but no arrangement was made, and the respondent took up his duties without any written service agreement. In 1942, after the respondent had designed

D a paragon in the course of his employment, an agreement was entered into whereby, where the respondent was primarily responsible for any inventions which were patentable, patents should be applied for in the names of the respondent and of the appellant company, and the appellant company would pay the respondent a royalty. In 1943, another agreement was made on terms more favourable to the respondent than those of the 1942 agreement.

E In 1944, the respondent having made more patentable inventions in respect of the paragon, a further agreement was made providing that these and any further inventions made by the respondent in relation to machine carbines should be comprised in the 1943 agreement, and cancelling the 1942 agreement. In 1947 the respondent took over the department concerned with the design and development of domestic electrical appliances. Between

F 1947 and 1950, in the course of his employment, he made six inventions in connection with domestic appliances, in respect of which patents were applied for in the joint names of the respondent and the appellant company. The respondent demanded some payment from the appellant company in respect of these inventions, but the company refused to make such payments. The respondent sued the company for a declaration of his title to a royalty for these inventions and, by his reply in that action, claimed alternatively that the benefit of the inventions should be apportioned under the Patents Act, 1949, s. 56 (2).

G **Held:** (i) the ordinary rule governing the relationship of master and servant, that, if an employee's invention was patented in the joint names of the employer and employee, the employee held his interest as trustee for the employer, could only be excluded by an express agreement that it should be varied and some other legal relationship should be created; and in the present case, the ordinary rule had not been displaced.

H (ii) in the words in s. 56 (2) of the Patents Act, 1949, "unless satisfied that one or other of the parties is entitled, to the exclusion of the other," to the benefit of an employee's invention, the word "entitled" refers to legal right, and, as in the present case the court was satisfied that the appellant company was legally entitled to the exclusion of the respondent, s. 56 (2) had no application.

I Appeal allowed.

[For the Patents Act, 1949, s. 56, see 17 HALSBURY'S STATUTES (2nd Edn.) 690.]

Case referred to:

(1) *Adamson v. Kenworthy*, (1931), 49 R.P.C. 57.

Appeal.

Appeal by the company from an order of the Court of Appeal, dated Dec. 14, 1953, discharging an order of DANCKWERTS, J., dated Apr. 27, 1953, made in favour of the company on their counterclaim. The claim in the action by the respondent was dismissed by ROXBURGH, J., on Dec. 18, 1952. The facts appear in the opinion of VISCOUNT SIMONDS.

K. E. Shelley, Q.C., and *G. T. Aldous* for the appellant company.

R. O. Wilberforce, Q.C., and *E. I. Goulding* for the respondent.

The House took time for consideration.

Jan. 20. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal is brought by the Sterling Engineering Co., Ltd., whom I will call "the company", from an order of the Court of Appeal which reversed an order of DANCKWERTS, J. The respondent is George William Patchett, and the appeal relates to six inventions made by him while in the employment of the company, which were the subject of patents registered in their joint names. The respondent, in January, 1942, entered the employment of the company as a production engineer at a salary of £1,200 a year. The company was then, and for some time afterwards, engaged exclusively on armaments. In December, 1941, before any contract of service was made, there was an exchange of letters and an interview between the parties in regard to any patentable invention that the respondent might make while in the company's employment. It is clear that no agreement was made, but, throughout the proceedings, which have culminated in an appeal to this House, it has been constantly alleged that an "understanding" was reached, and it is on that understanding that the respondent has relied for the relief refused to him by DANCKWERTS, J., but granted by the Court of Appeal. At the outset, I must admit that I find it difficult to appreciate how an understanding, which is, admittedly, not an agreement, can be made a ground of claim, though it may, I dare say, in certain circumstances, be a shield. But the facts of the present case are so unusual and the course which the action took so remarkable that I must closely examine what this understanding was.

On Dec. 11, 1941, after a previous exchange of letters and an interview to which I need not refer, the respondent wrote a letter to the company in which the following passage occurred:

"Patents. This is always a delicate problem between employer and employee and I suggest the following two methods of dealing with this question: (A) Any invention for which I am responsible will be provisionally patented by me and be transferred to you for a sum payment to be mutually arranged at the time. (B) Any invention for which I am responsible will be patented by you in the name of the firm and myself. A sum to be paid as royalty will be fixed and a minimum yearly royalty decided on. In the event of the minimum royalty not being paid I shall be free to exploit the patent. Any exploitation of such patent will entail a participation of the proceeds by both patentees. This participation will also apply in any case where the manufacturing rights are granted to other persons"

and the letter then dealt with so-called "special constructions" with which we are not concerned. To this letter the general manager of the company, a Mr. Redgrave, replied on Dec. 13, 1941, by a letter which contained the following passage relating to patents and no more:

"Patents: I agree that this is always a problem but feel confident when we next meet we shall have no difficulty in making a mutually satisfactory arrangement."

It does not appear that any further letters passed between the parties, and it is certain that, when they next met, no arrangement of any kind was made. On

A Jan. 1, 1942, the respondent took up his duties as production engineer without any written service agreement. That no arrangement was made nor, as I think, in the meantime discussed, is clear from the next letter to which I refer, for, on July 31, 1942, the respondent, having designed a gun in the course of his employment, which came to be called a "paragun", wrote to the chairman of the company as follows:

B " . . . This gun was designed by me without any instructions from the company and I think certain features are patentable. Before joining the company the question of patents was discussed but no definite arrangement made. I think this is a suitable opportunity for some arrangement to be arrived at."

C The company accepted this suggestion and, after an interview on Aug. 5, 1942, an agreement, which has conveniently been called the 1942 agreement, was made. Its terms were contained in two letters of Aug. 5 and 12, and provided (inter alia) that, where the respondent was primarily responsible for any inventions which were patentable, patents should be applied for in the two names (i.e., of the respondent and the company), and that the company should pay the respondent a royalty of half per cent. on the sale price of any articles made by them which used any such patent. This agreement was general in its scope, and extended beyond the invention which had been its immediate cause. In 1943 the respondent invented an automatic trigger mechanism for the purpose of the paragun, and, in regard to the patent for this invention, a specific agreement, known as the 1943 agreement, was made. I think it unnecessary to say more about it than that its terms were more favourable to the respondent than those of the 1942 agreement.

E In 1944, yet another agreement was made. The respondent had made eight more patentable inventions in connection with the paragun, and the new agreements, in effect, provided that these inventions, and any further inventions which the respondent might make during the term of his employment in relation to machine carbines, should be comprised in the 1943 agreement. It also contained a term which, as will be seen, came to be of great importance, that the 1942 agreement should be cancelled and of no further effect.

F Some modification of the 1943 agreement was made in 1945, but no other arrangement was made and there the matter rested, when, in 1947, the company, having turned to the arts of peace, the respondent was offered and accepted the leadership of the department concerned with the design and development of domestic electrical appliances. It was not disputed that, in this capacity, it was his duty to put his inventive faculty and skill at the service of the company. Between 1947 and 1950, the respondent, in the course of his employment, made six inventions in connection with domestic appliances (which I will call "the domestic inventions"), in respect of which patents were applied for in the joint names either of the respondent and the company or of the respondent and a company controlled by the company, a variation which can, for the purpose of this appeal, be disregarded. The applications were made at the expense of the company, but the respondent, as the inventor, was, until the Patents Act, 1949, came into force, a necessary party. The 1942 agreement had been cancelled, the later agreements did not cover the domestic inventions and, in these circumstances, the company refused the reiterated demands of the respondent that some payment should be made to him in respect of them.

I The respondent, accordingly, commenced the action out of which this appeal has arisen, and I must trouble your Lordships with some details of the pleadings in the action and consequent counterclaim, for the form that they have taken has not been the least of the causes of trouble in this litigation.

The statement of claim (which was amended and re-amended) opened with a plea that, at the time of his employment, it was "understood and agreed" between the respondent and the company that he should receive reasonable

remuneration in respect of all inventions made by him while in the employment of the company which should be used by the company. It then set out the agreements of 1942, 1943 and 1944. It specifically stated the cancellation clause in the 1944 agreement to which I have referred, and alleged that this clause was inserted by mutual mistake. In his formal claim, the respondent claimed a royalty of half per cent. on the selling price of all articles in which any of his inventions were made use of (other than those subject to the 1943 or 1944 agreements) or, alternatively, reasonable remuneration or royalties in respect thereof, and, in the further alternative, rectification of the 1944 agreement so as to exclude the cancellation clause or rescission of that agreement. This is a puzzling plea: for what is meant by an "understanding and agreement"? What is the efficacy of an understanding without an agreement, or what added force an understanding gives to an agreement, I do not understand. But the action was allowed to go forward in this fashion after an ineffectual attempt had been made to discover, on an application for particulars, what was the understanding, what the agreement.

The company duly put in its defence, denying any such understanding or agreement as had been alleged, and further denying that there had been such a mistake as to justify rectification or rescission of the 1944 agreement. It also put in a counterclaim alleging that the domestic inventions had been made by the respondent in the course of his employment and, that the company was, accordingly, entitled to have the respondent's interest in the relevant patents transferred to it and claiming the appropriate declaration and order.

By his reply and defence to counterclaim, the respondent challenged the plea that he was employed to make inventions in connection with domestic appliances. This was clearly contrary to the fact and does not appear to have been pursued. He further alleged that, in regard to any inventions other than those comprised in the 1943 or 1944 agreements, it was the "intention of the parties that the 1942 agreement should continue to operate or alternatively should not be governed by any agreement and should accordingly remain the property of" the respondent. He further pleaded that the domestic inventions were not made in the course of his employment, a plea clearly incapable of being sustained. Further pleas were made by amendment but I do not mention them yet, for the pleadings were in the form that I have outlined when the case came on for hearing before ROXBURGH, J. Before that learned judge the case took a most unfortunate course, for, owing to the exigencies of time or for some other reason, it was found possible only to dispose of the action, the counterclaim being left over for hearing after the immediately ensuing vacation. So far as the action was concerned, an order was made whereby it was dismissed with costs, and that was all. And it is clear that, whatever else your Lordships may look at in the event of a plea of *res judicata* being raised, you are at least entitled to know what were the issues raised in the pleadings in the action and you know, therefore, that the respondent failed to establish his right to remuneration under any heading of claim, or to rectification of the 1944 agreement. This order was duly drawn up, and the respondent did not appeal from it. I will only add here, since some reliance has been placed on it and certainly some confusion has arisen out of it, that, in the course of his judgment, ROXBURGH, J., said:

"At the time of his engagement it was understood between the plaintiff and the defendant company that the plaintiff should receive a reasonable remuneration in respect of all inventions made by him while in the employment of the defendant company which should be used by the defendant company. I have used the word 'understood' advisedly. There is a counterclaim, with which I am not in a position to deal, and I have used that vague word in order not in any way to prejudice the position with regard to the counterclaim."

The learned judge having decided that there was no agreement for the payment

A of remuneration, it is difficult to see what effect in the law is to be found in an understanding—particularly where the only plea had been of an “understanding and agreement.”

Unfortunately, ROXBURGH, J., had other duties in the following term and it fell to DANCKWERTS, J., to hear the counterclaim. In the course of the hearing before him, the defence to counterclaim was allowed to be amended by pleading
B once more the understanding and agreement alleged in para. 1 of the statement of claim and, by this final plea which found favour with the Court of Appeal,

“In the alternative to the contentions herein set out the plaintiff will claim that the benefit of the inventions referred to in the counterclaim be apportioned under s. 56 (2) of the Patents Act, 1949.”

C This amendment was, as I say, allowed, and it is too late to protest that it should not have been pleaded by way of defence to counterclaim but, if raised at all, should have found a place in the statement of claim.

It is convenient at this stage to set out s. 56 (2), which was for the first time introduced into the patent laws by the Act of 1949. It provided as follows:

“In proceedings before the court between an employer and a person
D who is or was at the material time his employee, or upon an application made to the comptroller under sub-s. (1) of this section, the court or comptroller may, unless satisfied that one or other of the parties is entitled, to the exclusion of the other, to the benefit of an invention made by the employee, by order provide for the apportionment between them of the benefit of the invention, and of any patent granted or to be granted in respect thereof, in such manner as the court or comptroller considers just.”
E

The task of disentangling the real issues from these pleadings is not made easier by the plea strenuously urged by the company that the doctrine of res
F judicata applied to bar the respondent's defence to the counterclaim. I will dispose of this matter very shortly, for I do not think that any decision on it is necessary for the determination of this appeal. I am glad to think so, for, in a case like this, where the whole matter in dispute, whether arising on claim or counterclaim, should and would, but for an unfortunate accident, have been disposed of at one and the same time, and where the learned judge who heard the action made certain reservations with a view to their further consideration on the counterclaim, I should be very reluctant to apply the ordinary rules of
G res judicata. I am not aware of any case in which such a thing has happened before and may be permitted to hope that it will not happen again. It is unnecessary to say more, because it became clear to me, as the case proceeded, that the counterclaim must succeed, and that the same considerations which secured its success were fatal to a claim under s. 56 (2) of the Patents Act, 1949.

The patents in question stand in the joint names of the company (or the
H company which it controls) and the respondent, i.e., in the names of employer and employee. It is elementary that, where the employee in the course of his employment (i.e., in his employer's time and with his materials) makes an invention which it falls within his duty to make (as was the case here), he holds his interest in the invention and in any resulting patent as trustee for the employer, unless he can show that he has a beneficial interest which the law recognises.
I Here, the respondent first asserted the “understanding and agreement” to which I have so often referred. It was for reasonable remuneration and nothing else. It failed: there was no “agreement”, and “understanding” meant nothing. If it had succeeded, it would still have afforded no defence to the counterclaim, though it might have supported a claim for other relief. Then it was pleaded that the 1942 agreement still governed the situation. This plea, too, failed, nor, had it succeeded, would it have afforded a defence. Next it was pleaded that it was the intention that the inventions should remain the sole property of the respondent: this plea was wholly inconsistent with the first plea of an agreement

for remuneration, and does not appear to have been pressed at any stage of the proceedings. Then it was pleaded that the inventions were not made by the respondent in the course of his employment, a plea clearly unsustainable. In this bewildering medley of pleas I find nothing to justify the view that the respondent was not a trustee for the company of his interest in the patents. Ultimately, I think, the argument resolved itself into the proposition that the so-called understanding, though it did not create any legal obligation, yet was sufficient to exclude any term of the employment by which inventions made by the employee would belong to the employer. It was not clear what the result of this would be, but, as there is no ground for suggesting that the inventions were to be the exclusive property of the respondent, I can only suppose there would be a deadlock until the parties could come to some agreement. But I think that this argument is based on a radical fallacy. It is true enough that the rule that inventions made by an employee belong to the employer is sometimes spoken of as an implied term of the contract of service.

In a sense, no doubt, it is an implied term in that it is not written out in the contract of service, but it is a term which, given the conditions which are here present, viz., inventions made by the employee in the course of his employment which it was part of his duty to make, the law imports into the contract. It appears to me that it is only an implied term in the same sense that it is an implied term, though not written at large, in the contract of service of any workman that what he produces by the strength of his arm or the skill of his hand or the exercise of his inventive faculty shall become the property of the employer. If the employment is of a designer, that which he designs is thus the property of the employer which he alone can dispose of. If it is patentable, it is for the employer to say whether it shall be patented, and he can require the employee to do what is necessary to that end. And if it is patented in their joint names, the employee holds his interest as trustee for the employer (see *Adamson v. Kenworthy* (1)). If this is, as I think it clearly is, the law, it can only be excluded by an express agreement that it shall be varied and some other legal relationship created. I will not go through the story again, but it appears to me impossible to rely on an understanding, which, vague enough in 1941, had, after it had been superseded by the sound agreements of 1942, 1943, 1944 and 1945, and after, in 1947, the respondent had substantially changed the area of his employment, become so tenuous as to be little more than an aspiration of the respondent that he would receive some recognition beyond his salary for the work that he was paid to do. I find nothing in all this which would justify the court in holding that the ordinary rule governing the relation of master and servant was displaced. I am, therefore, of opinion that the counterclaim should succeed, subject only to what may be said about s. 56 (2) of the Patents Act, 1949.

I turn, then, finally to that section. It may be said, if it has any application to the present case, to afford a defence in this limited sense. It would be a work of supererogation to require the respondent to transfer his interest in the patents to the company if the next step was to be an apportionment involving perhaps a retransfer; but, in my opinion, the sub-section has no application. I will assume that the present action and counterclaim were proceedings before the court between an employer and employee, in which its new and special jurisdiction might be invoked. That jurisdiction, however, only arises if the court is not satisfied that one or other of the parties is entitled to the exclusion of the other to the benefit of an invention. The word "entitled" refers to legal right. The court must, therefore, determine the legal rights, just as it must determine them in any other case, and, if the issue is, as it is here, whether one party is entitled to the exclusion of the other, it must decide that question "Aye" or "No" and, having decided it in the affirmative, it is not for the court to say that it is not satisfied. So here, having examined every plea which has been adduced to support the contention that the respondent has some beneficial interest in the patents and rejected them all, the court must declare itself satisfied

A that the company is entitled, to the exclusion of the respondent, and decline the jurisdiction conferred by the sub-section.

It was urged that this construction of the sub-section reduces its operation to negligible proportions. This was denied by counsel for the company, who gave your Lordships examples of cases where, he said, the section might still operate. I am not concerned to examine this question, for the scope of the section may be a matter of further debate and I would not prejudice any view of it. It is sufficient to determine, as I do, that it can have no operation in the present case. If, in the result, its scope is less wide than may have been expected, that is not the affair of the courts. I may add that the construction which I have adopted of sub-s. (2) is strongly supported by sub-s. (1), which refers to the "rights", meaning thereby the legal rights, of the parties.

C In the result, I move that the appeal be allowed and the order of the Court of Appeal discharged, except so far as it relates to costs, and the order of DANCKWERTS, J., be restored. In accordance with the condition imposed on the granting of leave to appeal, the company will pay the respondent's costs of this appeal.

D My Lords, my noble and learned friend, **LORD PORTER**, who is unable to be here, has asked me to say that he concurs in my opinion and in the motion which I make.

LORD REID: My Lords, s. 56 is a new section in the Patents Act, 1949. It begins by providing a relatively cheap and speedy method for determining disputes between employer and employee. It is, I think, clear that, under sub-s. (1), what has to be determined is the legal right of the parties and that this sub-section confers no power to override legal rights or to substitute for a decision on legal rights a determination of what may be thought just or fair in all the circumstances; but it was argued for the respondent that sub-s. (2) does confer a power to do this.

Sub-section (2) cannot be applied at all if the court or comptroller is

F "... satisfied that one or other of the parties is entitled, to the exclusion of the other, to the benefit of an invention made by the employee ..."

but, if the tribunal is not so satisfied, then it has power to apportion the benefit of the invention. The ordinary meaning of the word "entitled" is entitled as a matter of legal right, and, even if the word could, in some contexts, be held to mean fairly or justly entitled in all the circumstances, some very cogent reason for so construing it would be required to justify an inference that Parliament intended to take the very unusual course of subordinating the legal rights of the parties to the discretion of the court or the comptroller—particularly as there is no indication of any considerations to which the tribunal should have regard in exercising its discretion. In the sub-section I can see no more than a faint indication that such might have been the intention. To say that a court must be satisfied of something is more appropriate with regard to a matter of fact or opinion than with regard to a matter of legal right. The phraseology creates no real difficulty, however, if the sub-section is held to refer to legal rights alone. The only real difficulty is that, on this basis, the scope of the sub-section is very limited. In the absence of agreement, I do not see how there can be a case where the one party is not entitled to the whole benefit to the exclusion of the other and, if that be right, the sub-section can only come into operation if there has been some agreement, express or implied, to share the benefit. If there is such an agreement and the sub-section gives no authority to override legal rights, the sub-section cannot be used to give either party more or less than that to which the agreement entitles him. It is, I suppose, possible that the apportionment authorised by the section might, in some cases, afford a convenient method of working out the terms of the parties' agreement "in such manner as the court or comptroller considers just", but that is such a small matter that one is tempted to guess that Parliament had some wider intention. What that intention may

have been cannot, in my judgment, be found by any method of construction or interpretation which is open to us. Even if it could be shown that there is no case to which, on this interpretation, the sub-section could apply in practice, I would still find myself unable to discover any other meaning which could properly be given to it. A

Accordingly, before the respondent can invoke this sub-section he must point to something which would prevent the court from being satisfied that the legal right to the benefit of the inventions with which this case is concerned belongs to the appellant company. No doubt the respondent was the inventor and, in the ordinary case, the benefit of an invention belongs to the inventor. But, at the time when he made these inventions, he was employed by the company as their chief designer and it is, in my judgment, inherent in the legal relationship of master and servant that any product of the work which the servant is paid to do belongs to the master: I can find neither principle nor authority for holding that this rule ceases to apply if a product of that work happens to be a patentable invention. Of course, as the relationship of master and servant is constituted by contract, the parties can, if they choose, alter or vary the normal incidents of the relationship, but they can only do that by express agreement or by an agreement which can be implied from the facts of the case. The question in the present case, therefore, is whether there is anything to justify a finding that the parties agreed to alter the normal incidents of the respondent's contract of employment, for it was not disputed that, if the ordinary rule applies, the patents in question belong wholly to the company. B C D

There are cases where it has been said that the employer's right to inventions made by an employee in the course of his employment arises from an implied term in the contract of employment. Strictly speaking, I think that an implied term is something which, in the circumstances of a particular case, the law may read into the contract if the parties are silent and it would be reasonable to do so: it is something over and above the ordinary incidents of the particular type of contract. If it were necessary in this case to find an implied term in that sense, I should be in some difficulty. But the phrase "implied term" can be used to denote a term inherent in the nature of the contract which the law will imply in every case unless the parties agree to vary or exclude it. I think that it has probably been used in that sense in the cases founded on by the respondent, and I am of opinion that it is only in that sense that the company's right in this case can be said to arise from an implied term. E F

The respondent, therefore, could only succeed if he could establish some agreement—express or to be implied—by which the ordinary incidents of his contract of employment were altered. But all that he has to rely on is a so-called "understanding". I do not think that it can be put more favourably for the respondent than that he and the company agreed to try to reach agreement about this matter as soon as possible. And, in fact, they did reach such an agreement in 1942: they agreed that the respondent should receive a "royalty", the patents themselves remaining the property of the company. But that agreement was cancelled in 1944, and the new agreement for royalties which was then made did not cover the patents now in question; it only applied to certain other patents. I cannot find any basis for any implied agreement which would give to the respondent any rights in respect of the patents now in question. It appears to me that, after the 1942 agreement was cancelled, the position with regard to anything not covered by the 1944 agreement was that the ordinary rule inherent in the parties relationship of master and servant must apply, and, therefore, the patents in question belong to the company and the respondent has no defence to their counterclaim. I, therefore, agree that this appeal should be allowed. G H I

LORD TUCKER: My Lords, I am in complete agreement with the opinion that has just been delivered by my noble and learned friend on the Woolsack,

A and would desire to add only a word or two about the judgment of the Court of Appeal.

That court held that the "understanding" of December, 1941, contemplated that any arrangement made would recognise the appellant company's right to the benefit of any invention, or patent granted in respect thereof, subject to payment of a sum to be agreed by the company to the respondent for its use or exploitation, but that, as no agreement was ever reached as to the amount or nature of the payment to be made, the company—apart from s. 56 of the Patents Act, 1949—would be entitled in accordance with the ordinary implication to the benefit of the inventions and patents without any obligation to make any payment in respect thereof to the respondent, since the court—apart from s. 56—could not impose on the parties terms to which they had never agreed.

C The court, however, reached the conclusion that s. 56 gave them this jurisdiction. They said:

"It seems to us that the language of the sub-section necessarily implies that there may be cases in which the court may not be satisfied that the benefit of a disputed invention belongs to one of the parties to the exclusion of the other, although there is no agreement between them defining the proportions or manner in which such benefit is to be shared."

D For the reasons which have been stated by my noble and learned friend, I am unable to accept an interpretation of s. 56 which would enable the court—in the absence of express agreement—to vary the terms which the law imports into the contract of service between master and servant.

E LORD SOMERVELL OF HARROW: My Lords, I agree.

Appeal allowed.

Solicitors: *Cosmo Cran & Co.* (for the appellant company); *Gedge, Fiske & Co.* (for the respondent). [Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

WOOLMER v. DELMER PRICE, LTD.

F [QUEEN'S BENCH DIVISION (McNair, J.), January 11, 12, 13, 1955.]

Contract—Exception clause—"All goods left at customer's risk"—Fur coat delivered for storage—Failure to re-deliver—Coat lost—No satisfactory explanation how loss occurred.

Bailment—Storage—Condition excluding liability—Failure to re-deliver article to owner—No satisfactory explanation of loss.

G The plaintiff left her fur coat with the defendants for them to store it during the summer months. They failed to return it on demand and the plaintiff sued them for the return of the coat or for its value. The defendants alleged that they had re-delivered the coat to the plaintiff shortly after it had been left with them. This plea was rejected and the defendants could offer no other explanation how the coat had disappeared, but relied on a term in the contract which stated that all goods were left at customer's risk.

H **Held:** the defendants did not escape liability unless they established either that the loss occurred in some way not involving their negligence, or that the loss did occur by their negligence, in which case they would be protected by the term in the contract that all goods were left at the customer's risk; as the defendants had failed to show how the loss had occurred, and as it might have been caused in a way not covered by the "customer's risk" clause, the clause did not protect them and the plaintiff was entitled to recover damages.

I *Alderslade v. Hendon Laundry, Ltd.* ([1945] 1 All E.R. 244) considered.

[As to Standard of Care to be taken by a Bailee for reward, see 2 HALSBURY'S LAWS (3rd Edn.) 114, para. 225, 748, para. 1232; and for cases on the subject, see 3 DIGEST 95-99, 251-268, 275-280.]

Cases referred to:

- (1) *Alderslade v. Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244; [1945] K.B. 189; 114 L.J.K.B. 196; 172 L.T. 153; 2nd Digest Supp.
- (2) *Lilley v. Doubleday*, (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, 163.

Action.

The plaintiff claimed the return of a mink coat or its value, or alternatively damages for breach of contract. She alleged a contract of Apr. 30, 1952, under which the defendants agreed to store the coat, that the coat was delivered to them on May 1, 1952, and that the defendants failed to return it when demanded in October, 1952. The defendants denied the alleged contract, and contended that a contract was made on May 1, 1952, under which they undertook to try to sell the coat for the plaintiff, this contract being subject to a written term contained in the defendant's receipt which provided: "All goods left at customer's risk." The defendants, further, claimed to have returned the coat to the plaintiff on May 1, 1952, the day on which they alleged the contract had been made.

The parties first came together in September, 1946, when the plaintiff purchased the coat in question from the defendants. Four years later, in November, 1950, it was returned to the defendants for repair. The invoice for that repair was in the defendants' usual form and had printed on it in clear legible type the words: "All goods left at customer's risk. Please advise your insurers of this." On Jan. 31, 1952, the plaintiff went to the defendants' office with the coat and other furs. Her purpose in taking the coat was to hand it to Miss Delmer Price, of the defendant firm, so that Miss Price could sell it if she could obtain a suitable offer from a purchaser. This was the first occasion on which Miss Price had been entrusted with the mink coat and she drew the plaintiff's attention to the fact that the goods, while in her possession, would be at customer's risk and asked her whether she was insured. As a result Miss Price was asked to prepare a valuation for insurance purposes. The furs were left with the defendants and the plaintiff was given a receipt which contained the exclusion clause already referred to. About a fortnight later, the plaintiff decided to have the mink coat back and it was brought back to her house on Feb. 19 or Feb. 20.

Shortly before May 1, 1952, the plaintiff telephoned Miss Price and asked for her furs to be collected as she wished to put them into cold storage for the summer months. The defendants' van called and took the furs away. The defendants' version was that on May 1, 1952, the plaintiff arrived at the defendants' premises, handed the mink coat to Miss Price, asked her to sell it if she could and then left; that later on that day a telephone call was received at the defendants' office purporting to come from the plaintiff's house asking for the coat to be sent back, and that Miss Price instructed her vanman to take the coat back to the plaintiff. The vanman gave evidence that he did so.

The judge rejected the defendants' version of the events of May 1, 1952, and accepted the plaintiff's.

E. V. Falk for the plaintiff.

A. M. Lee for the defendants.

McNAIR, J., after considering the evidence and stating findings of fact as summarised above, continued: In those circumstances the defendants' plea of re-delivery in the evening of May 1, 1952, having failed, the question I have to determine is whether they are protected by the terms of the contract, viz., by the terms: "All goods left at customer's risk." From what I have already said, it is plain that the course of business between the parties was that the goods should be left at customer's risk, and furthermore in my view Miss Price clearly drew the plaintiff's attention on Jan. 31, 1952, to those words.

Those words accordingly forming part of the contract, the position of my finding so far is this: the plaintiff has proved a delivery to the defendants and

A the defendants' attempted proof of re-delivery has failed. In those circumstances can it be said that the plaintiff is defeated by this clause in the contract: "All goods left at customer's risk"?

B Counsel for the defendants who has argued this case with his customary moderation and, at the same time, with force, submits that as a matter of law, on the basis of *Alderslade v. Hendon Laundry, Ltd.* (1), if on the admitted facts delivery to the bailee has taken place on the terms that the goods are left at owner's risk, then, unless the plaintiff can bring his claim against the bailee for some independent wrong other than the mere failure to return the goods or for keeping the goods in some place not covered by the contract, the plaintiff cannot succeed, but is defeated by the words "all goods left at customer's risk."

C I do not read *Alderslade v. Hendon Laundry, Ltd.* (1), as going that length. I think that it is clear that in that case the two judgments in the Court of Appeal proceeded on the basis of the facts found by the county court judge which included the finding that there was negligence on the part of the defendants which caused the loss of the articles there in question, viz., some Irish linen handkerchiefs which had been handed over for laundering. On the facts of this case, however, where a fur coat has been handed over for the purpose of storage or,

D accepting the defendants' case, handed over for the purpose of sale, the defendants do not escape liability unless they establish either that the loss did occur in some way not involving their negligence, or alternatively, that the loss did occur by their negligence. If, however, they fail to adduce satisfactory evidence of how the loss occurred, as is the case, and if the loss may have occurred in a way which would not be covered by the "customer's risk" clause, then the

E clause does not protect them. By way of illustration, it seems to me that there are two states of fact at least which are consistent with the evidence given in the present case and which would not bring the exclusion clause into operation. One state of fact, which may very well be the truth in the present case, is that owing to some confusion in the defendants' premises—and from what I have heard of the way in which their business is conducted it seems to me that there is every

F opportunity for confusion—this coat may have been sold and its sale may have been recorded mistakenly as a sale of another coat altogether. Such a circumstance would not, as it seems to me, bring this clause into operation. Secondly, it may be that the coat was put into cold store at a place which was not permitted by the contract, viz., put into cold store with an independent contractor. It seems that the common practice was not to keep fur coats in cold store at the

G defendants' own premises but to keep them in cold store elsewhere. If they were so kept in cold store elsewhere, then, unless that fact had been brought to the attention of the customer, on the principle of such cases as *Lilley v. Doubleday* (2) and others, the protective clause would not avail because there would have been a fundamental breach in dealing with the goods otherwise than as authorised by the contract.

H I am unable accordingly to take the view that, on my finding of fact, the defendants have brought the case within the protective clause, though I accept without hesitation the submission made by counsel on behalf of the defendants that these words "All goods left at customer's risk" are apt to exclude liability for loss by negligence whilst in the defendants' possession at their premises.

I [HIS LORDSHIP then went on to consider the question of damages and awarded the sum of £600.]

Judgment for the plaintiff.

Solicitors: Haslewood, Hare, Shirley Woolmer & Co. (for the plaintiff); Kenneth Brown, Baker, Baker (for the defendants).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

GALER v. MORRISSEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Streatfeild, JJ.), January 20, 1955.]

Bye-Law—Validity—Bye-law prohibiting nuisance by noisy animals—Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 49), s. 92 (1) (b)—Local Government Act, 1933 (23 & 24 Geo. 5 c. 51), s. 249 (4).

By the Public Health Act, 1936, s. 92 (1) (b) "any animal kept in such a place or manner as to be prejudicial to health or a nuisance" is a "statutory nuisance" which can be dealt with summarily.

On Feb. 28, 1951, a county council, acting under the powers provided by the Local Government Act, 1933, s. 249 (1) "for the prevention and suppression of nuisances" made a bye-law, which was duly confirmed, whereby "No person shall keep within any house, building, or premises any noisy animal which shall be or cause a serious nuisance to residents in the neighbourhood." Under sub-s. (4) of s. 249 of the Act of 1933 where, by or under any enactment in force in any area provision is made for the prevention or suppression in a summary manner of any nuisance, power to make bye-laws under s. 249 is not exercisable as respects that area.

M. was charged under the bye-law with unlawfully keeping on his premises a number of noisy animals, namely, greyhounds. On the question whether or not the bye-law was ultra vires,

Held: section 92 (1) (b) of the Act of 1936 made provision for the suppression in a summary manner of nuisances caused by insanitary or defective premises, but not for the suppression of nuisances from noisy animals; the subject-matter of the bye-law was different from the subject-matter of s. 92 (1) (b), and, therefore, the bye-law was not invalid.

Appeal allowed.

[As to the Validity of Bye-Laws, see 26 HALSBURY'S LAWS (2nd Edn.) 604, para. 1291; and for cases on the subject, see 38 DIGEST 162, 163, 81-86.]

For the Local Government Act, 1933, s. 249, see 14 HALSBURY'S STATUTES (2nd Edn.) 484.

For the Public Health Act, 1936, s. 92 (1) (b), see 19 HALSBURY'S STATUTES (2nd Edn.) 379.]

Case referred to:

(1) *Thomas v. Sutters*, [1900] 1 Ch. 10; 69 L.J.Ch. 27; 81 L.T. 469; 25 Digest 435, 327.

Case Stated by Kent Quarter Sessions.

On Jan. 1, 1954, at a court of summary jurisdiction sitting at Maidstone, the appellant, James John Galer, preferred an information against the respondent, Walter Benedict Morrissey, charging that he, being the proprietor of certain premises known as "Cassa Training Ground" at Harrietsham, unlawfully did keep within those premises a number of noisy animals, namely, greyhounds, which did cause a serious nuisance to residents in the neighbourhood contrary to a bye-law dated Feb. 28, 1951, made by the Kent County Council, and to the Local Government Act, 1933, ss. 249-251. On Jan. 27, 1954, the respondent was convicted and fined. The respondent appealed against the conviction on the ground that the bye-law was ultra vires and unreasonable. On Apr. 2, 1954, the Appeal Committee of West Kent Quarter Sessions heard the appeal and found that the bye-law was made by the Kent County Council on Feb. 28, 1951, in pursuance of the Local Government Act, 1933, s. 249 (1), and confirmed by the Secretary of State. It was contended by the respondent that the bye-law was ultra vires of the county council because (i) s. 92 (1) (b) of the Public Health Act, 1936, provided that any animal kept in such a place or manner as to be prejudicial to health or a nuisance was a statutory nuisance and might be dealt with summarily; (ii) the said bye-law was made under s. 249 (1) of the

A Local Government Act, 1933, and sub-s. (4) provided that where any enactment was in force providing for the prevention and suppression in a summary manner of any nuisance the power to make bye-laws under that section was not exercisable; (iii) that there was no real difference between the bye-law and the provisions of s. 92 (1) of the Act of 1936; (iv) that if the animals were a nuisance the matter could be dealt with under s. 92 (1) of the Act of 1936. It was contended by B the [present] appellant that (i) the bye-law was supplementary to the provisions of s. 92 (1) of the Act of 1936 and was enforceable in a different manner and by a wider class of persons than the provisions of the statute; (ii) as the bye-law had been made by a public representative body and confirmed by the Secretary of State it ought to be benevolently interpreted and supported if possible. The appeal committee were of opinion that the bye-law was ultra vires in that the C provisions of s. 92 (1) of the Public Health Act, 1936, were wider than those of the bye-law, and gave power for proceedings to be taken in a summary manner in respect of animals which were kept in such a place or manner as to be a nuisance, and, accordingly, allowed the appeal.

Melford Stevenson, Q.C., B. R. Clapham and P. W. Gibbings for the appellant.
C. H. Gage for the respondent.

D LORD GODDARD, C.J.: The bye-law provides:

“No person shall keep within any house, building, or premises any noisy animal which shall be or cause a serious nuisance to residents in the neighbourhood.”

E I think the word “serious” may give rise to a great deal of dispute. If a nuisance is proved, it is a nuisance whether it is or is not serious. The bye-law provides that

“proceedings . . . shall not be taken against a person unless the nuisance has continued after the expiration of a fortnight from the date of the service on that person of a notice alleging serious nuisance, signed by not less than F three householders residing within hearing of the animal.”

Before the appeal committee it was argued that the bye-law was bad because the subject-matter was already dealt with by the Public Health Act, 1936, s. 92 (1) (b). It is conceded and no one doubts that if the statute deals with precisely the same matter, the bye-law would be ultra vires, because a bye-law cannot, in effect, cross the t's and dot the i's of a statute. If the bye-law G deals with the same matter as the statute there would be no necessity for the bye-law, and, if it goes beyond the statute, then the bye-law is bad.

In my opinion it is clear that this bye-law does not deal with the same matter as the statute. Section 92 (1) of the Public Health Act, 1936, creates a statutory nuisance where

H “(b) any animal [is] kept in such a place or manner as to be prejudicial to health or a nuisance.”

The conditions under which the animal is kept may create a nuisance and an abatement notice can be served, but the sub-section does not deal with a noisy animal. A noisy animal may be kept in the most sanitary conditions and yet still be a nuisance. What puts this matter beyond doubt is that you find this provision in Part III of the Public Health Act, 1936, which is headed “Nuisances and offensive trades” and there is a fasciculus of sections, all of which deal with factories, houses unfit for human habitation and smoke nuisance—all I matters which come from insanitary or defective premises. It is clear, to my mind, that s. 92 (1) is dealing with cases where, for example, pigs are kept so near to other houses as to cause a nuisance from effluvia.

Counsel for the appellant called the attention of the court to two or three local Acts in which there is express power to deal with noisy animals in pursuance of s. 92 (1). That is a recognition by Parliament that noisy animals do not come

within s. 92 (1) (b), but I am not relying simply on those private Acts. I am A
relying on a matter of construction of the sub-section. I am clear that it does
not deal with noisy animals; therefore, the bye-law is good and the Case must
go back to the appeal committee of quarter sessions with a direction that their
decision that the bye-law is ultra vires is wrong and that they must hear the
appeal.

CASSELS, J.: I agree. B

STREATFEILD, J.: I agree.

Appeal allowed; Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for Clerk of Kent County Council
(for the appellant); *Monckton, Son & Collis*, Maidstone (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.] C

MILLS AND ANOTHER v. AVON AND DORSET RIVER BOARD.

[CHANCERY DIVISION (Vaisey, J.), January 21, 25, 1955.] D

*Fishery—Private fishery—Salmon and trout—Owner of exclusive right of fishing—
Right to issue of general licence to fish—Salmon and Freshwater Fisheries
Act, 1923 (13 & 14 Geo. 5 c. 16), s. 61 (g).*

J.D.M. and J.M.M. were entitled to an exclusive right of fishing for
salmon and trout on two parts of the Hampshire Avon. For many years
before 1954, they, or one of them, had been granted general licences to fish E
in those waters under the Salmon and Freshwater Fisheries Act, 1923,
s. 61 (g), as modified under s. 93 (2) of that Act by the Hampshire Rivers
Fisheries Provisional Order, 1922. The Avon and Dorset River Board,
who were responsible for the issue of licences, found that the majority of the
owners of exclusive rights of fishing in their area had commercialised their
fishing, and that the issue of general licences (covering all persons who were F
permitted to fish by the owners of the fisheries) deprived them of revenue
which they would have derived from the issue of a licence to each person
who fished the waters covered by general licences. The board, therefore,
refused to issue any general licences for 1954. J.D.M. and J.M.M., who
had not commercialised their fisheries, applied for general licences and were
refused. G

Held: the indiscriminate withholding by the board of general licences
was unjustified and J.D.M. and J.M.M. were entitled as of right under
s. 61 (g) (as modified) to the issue to one or both of them of a general licence
to fish for salmon or trout subject to such conditions as might be agreed or
in default of agreement as might be determined by the Minister of Agriculture
and Fisheries, but without prejudice to the right of the board to withhold H
such general licence in the event of any abuse or misuse or threatened abuse
or misuse of the privileges conferred.

[For the Salmon and Freshwater Fisheries Act, 1923, s. 61, s. 93 (2), see
10 HALSBURY'S STATUTES (2nd Edn.) 105, 121.]

Adjourned Summons. I

The plaintiffs, the joint owners of two several fisheries, Bisterne Fishery and
Winkton Fishery on the Hampshire Avon, claimed against the Avon and Dorset
River Board a declaration that on the true construction of the Salmon and
Freshwater Fisheries Act, 1923, s. 61, as modified by the Hampshire Rivers
Fisheries Provisional Order, 1922, art. 17, they were entitled as of right to the
issue to one or both of them of a general licence to fish for salmon or trout with
rod and line subject to such conditions as might be agreed or in default of agree-
ment as might be determined by the Minister of Agriculture and Fisheries.

A *Dingle Foot, Q.C.*, and *Joseph Dean* for the plaintiffs.
N. J. Skelhorn, Q.C., and D. O. Thomas (with him R. Stock) for the board.

Cur. adv. vult.

Jan. 25. VAISEY, J.: For the purposes of this case the plaintiffs, John Digby Mills, and his son, John Micklethwaite Mills, may be regarded as the owners of two several fisheries on the Hampshire Avon, that is to say, the Bisterne Fishery in the Parish of Ringwood, and the Winkton Fishery in the Parish of Christchurch. The exact nature of their interests need not be specified. For many years down to and including 1953 general licences had been issued in respect of each of these fisheries, formerly under r. 4 of s. 34 of the Salmon Fishery Act, 1865, and afterwards under the Salmon and Freshwater Fisheries Act, 1923, s. 61 (g), as modified under s. 93 (2) of that Act by the Hampshire Rivers Fisheries Provisional Order, 1922. Such licences were issued before 1950 by the Hampshire Rivers Board of Conservators whose functions were thereafter taken over by and are now vested in the defendants, the Avon and Dorset River Board. In the latter part of 1953, the board informed the plaintiffs of their decision not to issue any general licences for 1954, and to that decision they adhered. The question raised in this case is whether that decision was justified.

The plaintiffs duly applied for general licences in respect of both their fisheries for 1954, and tendered the appropriate sums fixed by the Minister of Agriculture and Fisheries under s. 61 of the Act of 1923, as modified,* viz., £50 in respect of the Bisterne Fishery and £20 in respect of the Winkton Fishery. I am told that my decision in this case will cover the case of the owners of two other fisheries on the same river, Lord Normanton as owner of the Somerley Fishery, and Lord Manners as owner of the Avon Tyrrell Fishery. Each of them applied for and was refused a general licence in respect of his fishery for 1954. It appears that there are some twenty other cases in which general licences in respect of fisheries on the said river were granted in 1953 and withheld in 1954, and all the other persons to whom and from whom such licences were granted and withheld have acquiesced in the board's refusal to give them general licences for 1954.

The reason for the board's change of policy is explained in these words:

G "The majority of the present owners of exclusive rights of fishing in the board's area have commercialised their fishing. If, in such cases, a general licence is issued, it covers any number of persons who, whether for a consideration or not, are permitted to fish by the owners of the fishery and general licences are, therefore, no longer confined in such cases to private guests of the owners of the fishery. If no general licence is issued, each of the persons who fish the waters where there is an exclusive right to fishing has to obtain from the defendant board a separate salmon, trout or coarse fish licence. The grant of general licences, therefore, now causes a substantial loss of revenue to the board."

H It seems rather strange to me that the plaintiffs, who have not commercialised their fisheries, should be penalised by the action of the other fishery owners in having done so, and the same observation may, perhaps, be applicable also to the cases of Lord Normanton and Lord Manners. Surely any loss arising from commercialisation or other particular uses of fisheries ought not to be recouped in such a rough and ready way, but ought to be made to fall on those who are responsible for it and not on the general body of owners of fisheries. To withhold the issue of general licences in a wholesale and indiscriminate manner strikes me as being very inequitable, and I cannot understand why an owner, who, by commercialisation or otherwise, deprives the defendant board of income which they would otherwise receive, should not be charged an appropriate

* I.e., by art. 17 of the Hampshire Rivers Fisheries Provisional Order, 1922.

higher fee for a general licence, instead of having his general licence refused altogether. Still less can I understand why what I may call an innocent owner should be penalised, and the conclusion I have reached in this case is that a fishery owner is entitled to a general licence unless the board can adduce some good reason for withholding it referable to the applicant himself, or to the conditions under which his own fishery is being used. The withholding of a general licence from the plaintiffs for no better reason than that other persons unconnected with them have been acting in a manner of which the board disapproves is, in my judgment, unwarranted. The wholesale and indiscriminate withholding of general licences for 1954 was, in my judgment, unjustified.

I must now refer briefly to the relevant sections of the Act. Section 61 of the Salmon and Freshwater Fisheries Act, 1923, provides:

"Every fishery board shall grant licences to fish for salmon or trout with any instruments which may be lawfully used for the purpose, and such licences shall be issued and shall have effect in accordance with . . ."

rules set out under heads (a) to (m). Rule (a) reads thus:

"Licences shall be granted on payment of such licence duties as the fishery board, with the approval of the Minister, may from time to time determine, or, in the case of any instrument for which a licence duty has not been determined and approved and which may be lawfully used in the district on payment of a licence duty of 20s."

Rule (c) says:

"Subject to the provisions of this Part of this Act with respect to the limitation of the number of licences, every person demanding a licence, and tendering to the person appointed by the fishery board to distribute licences the amount of licence duty payable under this Act in respect of that licence, shall, unless disqualified for holding a licence in manner hereinafter appearing, be entitled to receive that licence without any question or objection whatsoever."

I pause there to observe that this reference to "without any question or objection" appeared also in the earlier Act*, and is, in my judgment, somewhat strange. Rule (g) provides:

"Any person or association of persons for the time being entitled to an exclusive right of fishing for salmon or trout in any waters may, on application to the fishery board, obtain a general licence subject to such conditions as the fishery board and the licensee may agree or in default of agreement as may be determined by the Minister; and such general licence shall enable the licensee or any person authorised by the licensee in writing under his hand, or when granted to an association of persons any member of the association authorised in writing by the secretary of the association, without any other licence, to fish for salmon or trout in any legal manner in those waters, but shall not be of any validity beyond the limits to which it refers."

Rule (h) provides:

"There shall be paid for a general licence such sum as the fishery board and the person or association of persons entitled to the licence may from time to time agree, with the approval of the Minister, having regard to the extent and productiveness of the fishery, and to the nature of the instruments used and to the conditions (if any) attached to the licence."

It seems to me that under r. (g) and r. (h) there is ample authority for the board, with the assent of the Minister, to make appropriate conditions, and to fix appropriate fees, in order to differentiate in a fair manner between the holders of the various fisheries. They ought not to penalise all holders

* I.e., the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 4, r. 4, repealed.

A in the indiscriminate manner which a total refusal of general licences would seem to involve.

By s. 93 (2) of the Act of 1923, the provisional order to which I have already referred must be treated as incorporated in the Act. That provisional order (the Hampshire Rivers Fisheries Provisional Order, 1922, which is scheduled to the Hampshire Rivers Fisheries Provisional Order Confirmation Act, 1922) provides by art. 17:

C “There shall be paid for a general licence such sum as shall be agreed by the fishery board and the person entitled to the licence and be approved by the Minister or as shall on the application of either party be determined by the Minister having regard to the extent and productiveness of the fishery and to any conditions attached to the licence with respect to the nature of the instruments or devices to be used for catching fish or otherwise which shall be agreed upon by the said parties or in default of agreement be imposed by the Minister.”

D I think that that article makes it clear that the fixing of the appropriate sum to be paid is a matter to be decided as between the defendants and the owners of the fisheries according to the circumstances of each case. This matter is one which should, I think, be dealt with in a human and reasonable and appropriate manner in each particular case, and not in the rough and ready manner which a total withdrawal of general licences would involve.

Such being my view, the order which I propose to make is as follows. I shall declare that

E “upon the true construction of s. 61 of the Salmon and Freshwater Fisheries Act, 1923, as modified under s. 93 (2) thereof by art. 17 of the Hampshire Rivers Fisheries Provisional Order, 1922, the plaintiffs as the persons for the time being entitled to the exclusive rights of fishing for salmon and trout in the two fisheries in the River Avon in Hampshire known as the Bisterne Fishery and the Winkton Fishery respectively are entitled as of right to the issue to one or both of them of a general licence within the meaning of s. 61 (g) of the said Act to fish for salmon or trout with rod and line subject to such conditions as may be agreed or in default of agreement as may be determined by the Minister of Agriculture and Fisheries having regard to the circumstances of the particular case, but without prejudice to the right of the [board] to withhold such general licence in the event of any abuse or misuse or threatened abuse or misuse of the privileges conferred or intended to be conferred thereby.”

G As the withholding of general licences for 1954 appears to me not to have been justified, I will order the board to pay the plaintiffs' costs.

Declaration accordingly.

Solicitors: *R. Graham Page*, agent for *Nevill & Stuart*, Ringwood (for the plaintiffs); *Vizard, Oldham, Crowder & Cash*, agents for *D. W. Treadgold*, Bournemouth (for the defendants).

[Reported by *R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

PRACTICE DIRECTION.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Gorman, JJ.),
January 31, 1955.]

*Criminal Law—Practice—Previous convictions—Particulars of convictions and
history of accused and convicted persons to be supplied by the police.*

LORD GODDARD, C.J., read the following statement: The judges of the Queen's Bench Division have considered the question as to the information and history of accused and convicted persons that should be given to the court, counsel and solicitors by police officers before and after conviction. They have resolved as follows:

(1) Details of previous convictions must always be supplied by the police to the defending solicitor, or if no solicitor is instructed, to defending counsel, on request. The judges are of opinion that there is no obligation on a police officer to satisfy himself that the prisoner has authorised a statement of previous convictions to be given as it is clearly within the ordinary authority of solicitor and counsel to obtain this information. In order that the defence may be properly conducted, the prisoner's advisers must know whether they can safely put the prisoner's character in issue.

(2) There is no need for police officers to supply a list of previous convictions to the court before conviction because the prisoner's previous convictions are always set out in the confidential calendar with which the judge is supplied by the governor of the gaol whose duty it is to supply it. The police will, of course, give any information to the governor that he may require to enable him to perform his duty.

(3) A proof of evidence should be prepared by a police officer containing a factual statement of the previous convictions, particulars of age, education and employment, the date of arrest, whether the prisoner has been on bail and, if previously convicted, the date of his last discharge from prison if known. It may also contain a short and concise statement as to the prisoner's domestic and family circumstances, his general reputation and associates and, if it is to be said that he associates with bad characters, the officer giving evidence must be able to speak of this from his own knowledge. This proof may be given either with his brief or at the outset of the case to counsel for the prosecution and to no one else, as unless the accused is convicted it has no relevance. It need not be prepared in two parts. If the accused is convicted it is to be given to the court and to counsel for the defence but it will be for counsel for the prosecution in the first place to decide how much of this he asks the officer to prove while it will, of course, be open to the presiding judge to put any questions he may think fit. The statement should not be handed to the court or to defending counsel until the officer is sworn. It may by leave of the court be given to the shorthand writer, who may use it to check his note but he must only transcribe so much as is given in evidence.

[Reported by A. P. PRINGLE, Esq., *Barrister-at-Law.*]

A **MANCHESTER CORPORATION v. MANCHESTER PALACE OF VARIETIES, LTD.**

[COURT OF CHIVALRY (Duke of Norfolk (Earl Marshal) and Lord Goddard, C.J. (Surrogate), with Officers of Arms in attendance), December 21, 1954, January 21, 1955.]

B *Court—Court of Chivalry—Jurisdiction—Usurpation of armorial bearings—Statute 8 Ric. 2 (1384), c. 5—Statute 13 Ric. 2 stat. 1 (1389-90), c. 2—Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), s. 3, schedule.*

C In 1842 a coat of arms, crest and supporters were granted to the Manchester Corporation by the Kings of Arms. Subsequently, over a period of many years, the defendant company, which owned a theatre in Manchester, used the Corporation's arms as the company's common seal and displayed them in the auditorium of the theatre. In April, 1954, the defendant refused a request by the Corporation to cease using and displaying the Corporation's arms, and the Corporation thereupon presented a petition to the Court of Chivalry asking for reparation. The Court of Chivalry had not sat for some two hundred years. The defendant did not claim that the jurisdiction of the court had become obsolete, but contended, among other things, that by the Statute 8 Ric. 2 c. 5 and the Statute 13 Ric. 2 stat. 1 c. 2 (which were repealed by the Statute Law Revision and Civil Procedure Act, 1881), the court had jurisdiction in relation to armorial bearings only when they were carried to war outside the realm, or displayed at a tournament within the realm, or, possibly, in a civil war.

E **Held:** (i) the Statutes 8 Ric. 2 c. 5* and 13 Ric. 2 stat. 1 c. 2* were intended merely to confine the jurisdiction of the Court of Chivalry to matters of dignity and arms and to prevent the court from entertaining matters cognisable by the ordinary courts, and, as the right to bear arms was not a matter cognisable at common law, the Court of Chivalry had

F * The statutes, which were repealed by the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), s. 3, provided as follows (the text is taken from Statutes at Large)—

G 8 Ric. 2 c. 5—"Because divers pleas concerning the common law, and which by the common law ought to be examined and discussed, are of late drawn before the constable and marshal of England, to the great damage and disquietness of the people; (2) it is agreed and ordained, That all pleas and suits touching the common law, and which ought to be examined and discussed at the common law shall not hereafter be drawn or holden by any means before the foresaid constable and marshal, but that the court of the same constable and marshal shall have that which belongeth to the same court, and that the common law shall be executed and used, and have that which to it belongeth, and the same shall be executed and used as it was accustomed to be used in the time of King EDWARD."

H 13 Ric. 2 Stat. 1 c. 2—"Because that the commons do make a grievous complaint, that the court of the constable and marshal hath inroached to him, and daily doth inroach contracts, covenants, trespasses, debts and detinues, and many other actions pleadable at the common law, in great prejudice of the King and of his courts, and to the great grievance and oppression of the people; (2) our lord the King, willing to ordain a remedy against the prejudices and grievances aforesaid, hath declared in this parliament, by the advice and assent of the lords spiritual and temporal, the power and jurisdiction of the said constable, in the form that followeth:

I To the constable it pertaineth to have cognisance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their time; (3) joining to the same, that every plaintiff shall declare plainly his matter in his petition, before that any man be sent for to answer thereunto. And if any will complain, that any plea be commenced before the constable and marshal, that might be tried by the common law of the land, the same plaintiff shall have a privy seal of the King without difficulty, directed to the said constable and marshal, to surcease in that plea, until it be discussed by the King's council, if that matter ought of right to pertain to that court, or otherwise to be tried by the common law of the realm of England, and also that they surcease in the mean time."

jurisdiction to deal with complaints relating to the usurpation of armorial bearings.

(ii) the display of the Corporation's arms in the auditorium of the defendant's theatre would not be, by itself, a ground for intervention by the court, since armorial bearings were widely used as a decoration or embellishment without complaint; but the use of the Corporation's arms as the defendant's common seal was a legitimate subject of complaint, because a deed sealed with an armorial device was thereby authenticated as the act and deed of the person entitled to bear the arms; and, in the circumstances, the court would inhibit and enjoin the defendant from any display of the Corporation's arms.

Per LORD GODDARD, C.J. (THE SURROGATE): "... once it is established that this court exists, whatever interval may have elapsed since its last sitting, there is no way, so far as I know, of putting an end to it save by an Act of Parliament" (see p. 393, letter I, post).

[**Editorial Note.** LORD GODDARD, C.J., distinguishes the present case, where an ancient jurisdiction is held to be subsisting despite long disuse, from the instance of the ecclesiastical courts where recurrence of jurisdiction to punish laity was rejected as being no longer in harmony with modern ideas (see p. 394, letter C, post). He suggests the desirability of leave having to be obtained before proceedings in the Court of Chivalry are instituted, and that the jurisdiction of the court, if it is to be convened at all frequently, should be defined by statute. As appears from the headnote and argument, the two statutes, 8 Ric. 2 c. 5 and 13 Ric. 2 Stat. 1 c. 2, were repealed by the Act of 1881. They had been repealed, however, before that Act by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 2, subject to the savings in s. 4, which provides that the repeal shall not affect "any jurisdiction . . . established or confirmed . . . by or under any enactment so repealed". These words would be sufficient to save the jurisdiction of the court even if that jurisdiction had rested wholly on the statute repealed (see *Leeds Industrial Co-operative Society, Ltd. v. Slack*, [1924] A.C. at p. 862).

As to the Court of Chivalry, see 9 HALSBURY'S LAWS (3rd Edn.) 572, para. 1337; 25 HALSBURY'S LAWS (2nd Edn.) 70, para. 164; and for cases on the subject, see 16 DIGEST 193, 975-979.]

Cases referred to:

- (1) *R. v. Daily Mail, Ex p. Farnsworth*, [1921] 2 K.B. 733; 90 L.J.K.B. 871; 125 L.T. 63; 16 Digest 12, 54.
- (2) *R. v. Daily Herald, Editor, Printers & Publishers of, Ex p. Norwich (Bp.)*, [1932] 2 K.B. 402; 101 L.J.K.B. 305; 146 L.T. 485; Digest Supp.
- (3) *Scroop v. Grosvenor*, (1389), Calendar of Close Rolls, Richard II, Vol. III, p. 586; 16 Digest 193, 975.
- (4) *Re Rivett-Carnac's Will*, (1885), 30 Ch.D. 136; 54 L.J.Ch. 1074; 53 L.T. 81; 37 Digest 49, 307.
- (5) *R. v. St. Edmundsbury & Ipswich Diocese (Chancellor), Ex p. White*, [1946] 2 All E.R. 604; [1947] K.B. 263; 175 L.T. 483; *affd.* C.A., [1947] 2 All E.R. 170; [1948] 1 K.B. 195; 177 L.T. 488; 2nd Digest Supp.
- (6) *Sturla v. Freccia*, (1880), 5 App. Cas. 623; 50 L.J.Ch. 86; 43 L.T. 209; 44 J.P. 812; 22 Digest (Repl.) 307, 3179.
- (7) *Chambers v. Jennings*, (1702), 7 Mod. Rep. 125 (87 E.R. 1139); 2 Salk. 553 (91 E.R. 468); 16 Digest 193, 978.
- (8) *Russell's Case*, (1584), 5 Co. Rep. 27a (77 E.R. 91); 4 Mod. Rep. 128 (87 E.R. 301); 23 Digest 62, 427.
- (9) *Oldis v. Donmille*, (1695), Show. Parl. Cas. 58; 1 E.R. 40; 16 Digest 193, 977.
- (10) *Isherwood v. Oldknow*, (1815), 3 M. & S. 382; 105 E.R. 654; 31 Digest (Repl.) 468, 5941.

- A (11) *Blunt v. Park Lane Hotel, Ltd.*, [1942] 2 All E.R. 187; [1942] 2 K.B. 253; 111 L.J.K.B. 706; 167 L.T. 359; 2nd Digest Supp.
 (12) *Maidman v. Malpas*, (1794), 1 Hag. Con. 205; 161 E.R. 526; 7 Digest 527, 71.

Petition to the Earl Marshal.

- B On May 5, 1954, Manchester Corporation (referred to hereinafter as "the Corporation") presented a petition* in the Court of Chivalry alleging (i) that they were a body corporate and lawfully bore for arms: Gules, three bendlets enhanced or, a chief argent, thereon on waves of the sea a ship under sail proper; and for crest: on a wreath of the colours, a terrestrial globe semée of bees volant all proper; and for supporters: on the dexter side, an heraldic antelope argent, attired, collared and chain reflexed over the back or, and on the sinister side, a lion guardant or, murally crowned gules, each charged on the shoulder with a rose of the last; (ii) that the Manchester Palace of Varieties, Ltd. (referred to hereinafter as "the defendant") was the occupier of a building known as the Palace Theatre, Whitworth Street, Manchester, open to members of the public and therein displayed publicly on a pelmet above the main curtain in the auditorium, without the leave or licence and contrary to the will of the plaintiffs, representations of the said arms, crest and supporters, or arms, crest and supporters differing from them in no material respect, contrary to the laws and usages of arms; (iii) that the defendant also displayed representations of the said arms, crest and supporters on its common seal without the leave and licence and contrary to the will of the Corporation, contrary to the law and usages of arms; and (iv) that, notwithstanding the Corporation's request to cease the display of the said representations, the defendant had continued and threatened to continue the display thereof, whereby, the Corporation were greatly disparaged. The Corporation prayed that the Earl Marshal might be pleased to award process against the defendant to appear and answer the premises in His Grace's High Court of Chivalry or Court Military and that thereupon such course might be taken for the Corporation's reparation as the court should think fit.

- On Oct. 20, 1954, the Duke of Norfolk (the Earl Marshal) issued a citation under his hand and seal directed to all justices of the peace, sheriffs, bailiffs, constables, officers and other faithful subjects of the Queen's Majesty commanding them to cite or cause to be cited the defendants to enter an appearance in the registry of the High Court of Chivalry at the College of Arms, Queen Victoria Street, London, within fifteen days after service thereof and answer the complaint of the Corporation. Service of the citation was executed on Oct. 25, 1954, by the Corporation's solicitors showing the same to the defendant's solicitors. The defendant entered an appearance and the Corporation propounded a libel which repeated the allegations contained in the petition and, in addition, stated (i) that the inhabitants of the borough of Manchester were incorporated by royal charter dated Oct. 23, 1388; (ii) that the arms and crest described in the petition, together with a motto, were granted to the borough by the Kings of Arms on Mar. 1, 1842, and the supporters described in the petition were granted by the Garter Principal King of Arms on Mar. 2, 1842, to be borne and used for ever thereafter by the borough and their successors according to the laws of arms; (iii) that by royal charter dated Mar. 29, 1853, the borough was constituted a city; (iv) that the representations of the said arms, crest, motto and supporters were publicly displayed in the defendant's theatre in the months of May to December, 1953, and January to April, 1954, or one of them, and that the representations of the said arms, crest, motto and supporters were displayed on

* An old description of proceedings before the Court of Chivalry for usurping arms, was "cause of instance", and the allegations or complaint in support of the usurpation, distinct from the petition, were called "the libel"; an instance was *Pouncefote v. Pouncefote* (Cur. Mil. Boxes 18/3a), which is included among the notes of cases prepared for the court and presented in the present case by counsel for the Corporation.

the defendant's common seal during the same months, or one of them; (v) that by a letter dated Apr. 13, 1954, the Corporation, by their town clerk, requested the defendant to cease the display of the said representations; (vi) that in a letter dated Apr. 21, 1954, the defendant, by its solicitors, stated that it did not admit the Corporation's right to require it to cease to display the said arms, crest, motto and supporters and that it did not propose to stop so displaying them. By its answer the defendant admitted the allegations of fact stated in the libel, but denied that the display of a representation of the arms granted to the Corporation was contrary to the law, usages or customs of arms and that the said arms could not be displayed in the manner complained of without the Corporation's leave or licence. The defendant alleged that it had used the armorial bearings at the Palace Theatre for upwards of twenty years, and on its common seal for sixty years or more and that, until the plaintiffs' letter of Apr. 13, 1954, no complaint in regard to the display had been made by the plaintiffs or by the Kings of Arms. The defendant further contended that the matter did not fall within the jurisdiction of the court as defined by the statutes 8 Ric. 2 (1384) c. 5, and 13 Ric. 2 stat. 1 (1389-90), c. 2 (which were both repealed by the Statute Law Revision and Civil Procedure Act, 1881 (s. 3 and schedule).

The Corporation, when presenting their petition, and the defendant, with its answer, entered into bonds of £100 each to abide the judgment of the court.

On Dec. 21, 1954, the case was heard before the Earl Marshal and his surrogate, LORD GODDARD, C.J., four heralds and two pursuivants being in attendance. The style of the Earl Marshal having been rehearsed, a letter patent of Charles 2, whereby His Grace the Duke of Norfolk holds the office of Earl Marshal was read, and after it was stated that the court could be held before the Earl Marshal alone, the warrant of the Earl Marshal appointing LORD GODDARD, C.J., to be his lieutenant, assessor and surrogate was read. The Earl Marshal, LORD GODDARD, C.J., and the Officers of Arms then made their declarations and the case was called on.

G. D. Squibb, for the Corporation, opening the case, stated that never before had members of the Inns of Courts appeared before this court or any other temporal court of civil law, the advocates in such courts having always been members of Doctor's Commons. In the present case, also for the first time, solicitors, instead of proctors (who, like the advocates, were appointed by the Archbishop of Canterbury), were acting for the parties. As no reports of civil law courts appeared before the end of the eighteenth century, counsel for the Corporation presented to the court a report of twenty-six cases heard in the Court of Chivalry, and selected by him from the records of cases of that court heard between 1634 and 1707. Dealing generally with the question of jurisdiction, counsel mentioned the Statute 13 Ric. 2 stat. 1 c. 2, which was repealed by the Statute Law Revision and Civil Procedure Act, 1881, and submitted that the Act of 1881 had not affected the jurisdiction of the court, which was not created by statute.

LORD GODDARD, C.J., raised the question of enforcement of a judgment of the court, having regard to the statement to be found in the authorities that it was not a court of record. Counsel for the Corporation submitted that there were three ways of enforcing judgment: (i) by suing on the bonds; (ii) by imprisonment under a warrant of the Earl Marshal; (iii) by a declaration that the party was in contempt, followed by an application to the High Court that the party might be committed for contempt of court, this being the practice followed in the ecclesiastical courts. Counsel referred to *R. v. Daily Mail, Ex p. Farnsworth* (1) and *R. v. Daily Herald, Editor, Printers & Publishers of, Ex p. Norwich (Bp.)* (2) as authorities showing that the High Court protects inferior courts in that way.

A. C. Cole, for the defendant, submitted (i) that the words "with other usages or customs to the same matters pertaining" in the second limb of the

A statute 13 Ric. 2 stat. 1 c. 2*, should be construed ejusdem generis with the first limb and that, therefore, only armorial bearings displayed during a war or tournament were within the jurisdiction of the court, and that the wide jurisdiction accepted by the common lawyers after 1521 was illegal; (ii) that the court never exercised jurisdiction over corporations; (iii) that the use of arms in a seal or for decorative purposes was not an unlawful display according to the laws of arms. Counsel read an affidavit proving the user of the seal and the helmet during the periods alleged in the answer but said that a defence in the nature of laches was not going to be raised.

G. D. Squibb, for the Corporation, replied.

Counsel on both sides put in drafts of the definitive sentences which they proffered for the court to pronounce. The Corporation prayed the court to

C “pronounce decree and declare that the [Corporation] lawfully bear the arms crest motto and supporters in this cause libellate and that the defendants have displayed representations of the said arms crest motto and supporters in the manner in this cause libellate without the leave or licence and contrary to the will of the [Corporation] and the laws and usages of arms and [to] inhibit and strictly enjoin the defendant that they D do not presume to display the said arms crest motto or supporters or any of them without the leave and licence of the [Corporation] . . .”

and further that the court

E “by this [their] definitive sentence or this [their] final decree which sentence or decree [the court] make and promulgate in this writing condemn the defendant in lawful costs incurred by and on behalf of the [Corporation] which costs [the court] tax at the sum of . . . of good and lawful money of Great Britain.”

The defendant prayed the court to

F “pronounce, decree and declare that the defendant ought of right to be dismissed and absolved from the claim and demand of the Corporation touching the matters set forth or claimed in the said pretended libel, and [to] dismiss and absolve the defendant accordingly . . .”

and to condemn the Corporation in costs. Counsel informed the court that the costs on each side were agreed at £300 to be paid by the party who should lose the case. After an adjournment LORD GODDARD, C.J., announced that the court had jurisdiction, that judgment would be given for the Corporation with G £300 costs, and that the reasons for the judgment would be delivered later by him sitting alone.

H Jan. 21. LORD GODDARD, C.J. (The Surrogate), read the following judgment: On Mar. 1, 1842, the Kings of Arms of Her late Majesty Queen Victoria granted a coat of arms and crest to the recently incorporated borough of Manchester, since enhanced to the dignity of a city, and supporters were granted by Garter's warrant on the following day. The Corporation of the City of Manchester now allege and complain that the defendant company, the Manchester Palace of Varieties, Ltd., have over a period of years usurped the achievement granted to them by displaying the arms in the auditorium of the theatre and by using them as their common seal. The defendant admits the allegations of fact in the libel, but deny the jurisdiction of this court, first, because they I say that the court can only deal with matters set forth in the Statutes of 8 Ric. 2 c. 5, and 13 Ric. 2 stat. 1 c. 2, and that the matters alleged do not bring this case within those statutes. Secondly, they submit that judgments binding on this court† have decided that private persons are not answerable to or punishable by this court in respect of such matters as are alleged in the complaint.

* See p. 387, letter H, ante.

† The judgments relied on by the defendant in this connection were *Russell's Case* (5 Co. Rep. 27a) and *Oldis v. Donmille* (Show. Parl. Cas. 58), see post p. 393, letter G.

It is not contended that this court, however long a period may have elapsed since it last sat, is no longer known to the law. It was originally the Court of the Constable and Marshal and has probably existed since the Conquest. At least it had been in existence for very many years before the reign of Richard II, who reigned from 1377 to 1399, and during his time the famous case of *Scroop v. Grosvenor* (3) was heard before it. The hereditary office of Lord High Constable was abolished on the attainder of the Duke of Buckingham in 1521, since when the court has always been held before the Earl Marshal or his surrogate alone and his right to hold the court and to adjudicate at least on heraldic matters was recognised and confirmed by Letters Patent of James I in 1622 and those of Charles II, which were read at the opening of this court. Its records show that frequent sittings have taken place and judgments have been given by the Earl Marshal alone acting through his surrogate. In origin, no doubt, the court was essentially a military tribunal, the forerunner of courts martial, which in later years were established under articles of war issued by the Sovereign from time to time, and now are established and regulated by the Army Act. As the origin of armorial bearings was, or, at least, is commonly believed to have been, a method of identifying knights clothed in armour, it was natural that disputes with regard to the right to display a particular achievement on a shield should have fallen within the cognisance of this court. The power to grant armorial bearings is, as I understand it, delegated by the Sovereign to the Kings of Arms who with their officers were incorporated as a College of Arms in the reign of Philip and Mary. The Earl Marshal is the head and, I think, the visitor of the college. The right to bear arms is, in my opinion, to be regarded as a dignity and not as property within the true sense of that term. It is conferred by a direct grant or by descent from an ancestor to whom the arms had been originally granted. There is authority that a dignity which descends to heirs general or to heirs of the body is an incorporeal hereditament whether or not the dignity concerns lands: see *Re Rivett-Carnac's Will* (4) which related to a baronetcy. It was not contended before me that armorial bearings were an incorporeal hereditament, and in any case it is clear that the right to bear arms is not a matter cognisable by the common law which seems to show that there is no property in arms in the legal sense, otherwise the courts of law would protect them.

Counsel for the defendant, in the course of a careful and learned argument, submitted that the powers of the court were defined by the statutes of Richard II referred to above, since repealed by the Statute Law Revision and Civil Procedure Act, 1881. He argued that the effect of those statutes was that the court had power to act in relation to armorial bearings only when carried to war outside the realm or displayed at a tournament within the realm and, possibly, if carried in an army engaged in suppressing rebellion, that is to say, in a civil war. In my opinion, however, the statutes of Richard were intended, or, at least, have been regarded as intended to confine this court to matters of dignity and arms and to prevent it from entertaining matters cognisable by the ordinary courts of the kingdom. The common law courts have always been vigilant and jealous of any attempt to usurp or encroach on their jurisdiction. Many instances are to be found in the books of prohibitions to the Court of Admiralty and to the spiritual courts, and the liability of the latter to writs of prohibition, though not of certiorari, was fully discussed in the recent case of *R. v. St. Edmundsbury & Ipswich Diocese (Chancellor), Ex p. White* (5). But that the Court of Chivalry has jurisdiction in matters relating to armorial bearings has been recognised by the highest authorities. COKE, C.J., deals with the Court of Chivalry at length in 4 COKE'S INSTITUTES, ch. 17. In COMYN'S DIGEST, tit. Courts, E 2, it is said:

"... the Court [of Chivalry] has an absolute jurisdiction, by prescription, in matters of honour, pedigree, descent, and coat armour."

- A This passage was quoted by LORD BLACKBURN without comment in *Sturla v. Freccia* (6) (5 App. Cas. at p. 628). BLACKSTONE deals with the court as an existing court though one which has, he says, by reason of its narrow and restricted jurisdiction, fallen into contempt and disuse (BLACKSTONE'S COMMENTARIES, vol. 3, p. 103). He points out (*ibid.*) that the Statute of 13 Ric. 2 stat. 1 (1389-1390) c. 2, gives it cognisance touching deeds of arms together with other usages and customs to the same matters appertaining, and he says
- B that the words "other usages and customs" support the claim of the court to give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour, whence it follows that its civil jurisdiction is principally in two points, that of redressing injuries of honour and correcting encroachments in matters of coat-armour, precedence, and other distinctions of families.
- C In HAWKINS' PLEAS OF THE CROWN (8th Edn.), vol. 2, a chapter [ch. 4] is devoted to the court, and that very learned author has no doubt, not only that the court existed, but that the absence of the Constable made no difference to its jurisdiction in these matters that I have mentioned. He says (*ibid.*, at p. 15):

- D "Neither is it probable, that the lord-marshal, upon the extinguishment of the hereditary office of the constable, should from time to time . . . hold this court by himself, without any constable, and also often be assisted therein by the judges of the common law, unless it were then well known that such his proceeding was warranted by the ancient and established usage of his court; and it is very extraordinary, that our judges and lawyers should
- E generally take it as a thing granted, that the marshal is at this day the proper judge of points of honour, etc. if it were imagined that he has no power to act without the concurrence of a constable."

- HAWKINS' opinion is of particular value, as he was in practice as a serjeant at the time when this court last sat, that is, in 1737. *Chambers v. Jennings* (7) has been cited as authority for the proposition that the court cannot sit in the
- F absence of the Constable, but what the court decided in that case was that the court could not entertain any longer an action for words. Slander was cognisable by the courts of common law. They were not going to have the Court of Chivalry abrogating to itself that which could be tried in the Court of Common Pleas, and they took what may perhaps be described as a short cut by saying that, whatever colour there be to hold the plea of some things before
- G the Marshal alone, there was no pretence to hold a plea of words before the court in the absence of the Constable. The explanation of *Russel's Case* (8) and *Oldis v. Donmille* (9), in my opinion, is that the matters there complained of were an infringement of the privileges of the Heralds which might result in their temporal, that is, financial loss. Therefore, there was a remedy by an action on the case and, accordingly, this court was prohibited.

- H The passage from HAWKINS which I have cited in effect amounts to this, that communis opinio among lawyers is evidence of what the law is, which is the way LORD ELLENBOROUGH, C.J., put it in *Isherwood v. Oldknow* (10) (3 M. & S. at pp. 396, 397), and in view of the opinions which I have cited of authors whose works are recognised as of the highest authority, I have no hesitation in holding that this court has jurisdiction to deal with complaints relating
- I to the usurpation of armorial bearings. BLACKSTONE, it is true, regarded the court as obsolete when he was writing not many years after its last recorded sitting, and his view is indorsed by SIR WILLIAM HOLDSWORTH in his HISTORY OF ENGLISH LAW, vol. 1, pp. 578-580. No doubt, one of the reasons why the court fell into disuse was because the way in which its decisions are to be enforced is a matter of great doubt and obscurity, but once it is established that this court exists, whatever interval may have elapsed since its last sitting, there is no way, so far as I know, of putting an end to it save by an Act of Parliament. There may be very good reasons for a court no longer exercising powers which were undoubted

in days gone by. I may instance the powers of the spiritual courts over the laity. For centuries they exercised a very active jurisdiction over laymen in so-called criminal causes, and all forms of immorality and not merely adultery were within their cognisance, "pro reformatione morum et pro salute animae". Although they have been deprived by statute of this jurisdiction with regard to many matters, for example, slander and brawling in church, still in theory they could make decrees of excommunication against an immoral layman and enjoin penance and, what is more, order costs. If I may refer to a judgment of my own on this point, I dealt with the matter at some length in *Blunt v. Park Lane Hotel, Ltd.* (11). I there endeavoured to show the reason why this jurisdiction had become obsolete and beyond recall without the intervention of a statute. It is because judgments of ecclesiastical lawyers of the highest eminence have said that such jurisdiction is not in accordance with modern thought, and ought no longer to be exercised. In the ecclesiastical courts the office of the judge cannot be promoted in a criminal cause without leave: see *Maidman v. Malpas* (12)*. In view of the pronouncements on this subject by LORD PENZANCE and others, it is unthinkable that any diocesan chancellor or Dean of the Arches would permit such a suit nowadays to be promoted. I refer to this matter particularly because it seems to me to indicate a method by which any abuse of this court's undoubted jurisdiction can be prevented. The surrogate of this court and the advocates who practised in it were always civilians and there seems every reason why the practice which obtained in the courts of the civilians should apply here. If, therefore, it is laid down as a rule of this court, as I would very respectfully suggest to His Grace the Earl Marshal that it should be, that leave must be obtained before any proceedings are instituted, it would, I think, prevent frivolous actions, and if this court is to sit again it should be convened only where there is some really substantial reason for the exercise of its jurisdiction. Moreover, should there be any indication of a considerable desire to institute proceedings now that this court has been revived, I am firmly of opinion that it should be put on a statutory basis, defining its jurisdiction and the sanctions which it can impose.

To deal, then, with the present complaint, two matters are alleged: the display of the arms in the auditorium of the theatre, and the use of the arms of the City of Manchester as the common seal of the defendant company. The latter does seem to me to be a legitimate subject of complaint. The corporation of a great city can properly object to their arms being used on any seal but their own. A deed sealed with an armorial device is thereby authenticated as the act and deed of the person entitled to bear the arms. It is, indeed, the seal which makes a document a deed and enabled an action of covenant to be maintained, a form of action far older in English law than assumpsit. For the defendant company to use the arms of the city as its seal looks very much like an attempt to identify the company with the Corporation. With regard to the display in the auditorium, if that were the only complaint, I should have felt it raised a matter of some difficulty. I am by no means satisfied that nowadays it would be right for this court to be put in motion merely because some arms, whether of a corporation or of a family, have been displayed by way of decoration or embellishment. Whatever may have been the case 250 years ago, one must, I think, take into account practices and usages which have for so many years prevailed without any interference. It is common knowledge that armorial bearings are widely used as a decoration or embellishment without complaint. To take one instance, hundreds, if not thousands, of inns and licensed premises throughout the land are known as the so-and-so Arms, and the achievements of a nobleman or landowner are displayed as their sign. It may be and frequently

* *Maidman v. Malpas* was a case of a cause of office, a criminal proceeding, promoted by a rector in which a citation had been dismissed on the ground that leave of the judge had not been obtained as was required by rule which the court had laid down; see 1 Hag. Con. at p. 209.

A is the case that the family whose arms are those displayed have parted with their lands in the neighbourhood and perhaps have never owned the inn or, at least, do so no longer. The arms of universities, colleges or dioceses displayed on tobacco jars, ash trays, teapots and other articles of domestic use are to be found in shops all over the country and are dear to the heart of souvenir hunters, tourists, American and others, as well as sea-side visitors. In strictness, I suppose none of these people have any right to use or display articles thus emblazoned. Then again, at the present day, many a gracious ancient house bears over its porch the arms of the family who built but no longer lives in it. It may be that the line is extinct; it may be that necessity has compelled a sale to another who has recently made a fortune as ample as that of the original builder, amassed perhaps in Cotswold wool, the slave trade, or just as an acquisitive landowner. Could this court be asked to deface the fabric by ordering the removal of the original achievement which has adorned the house, it may be for hundreds of years? The vendor could not complain if he sold the house without first removing the device, nor can I conceive of the Attorney-General, in whom is vested such of the powers and duties of the former King's Advocate as may still remain, emulating the activities of Dr. Duck or Dr. Oldys in the seventeenth and early eighteenth centuries and seeking to have the new owner declared to be "no gentleman and disentitled to bear arms", or, at least, the arms thus displayed. Let me quote from BACON'S ESSAY ON JUDICATURE*:

"... let penal laws, if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution."

E Where, then, is one to draw the line? It can, I think, only be done by the exercise of common sense and by saying that use or display in such circumstances would not be a ground for intervention by this court. In view, however, of the use by the defendant of the arms of the City of Manchester as its common seal, and the contentions which it has set up in this case, I think the court may properly inhibit and enjoin it from any display of the Corporation's arms, and, accordingly, I pronounce the sentence porrected by the plaintiffs, except that, subject to further argument, I should propose to delete the words "without the leave and licence of the [Corporation]". These words appear to assume that a grantee of arms can himself authorise and permit another to bear them. I am not at present satisfied that this is permissible by the law of arms, as it seems to me it would infringe the rights of the Officers of Arms who alone can make grants and might deprive them of revenue.

G Mr. Squibb, I should like to hear what you say about those words being deleted?

G. D. Squibb: I would not oppose the deletion your Lordship suggests. The only reason that they were put in was to meet a possible defence of leave and licence, which, I think, would have the effect of disentitling the plaintiffs to sue. Leave and licence could not confer any right as against the world but it might well disentitle the plaintiffs to sue.

H **LORD GODDARD, C.J.:** That was not raised in the case, so I propose to take those words out. As the question of costs has been settled, I can take out the sentence that deals with costs.

Judgment for the Corporation.

I Solicitors: *Town clerk*, Manchester (for the plaintiffs); *Boote, Edgar & Co.*, Manchester (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

HERN v. PALMER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Parker, L.J.J.), January 12, 13, 1955.]

Rent Restriction—Furnished letting—Amount of rent attributable to use of furniture—Substantiality of amount—No evidence of value of furniture—Onus of proof—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 12 (2), proviso (i)—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5 c. 32), s. 10 (1).

The landlord advertised part of a dwelling-house to be let furnished. The tenant inspected the premises and the furniture therein and suggested a rent of £2 10s. per week to which the landlord agreed. The tenant drafted the tenancy agreement in which the premises were described as "partly furnished". In an action by the landlord for possession the tenant pleaded the protection of the Rent Restrictions Acts and alleged that the standard rent of the premises was 15s. per week. At the hearing the landlord produced the tenancy agreement and described the furniture in each room. No evidence was given as to the value of the furniture. At the close of the landlord's case counsel for the tenant elected to call no evidence, and submitted that in the absence of any proof that the amount of rent attributable to the use of furniture formed a substantial part of the whole rent, there was no case to be answered.

Held: although, where a dwelling-house is alleged to be outside the Rent Restrictions Acts because it is let at a rent of which a substantial amount is attributable to payment for furniture, evidence of the capital value of the furniture should be given, yet the court can hold in the absence of such evidence that a prima facie case is established that the dwelling-house is so let; on the facts the landlord had discharged the onus of proof and the case would be remitted for re-hearing but the tenant would not be bound by the election made by his counsel on the first occasion.

Roppel v. Bennett, Roppel v. Davies ([1948] 2 All E.R. 627) considered. Appeal allowed.

[As to Furnished Lettings, see 20 HALSBURY'S LAWS (2nd Edn.) 314, para. 370; and for cases on the subject, see 31 DIGEST (Repl.) 652-655, 7558-7577.]

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), proviso (i), see 13 HALSBURY'S STATUTES (2nd Edn.) 1004, and for the Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1), see *ibid.*, 1040.]

Cases referred to:

- (1) *Roppel v. Bennett, Roppel v. Davies*, [1948] 2 All E.R. 627; [1949] 1 K.B. 115; [1948] L.J.R. 1929; 31 Digest (Repl.) 653, 7570.
- (2) *Palser v. Grinling, Property Holding Co., Ltd. v. Mischeff*, [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600; 31 Digest (Repl.) 651, 7541.

Appeal.

The landlord appealed against an order of His Honour JUDGE GERWYN THOMAS at Cardiff County Court, dated Oct. 13, 1954.

Certain premises, which had been advertised as to let furnished, were let by the landlord to the tenant under an agreement, dated Apr. 13, 1953, and drawn up by the tenant, whereby it was stated:

"No. 13 Stockland Street, Grangetown, Cardiff. Monday, Apr. 13, 1953. We the undersigned do hereby agree to the following terms for the tenancy of part of the above premises: (i) Partly furnished, (a) Front room, (b) Front bedroom, (c) Dining room, and (d) Kitchenette. (ii) Rental at £2 10s. per week payable one month in advance. (iii) Minimum period of tenancy six months, one year. (iv) The tenant shall keep the premises clean and decorate to respectability."

A The landlord terminated the tenancy by a notice served on the tenant to quit the premises on Apr. 13, 1954. The landlord instituted proceedings in the county court claiming possession on the ground that the premises were let furnished and were not subject to the Rent Restrictions Acts. The tenant by his defence denied that the premises were let furnished and claimed to be protected by the Rent Restrictions Acts. At the hearing the landlord gave evidence about the letting and the notice to quit and about what the furniture was, dealing with each room in turn. She was cross-examined and it was not suggested in cross-examination that the furniture was valueless. No evidence was given of the capital value of the furniture. The tenant contended that it was not shown that the amount of the rent fairly attributable to the use of the furniture was substantial. The county court judge dismissed the claim and the landlord appealed.

C *J. G. Wilmers* for the landlord.

A. S. Myerson and *Miss D. M. Rowland* for the tenant.

BIRKETT, L.J., stated the facts and continued: By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), proviso (i), it is provided:

D "this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture."

The landlord was saying: "That applies here because I advertised it as a furnished house and it was let in fact as a furnished dwelling". The Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1) reads:

E "For the purposes of s. 12 (2) of proviso (i) of the . . . Act [of 1920] (which relates to the exclusion of dwelling-houses from the principal Act in certain circumstances), a dwelling-house shall not be deemed to be bona fide let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

F The landlord was saying, in effect, "This is a furnished dwelling". The tenant was saying: "It is a dwelling which must be regarded for the purposes of this trial as an unfurnished dwelling subject to the provisions of the Rent Acts". The landlord gave evidence as to the agreement of letting and stated that the tenant had drawn up the agreement and had himself fixed the rent after viewing the premises and the furniture. The landlord then gave details of the furniture in each room. It was not suggested to her in cross-examination that the furniture was valueless. At the conclusion of her case counsel for the tenant said: "I shall call no evidence". He referred to s. 10 (1) of the Act of 1923, and submitted that it had not been shown by the landlord that the amount of the rent which was stated in the agreement fairly attributable to the use of the furniture formed a substantial portion of the whole rent. The learned judge accepted that submission, and said: "There is no evidence about it, and, therefore, I must give judgment for the tenant". The question is whether the learned judge ought to have done that.

I It is true that it was given in evidence that the tenant brought a lot of furniture to the house himself; but here was a house which had been advertised as a furnished house. Evidence had been given that in every room of the letting there had been the articles of furniture which were specified by the landlord; and the rent of the house, according to the evidence, had been fixed by the tenant himself after viewing the house and the furniture it contained. So it is unusual that the appeal comes before the court in the form in which it does. The first question I think is this: Was there no case to answer, as the learned county court judge indicated, or had there been raised a *prima facie* case which did call for an answer by the tenant? I must say that it would have been better,

and it ought to be observed for the future, that in cases of this kind the learned county court judge ought not to be left in the position in which he was left in the present case. Evidence ought to be given of the capital value of the furniture, and of the value of that furniture to the tenant, so that the material is before the learned county court judge on which he can decide according to the tenor and meaning of the sub-sections which I have quoted. In the present case no evidence was given of capital value; no evidence was given of the purchase price of any single article; no evidence was given of its condition at the time; and no evidence was given of its value to the tenant. No explanation was given (in any detail, at any rate) of the necessity for the tenant to bring some of his own furniture, though the landlord when giving evidence did deal with that in some degree by saying, for example, with regard to the dining-room, that the tenant wanted his own table; with regard to the kitchenette "He said he would require his own cooker"; with regard to the bedroom suite upstairs "He said he would prefer to provide his own bed". There was, however, no evidence to show that any of those were necessitated by the fact that there was not adequate furniture already in the house. However, it does not follow, I think, in the special circumstances of the present case, that there was no case to answer. On the other hand, the *prima facie* case which may be said to be raised on the evidence lies here: first of all, it is a factor which is not to be ignored that the premises in question had in fact been advertised as furnished, and I gather that it was because of that advertisement that the parties came together. I think for my own part that that raises some presumption that the furniture that was in the premises was certainly of some considerable value and was regarded by the landlord as being adequate for the furnishing of the premises so that it could properly be described as a furnished dwelling.

That is the first point. The second point is that the tenant himself viewed the premises and saw the furniture and, as I understand it, after seeing it, himself fixed this rent of £2 10s. On that it is a matter of comment that when the present case had been concluded before the learned county court judge an order was made that the standard rent of the premises should be ascertained by the learned registrar, and learned counsel went before the registrar, called the necessary evidence, and the learned registrar fixed the standard rent of the premises as 16s. 1d., which is very different from the rent of £2 10s. which had been fixed by the tenant. It is true that in his defence which he filed the tenant said that the standard rent of the dwelling-house was 23s. inclusive of rates for the whole of the house, and 15s. for the portion which he himself occupied, but he himself had fixed the rent in the agreement under which he took possession of the premises at £2 10s. It seems to me that when a submission was made that there was no case to answer there was on those two matters mentioned a *prima facie* case which required, as I think, some answer by the tenant.

That being the situation, the question is: What is the right and proper thing to do? One had an uneasy feeling throughout the hearing of this appeal that the proceedings in the county court were unsatisfactory. The real issue to be determined under s. 10 (1) of the Act of 1923 was not dealt with in evidence at all. No attempt was made specifically to show that the value of the use of this furniture to the tenant was a substantial portion of the particular rent which had been reserved of £2 10s. There was the undoubted fact that there had been the advertisement of a furnished letting. There was the undoubted fact that in every room there was the furniture which had been specified and detailed by the landlord, and in the county court the case turned merely on this particular matter that the learned judge said the onus of proof of showing what he called substantiality within the meaning of the sub-section had not been discharged by the landlord and, therefore, there must be judgment for the tenant. One is left with the very uneasy feeling that true justice has not been done. I appreciate that counsel for the tenant takes the view: "It was the duty of the

A landlord to discharge the onus of proof. It was the duty of the landlord to call evidence with regard to capital value of the furniture and to show that the conditions laid down in the sub-section had been fulfilled, and she did not do it. I was entitled, therefore, to take advantage of that matter and to say that that has not been proved". However, all these various other matters to which I have referred did raise, in my view, a prima facie case, though not the adequate case which might have been presented if the evidence had been given in the way that I have indicated and if the capital value had been dealt with, and the cost of the furniture, its state and value to the tenant and the reason why the tenant brought his own furniture. I do not think it satisfactory that the present case should be determined merely on the submission made by counsel for the tenant that there was no evidence on this particular matter, when I think that there was some at any rate which required an answer. I think the case should go back for a re-hearing in order that the real matters in dispute shall be heard and shall be determined. I think further, with great respect to the learned county court judge, that the ordinary rule might here be followed that it should go back to another county court judge who would have a mind that would be completely free from any of the former controversies.

D **SIR RAYMOND EVERSHED, M.R.:** I am also of that opinion. I have in mind, like BIRKETT, L.J., *Roppel v. Bennett*, *Roppel v. Davies* (1), to which our attention was drawn. I am not, of course, seeking for a moment to qualify what this court laid down in *Roppel v. Bennett* (1), nor, indeed, could I do so, if I wished. I think, as BIRKETT, L.J., said, that the conduct of the landlord in failing to call any evidence of the value of the furniture, either its capital value or the value to the landlord or the tenant, or to anybody else, was temerarious in the extreme; but I cannot myself accept the view that in the absence of evidence of that nature the court can never hold or infer that premises let as furnished or partly furnished premises are not to be treated as bona fide let at a rent which includes payment for the use of furniture, having regard to the terms of s. 10 (1) of the Act of 1923; that is to say, that they cannot be treated as so let unless the amount of rent which is fairly attributable to the use of furniture forms a substantial portion of the whole rent. As BIRKETT, L.J., has observed, there are in the present case very special facts or circumstances relevant to the question at issue. I do not seek to repeat them all, but refer to the fact of the dwelling-house being advertised as furnished; to the fact that the tenancy agreement, or the note of it which was prepared by the tenant himself, described the premises as "Partly furnished front room, front bedroom, dining-room and kitchenette"; and to the fact that the landlord in the course of her evidence alleged that that record was accurate, that this was the letting of a partly furnished dwelling-house—a proposition which was challenged, I understand, in cross-examination, but in respect of which the learned judge accepted the evidence of the landlord. I add finally that the tenant in his defence, though he had himself fixed the rent of £2 10s. per week, asserted that the standard rent of the premises, that is the rent of the premises unfurnished, was 15s. a week.

I In the light of those and the other facts to which reference has already been made, it seems to me that there was clearly evidence on which the learned judge could conclude, and I venture to think without more should have concluded, that the onus in connection with the so-called question of substantiality had been discharged by the landlord in the absence of any evidence to the contrary. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), proviso (i), provides:

"this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture . . ."

If that had stood alone it would have been incontrovertible that this was a letting at a rent which included payments in respect of the use of furniture, because the document which the tenant himself prepared so described it. The remaining question is whether the amount of the rent was substantial. If this be treated as a jury question—aye or no, on the evidence as it was produced, was there here a substantial amount of rent attributable to the furniture?—I, for my part, think that the jury clearly could have answered, and should have answered, that question affirmatively. If this appeal were dismissed and the matter allowed to rest where it is, there would be a grave likelihood of serious injustice being done. On that footing, as counsel for the tenant conceded, the furniture which has been enumerated would be treated as in no way included in the letting. He says frankly that the landlord can take it away. If that is the result then the conclusion is in flat contradiction to the bargain which the tenant himself recorded in writing, namely, that this was a partly furnished letting. It may be that on a further investigation of the facts it will be found that the amount attributable to the furniture in the present case ought to be regarded as unsubstantial. That, however, is a question for future debate. I think that it would not be right to let the matter rest where it is, and I agree with the course which BIRKETT, L.J., has proposed. It reflects no criticism or disrespect whatever of the learned judge who tried the case that we should follow the almost invariable practice in this court of remitting the case for trial to another judge in the same district at some place and time convenient to the parties.

I only add this: it is a well-established principle in the practice of our law that if a defendant elects to call no evidence then *prima facie* his election is final, and if his submission that he has no case to answer ultimately fails, then in the ordinary case he cannot afterwards have another attempt by calling evidence to defeat the plaintiff's case. This is a Rent Acts case, however, and Parliament has laid it down that the court shall not make an order for possession unless it is satisfied on the various matters which Parliament has enumerated. In those circumstances it would not be right, having regard to the special facts of the present case, to treat the tenant as finally excluded from giving any evidence. For that reason I concur in the view which BIRKETT, L.J., has expressed, that this case should be remitted for re-hearing, and the conduct of the parties at the re-hearing will be unaffected by the election made by counsel for the tenant (not, if I may say so, without some shrewdness) on the first occasion.

I think the appeal should be allowed.

PARKER, L.J.: I agree.

Appeal allowed; case remitted for re-hearing.

Solicitors: *Jaques & Co.*, agents for *D. Edmunds Rees*, Caerphilly (for the landlord); *Rhys Roberts & Co.*, agents for *Leo Abse & Cohen*, Cardiff (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COMMISSIONER OF INCOME TAX v. BJORDAL.

[PRIVY COUNCIL (Lord Oaksey, Lord Tucker and Mr. L. M. D. de Silva), November 25, 29, 1954, January 24, 1955.]

Income Tax—Undistributed income—Company in which public substantially interested—Controlling interest in company—Percentage of voting power—Income Tax Ordinance, 1940 (Ordinance No. 8 of 1940 of the Uganda Protectorate), s. 21 (2) (as amended by the Income Tax (Amendment) Ordinance, 1943 (Ordinance No. 11 of 1943 of the Uganda Protectorate), s. 5).

Privy Council—Uganda—Income tax—Undistributed income—Company in which public substantially interested—Controlling interest in company—Percentage of voting power—Income Tax Ordinance, 1940 (Ordinance No. 8 of 1940 of the Uganda Protectorate), s. 21 (2) (as amended by the Income Tax (Amendment) Ordinance, 1943 (Ordinance No. 11 of 1943 of the Uganda Protectorate), s. 5).

The Income Tax Ordinance, 1940 (Ordinance No. 8 of 1940 of the Uganda Protectorate), s. 21, as amended by the Income Tax (Amendment) Ordinance, 1943 (Ordinance No. 11 of 1943 of the Uganda Protectorate), s. 5*, provides, by sub-s. (1), that, where the Commissioner of Income Tax is satisfied that the profits of a company resident in the Protectorate distributed as dividends in respect of any period for which the accounts of the company have been made up are less than sixty per cent. of the total income of the company, he may order that the undistributed portion of sixty per cent. of such total income be deemed to have been distributed as dividends among the shareholders, and, thereupon, the proportionate share thereof of each shareholder shall be included in his total income for the purposes of the ordinance. By s. 21 (1) proviso (b), s. 21 (1) does not apply "to any company in which the public are substantially interested" and by s. 21 (2), a company is deemed to be such "if shares of the company . . . carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are . . . beneficially held by, the public . . ."

The respondent, a director of B. Mines, Ltd., held 7,632 A shares and 1,249 B shares of the issued capital of 12,007 shares. His brother, also a director, held beneficially 3,121 B shares which he had acquired unconditionally by purchase, and five other persons held one B share each. The A and B shares carried equal voting rights. The respondent's shares thus carried 73·96 per cent. and his brother's shares carried 25·99 per cent. of the aggregate of votes in respect of all issued shares. The respondent and his brother were not acting in concert. The respondent's notice of assessment of income tax for 1950 included a sum deemed to have been distributed as dividends, under s. 21 of the ordinance, among the shareholders of the company. On the question whether, at the relevant time, B. Mines, Ltd., was a company "in which the public were substantially interested" within the meaning of proviso (b) to s. 21 (1) of and of s. 21 (2) of the ordinance, with the result that s. 21 (1) did not apply to the company,

Held: B. Mines, Ltd. was a company in which the public were substantially interested, because (i) the public were those members of the company who did not have the control of the company by voting power, (ii) the control of the company by voting power was carried by a holding of 51 per cent. or more of the votes, so that the respondent (who held 73·96 per cent. of the voting power) had control of the company, and (iii) the respondent's brother, who accordingly was one of the public, held more than 25 per cent. of the voting power.

* Now Chapter 189 of the Laws of the Uganda Protectorate, 1951.

Quaere whether, if the percentage of voting power requisite to constitute a controlling interest were held by more than one individual, a controlling interest arose, unless it were shown that those individuals were acting in concert (see p. 406, letter D, post).

Appeal dismissed.

[**Editorial Note.** The Income Tax Ordinance, 1940 (Ordinance No. 8 of 1940 of the Uganda Protectorate), s. 21, as amended, is similar in object to the Finance Act, 1922, s. 21, as amended by the Finance Act, 1927, s. 31 (3), for which, see 12 HALSBURY'S STATUTES (2nd Edn.) 237; both Acts are repealed and, for the replacing provisions, see Income Tax Act, 1952, ss. 245 et seq., 31 HALSBURY'S STATUTES (2nd Edn.) 232 et seq. Section 245 of that Act applies to a company which is under the control of not more than five persons and in which "the public are substantially interested" (ibid., s. 256 (1)), and s. 256 (5) of that Act contains words similar to those in s. 21 (2) of the Income Tax Ordinance, 1940, considered in the present case.]

Case referred to:

- (1) *Tatem Steam Navigation Co., Ltd. v. Inland Revenue Comrs.*, [1941] 2 All E.R. 616; [1941] 2 K.B. 194; 111 L.J.K.B. 17; 165 L.T. 182; 24 Tax Cas. 57; 2nd Digest Supp.

Appeal.

Appeal by the Commissioner of Income Tax from an order of the Court of Appeal for Eastern Africa, dated Apr. 28, 1952, reversing an order of the High Court of Uganda, dated June 29, 1951, dismissing the taxpayer's appeal from a decision of the Commissioner of Income Tax, dated Jan. 29, 1951, as to assessment of tax for 1950.

Bjordal Mines, Ltd., was a limited liability company registered at Kampala, Uganda. Its authorised capital was Shs. 250,000, divided into 12,500 shares of Shs. 20 each. The share capital was divided into 8,125 A shares and 4,375 B shares, of which the A shares were not transferable without the consent of the directors. The B shares were freely transferable and had equal voting and dividend rights with the A shares. At the relevant time 12,007 shares had been issued. The respondent, Hendrik Bjordal (who, with S. H. Bjordal and L. G. Appenden, were the directors of the company), held 7,632 A shares and 1,249 B shares. S. H. Bjordal held 3,121 B shares (which he had purchased from the respondent) and L. G. Appenden and four other persons each held one B share. The respondent was assessed for the year of assessment 1950, relating to the year of income 1949, and the notice of assessment included as his income £3,580, in respect of moneys deemed to have been distributed as dividends among the shareholders of the company under s. 21 of the Income Tax Ordinance, 1940, as amended. The company's income for 1949, as computed for income tax purposes, was Shs. 161,340, of which no portion was distributed as dividends. The appellant served notice under s. 21 of the ordinance deeming sixty per cent. of that sum to have been distributed among the shareholders, which amounted to Shs. 96,804, of which the respondent's proportionate share was Shs. 71,802. The respondent disputed this assessment and the appellant thereupon certified his decision to the effect that the company was a company to which s. 21 (1) of the ordinance applied, that proviso (b) thereto did not apply to the company and that the company was not a company in which the public were substantially interested as defined by s. 21 (2) of the ordinance. The respondent appealed against this decision, and the High Court of Uganda having upheld the assessment, appealed to the Court of Appeal for Eastern Africa who allowed his appeal.

J. Senter, Q.C., and *R. A. Watson* for the appellant.

Heyworth Talbot, Q.C., and *H. M. Allen* for the respondent.

MR. L. M. D. de SILVA: This is an appeal from a judgment of the Court of Appeal for Eastern Africa, dated Apr. 28, 1952, which reversed a decision

A of the High Court of Uganda, dated June 29, 1951, to the effect that Bjordal Mines, Ltd., a limited liability company registered in Uganda, of which the respondent is a shareholder and director, was not, at the relevant time, a company in which "the public were substantially interested" within the meaning of s. 21 of the Income Tax Ordinance, 1940, of the Uganda Protectorate, as amended. Section 21 just referred to reads:

B " (1) Where the commissioner is satisfied that in respect of any period for which the accounts of a company resident in the Protectorate have been made up, the profits distributed as dividends by that company up to the end of the sixth month after the last date upon which its accounts for that period are required by virtue of the provisions of the Companies Ordinance, to be laid before the company in general meeting, increased by any tax payable thereon are less than sixty per cent. of the total income of the company ascertained in accordance with the provisions of this ordinance

C for that period, he may, unless he is satisfied that having regard to losses previously incurred by the company or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, by notice in writing order that the undistributed portion of

D sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders as at the said last date and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this ordinance: Provided that— . . . (b) this sub-section shall not apply to any company in which the public are substantially

E interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

" (2) For the purpose of this section a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether

F with or without a further right to participate in profits) carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the said period beneficially held by, the public (not including a company to which the provisions of this section apply), and if any such shares have in the course of such period been, in fact, freely transferable by the holders to other

G members of the public . . . "

There follow five sub-sections, to which it is not necessary to make reference.

Section 21, in the form in which it appears above, was the result of a substitution effected by an amending ordinance of 1943. In its original form it read:

H " Where it appears to the commissioners that with a view to the avoidance or reduction of tax a company controlled by not more than five persons has not distributed to its shareholders, as dividend, profits made in any period ending after Jan. 1, 1939, which could be distributed without detriment to the company's existing business, he may treat any such undistributed profits as distributed, and the persons concerned shall be assessable accordingly."

I It will be seen that, when the conditions stated in sub-s. (1) of existing s. 21 are satisfied, the commissioner has the power to make an order under which the undistributed portion of sixty per cent. of the total income of a company for a period specified in the sub-section is notionally to be regarded as having been distributed, and the " proportionate share thereof of each shareholder " is to be regarded as having been received by the shareholder for purposes of assessing the amount of income tax payable by him. Clause (b) of the proviso to the sub-section takes away the power of the commissioner to make such an order with regard to a company " in which the public are substantially interested ".

Section 21 (2) lays down a set of conditions on the satisfaction of which a company is to be "deemed" to be one in which the "public are substantially interested". A

The question for decision by their Lordships is whether Bjordal Mines, Ltd., satisfies the conditions laid down in sub-s. (2). The difficulty in deciding this question lies in the words "the public" appearing in the sub-section. There is no definition of this term in the ordinance. Section 21 of the English Finance Act, 1922,* similar in object to the Uganda ordinance under consideration, contains a reference in terms to "control" of a company by an individual or individuals, and the words "the public" which occur in the English Act have been understood as meaning all persons other than the controlling individual or individuals (*Tatem Steam Navigation Co., Ltd. v. Inland Revenue Comrs.* (1)). There is no such reference to "control" in the existing statute law of Uganda, although the original s. 21 of the ordinance of 1940, now repealed, did contain a reference in terms to "control". B C

In the main argument before their Lordships, both sides proceeded on the basis of a view expressed by the trial judge (PEARSON, J.) and accepted to a substantial extent by the Court of Appeal. The trial judge said:

"I think the members of a company who are to be distinguished from the public for the purposes of this section are those who have control of the company by voting power." D

It was common ground that it was necessary first to decide which member or group of members possessed a controlling interest. It was agreed that the remaining members were members of "the public" within the meaning of sub-s. (2). Their Lordships were invited to decide in which member or group of members of Bjordal Mines, Ltd. the controlling interest resided. E

The facts relating to the holdings of shares in Bjordal Mines, Ltd. are set out fully in a judgment of the Court of Appeal. For the purposes of their decision, their Lordships need only say that, at the relevant time, 12,007 shares, some designated A shares and the others B shares, had been issued. The A shares were not transferable without the consent of the directors. The B shares were freely transferable. They carried equal voting rights. Of the 12,007 shares, the respondent held 8,881 shares (7,632 A and 1,249 B). His brother, Sverre Hendrik Bjordal, held 3,121 B shares. Five other persons held one B share each. Thus the respondent held 73·96 per cent. of the voting power and Sverre Hendrik 25·99 per cent. The five others held the remaining very small percentage of ·04 (the decimal places beyond the second are not material and are not mentioned). The 3,121 B shares held by Sverre Hendrik had been purchased from the respondent, his brother, for full value. It is not suggested that Sverre Hendrik was a nominee of the respondent, and there is nothing to show that he was acting in concert with the respondent as a shareholder or as a director. F G

It was argued for the appellant that a member, or group of members, of a company could be said to have a controlling interest only if they commanded seventy-five per cent. or more of the total voting power. It was said that the respondent did not possess the requisite percentage of voting power as he possessed only 73·96 per cent. but, as the respondent and Sverre together possessed over seventy-five per cent., and as no other combination of shareholders possessed over seventy-five per cent., the respondent and Sverre together must be held to have the controlling interest. If this argument were correct then, as the respondent and Sverre held between them over ninety-nine per cent. of the shares, twenty-five per cent. could not be held by the public, and the company could not, under sub-s. (2), be deemed to be one in which the public were substantially interested. H I

It was argued for the respondent that, in order to have a controlling interest, the requisite percentage was fifty-one or over. That, as the respondent alone possessed this percentage, no other member, or group of members, could possess

* See note, p. 402, letter B, ante, as regards the subsequent superseding enactments.

A the requisite percentage and that, therefore, in the absence of concerted action between the respondent and any other member, the respondent, by himself, must be held to have a controlling interest. If this argument be correct then, as the shares of the other members carried more than twenty-five per cent. of the voting power, the company must be held to be one in which the public were substantially interested within the meaning of s. 21 (2).

B It was not disputed that the shares possessed by members other than the respondent had been "allotted unconditionally to or acquired unconditionally by" those owning them, that at the end of the relevant period they had been "held beneficially" by those owners and had been "freely transferable" by the owners as stipulated by s. 21 (2). Both the appellant and the respondent agree that the chief factor determining the question where the controlling interest resides is percentage of voting power, although they are not agreed as to what figure of percentage is requisite for the purpose.

C For the purposes of a decision on the arguments addressed to them, their Lordships are of opinion that fifty-one should be adopted as the figure of percentage requisite to confer a controlling interest. A member or group of members holding fifty-one per cent. of the voting power would succeed in fulfilling his, or
D their, wishes with regard to the ordinary resolutions which come up before meetings of shareholders. They would generally have a dominant voice in the election of directors when such elections fell due. Although they would not be able, without support from others, to secure the passing of a special resolution, nevertheless they would be able to resist a special resolution which was not in accordance with their wishes. They would be able generally to control the
E company, though their capacity to do so would not be as ample as that accompanying the possession of seventy-five per cent. of the voting power. The fact that the ability to control enjoyed by an individual or group holding fifty-one per cent. of the voting power is limited in some ways does not persuade their Lordships that the requisite percentage is seventy-five.

There is another consideration directly connected with s. 21 which points to
F fifty-one being the correct figure of percentage. By s. 21 (2), the legislature appears to have created a category of companies which, despite the existence of a controlling interest, are, by reason of compliance with its provisions, excluded from the operation of sub-s. (1). If the argument of the appellant is correct, the controlling group (or individual) must have (a) seventy-five per cent. of the voting power or (b) over seventy-five per cent. of the voting power. In case (b),
G the provisions of sub-s. (2) cannot be complied with as the twenty-five per cent. of the voting power required to be held by others does not exist. Consequently, there is only one case which will fall into the category, namely, the case in which the controlling interest is constituted by exactly seventy-five per cent. of the voting power. It is improbable that the legislature enacted a sub-section to provide for this one solitary case.

H On the arguments addressed to their Lordships, they are of opinion that the respondent must be held to have a controlling interest. If any of the other shareholders had been shown to have been acting in concert with the respondent they would, with the respondent, have fallen into a group holding the controlling interest. The remaining shareholders would have been members of "the public". There is nothing to indicate that Sverre was acting in concert with the
I respondent. He must, therefore, be regarded as a member of "the public" within the meaning of the sub-section.

The fact that Sverre is a brother of the respondent was pointed out as a reason why Sverre and the respondent should be regarded as a group in combination and not as two separate individuals in respect of their holdings of shares. Their Lordships are unable to accede to this suggestion. They do not think that relationship, by itself, affords a sufficient reason for grouping relatives together in the process of determining where the controlling interest resides. They are

supported in this view by the decision in *Tatem Steam Navigation Co., Ltd. v. A Inland Revenue Comrs.* (1). In that case, the principal shareholder had given to his niece the greater part of the shares held by her and it was contended, on the ground of relationship among other grounds, that the niece could not be regarded as holding these shares independently of the principal shareholder. Rejecting the argument, SCOTT, L.J., said ([1941] 2 All E.R. at p. 618):

"I cannot understand why the fact that she was a niece or that it was a gift or that it was for the purpose of her marriage settlement makes any difference at all."

He went on to say (*ibid.*, at p. 619) that there was no implication of control by a relative except where such implication arose under the special statutory provision made by the English Act in respect of certain relatives. There is no similar statutory provision in the Uganda ordinance under consideration. Sverre held shares commanding more than twenty-five per cent. of the voting power and, consequently, it must be held that Bjordal Mines, Ltd. is a company which complies with the provisions of sub-s. (2) and, therefore, is a company in which "the public are substantially interested".

It was said in the course of the argument that, if the requisite percentage of voting power is not held by one individual but held by more than one individual, a controlling interest cannot be said to arise unless it is shown that the individuals who together hold the requisite percentage are acting in concert. In the case before their Lordships, over fifty-one per cent. of the voting power was held by the respondent, a single individual, and, consequently, the question does not arise. Their Lordships express no opinion on the questions which would arise when the requisite percentage is not held by a single individual but only by a group, or by overlapping groups, of individuals.

The appellant also argued that neither the respondent nor Sverre could be regarded as members of "the public" as they were directors of the company. It is clear that members of "the public" within the meaning of the section are shareholders in the company. Their Lordships can find no reason for holding that shareholders cease to be members of "the public" because they have become directors.

For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

Appeal dismissed.

Solicitors: *Charles Russell & Co.* (for the appellant); *Hale, Ringrose & Morrow* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

TREVETT AND ANOTHER v. LEE AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Parker, L.JJ.), January 11, 12, 1955.]

Nuisance—Highway—Premises adjoining highway—Public nuisance—Right of adjoining owner—Obstruction by small hosepipe to supply water—Reasonableness of user.

A house abutting on a country lane, which was a public highway, had not in time of dry weather a sufficient supply of water for domestic purposes. During droughts the defendants, who were occupiers of the house, obtained water from a tank on the far side of the lane by way of a small hosepipe of half an inch internal diameter laid across the width of the lane. That process lasted for a few hours on each occasion and was carried out only during daylight. The first plaintiff, who was passing along the highway carrying bottles of milk for delivery, saw the hosepipe, but negligently did not step clear of it, and, as a result of treading on it, fell and sustained

A injuries. She and her husband sued the defendants for damages on the ground, among other grounds, that the presence of the pipe across the highway constituted a public nuisance from which they suffered special damage. It having been held in the county court that the defendants' user of this highway was in the particular circumstances of the case reasonable and justifiable as ancillary to their enjoyment of the premises, the plaintiffs
B appealed.

Held: the question whether a householder, whose house adjoins a highway and who uses the highway or part of it for purposes connected with his house, is or is not so obstructing the highway as to cause a public nuisance is to be judged by balancing, on standards of reasonableness, the claims and conduct of the householder on the one side and of the members of the public on the other side, having regard to all the circumstances of the case; in the present case, which was one where the facts were special, the finding of the county court judge that the defendants' user of the highway had been reasonable in all the circumstances was justified by the evidence and would not be disturbed, and accordingly the laying of the hosepipe across the highway did not constitute a public nuisance.

D *Harper v. G. N. Haden & Sons* ([1933] Ch. 298) and *Farrell v. John Mowlem & Co., Ltd.* ([1954] 1 Lloyd's Rep. 437) applied.

Per SIR RAYMOND EVERSLED, M.R.: it does not necessarily follow that conduct, amounting to contributory negligence on the part of the plaintiffs, which was sufficient wholly to extinguish any liability of the defendants in negligence would similarly extinguish any liability of the defendants in nuisance.

E Appeal dismissed.

[As to Public Nuisance in Respect of Highways, see 16 HALSBURY'S LAWS (2nd Edn.) 354, para. 483; and for cases on the subject, see 26 DIGEST 445, 1626, 1627 and 446, 1629-1632, and as regards contributory negligence, see 26 DIGEST 446, 1634 et seq.]

F Cases referred to:

- (1) *Harper v. Haden (G. N.) & Sons*, [1933] Ch. 298; 102 L.J.Ch. 6; 148 L.T. 303; 96 J.P. 525; Digest Supp.
- (2) *Lingke v. Christchurch Corpn.*, [1912] 3 K.B. 595; 82 L.J.K.B. 37; 107 L.T. 476; 76 J.P. 433; 11 Digest (Repl.) 151, 285.
- G (3) *Fritz v. Hobson*, (1880), 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 17 Digest (Repl.) 125, 353.
- (4) *Farrell v. John Mowlem & Co., Ltd.*, [1954] 1 Lloyd's Rep. 437.
- (5) *Bamford v. Turnley*, (1862), 3 B. & S. 66; 31 L.J.Q.B. 286; 6 L.T. 721; 122 E.R. 27; 36 Digest (Repl.) 263, 123.

Appeal.

H Appeal by the plaintiffs from an order of His Honour JUDGE ARMSTRONG, at Dorchester County Court, dated Oct. 8, 1954, whereby he dismissed the action.

The plaintiffs commenced the action in the High Court of Justice, Queen's Bench Division, claiming damages for injury to the plaintiffs from nuisance by the defendants, and alternatively for injury by their negligence in wrongfully placing a hosepipe across the public highway known as Clay Lane, Litton Cheney, Dorset. The case was remitted to the Dorchester County Court. The
I plaintiffs appealed only on their claim based on nuisance.

R. Stock for the plaintiffs.

R. Hughes for the defendants.

SIR RAYMOND EVERSLED, M.R.: This case arose out of an unfortunate accident which occasioned to the first plaintiff, Mrs. Mary Blanche Trevett, personal injuries in a country lane on Mar. 21, 1953. Mrs. Trevett was on the morning of that day, as agent for or servant of her husband, the second

plaintiff, engaged on delivering milk on a milk round, and she was proceeding along and up (for the lane was on a slope) a highway known as Clay Lane, Litton Cheney, in the county of Dorset. She came to a point on that lane where the highway passed and abutted on the premises of the defendants. It appears that the defendants' house, being erected immediately adjacent to the road, was equipped and furnished with water sanitary arrangements, but was not on any general or public supply of water. For domestic and other uses the water for the defendants' house was accumulated in ordinary circumstances from rainfall in a tank on the premises, but in time of dry weather that tank was not sufficient for the ordinary requirements of the house judged by the ordinary standards of living of today. On the other side of this lane from the defendants' house, however, there happened to be a tank or water supply fed from an artesian well or a spring, and that supply even in periods of drought was always adequate and enabled water to be taken from it to supply the ordinary needs of the defendants. When these dry conditions made it necessary or desirable for them to do so, the defendants made use of a small garden hosepipe, of an internal diameter of half an inch, which was attached to the tank or supply on the far side of the road and laid on the surface of the road, somewhat at an angle across it, into the premises of the defendants. In the course of time, normally a few hours, water from the supply on the far side of the road filled by process of gravity the tank which was on the defendants' premises and thereby gave to the defendants the supply of water required for their domestic purposes.

On the morning to which I have alluded, Mar. 21, 1953, this process of taking water by means of a hosepipe was being employed by the defendants. Mrs. Trevett saw the pipe as she was proceeding up the hill with a crate of milk bottles in each hand. When she came to it, however, she misjudged her stride. Instead of stepping over it, her heel trod on the pipe and the pipe rolled or moved under the weight of her heel. Mrs. Trevett was anxious that she should not break the milk bottles, if it could be avoided, and, as a consequence of her attempt to save the bottles, she lost her balance and fell heavily and suffered injuries to her person which caused her pain, and in respect of which (if damages were proper to be awarded) the learned judge arrived at a figure by way of compensation of £350. It will be seen, therefore, that from Mrs. Trevett's point of view her accident was not unsubstantial, and that, on any view, it was most unfortunate for her that she suffered as she did.

It does not follow that because a man or a woman falls in the street and is hurt, or even grievously hurt, somebody else ought to pay damages, either for nuisance or negligence, or on any other ground, though I sometimes feel that that view is apt to be somewhat generally entertained. Mrs. Trevett and her husband sought to recover damages in this case from the defendants both on the ground of nuisance and on the ground of negligence. The alleged negligence was, according to the claim, that the defendants had insufficiently warned passers-by of the presence of the pipe. On that question the learned judge's conclusion was that any negligence of that character (if such there was) was extinguished altogether by the contributory negligence of the plaintiff, Mrs. Trevett, in failing to step over the pipe. Since this matter of contributory negligence will arise again hereafter, I desire to state somewhat carefully that on this matter of contributory negligence the fault is in my view to be judged in the light of the negligence alleged against the defendants, which was failure to draw attention to the presence of the pipe, and, as I read from the judgment, "if necessary, to assist persons over it." In this case it was established that the plaintiff saw the pipe, and that she was not infirm. The claim in this court has been on the head of nuisance, not on the ground of negligence. I therefore need say no more on the question of negligence than that there is no ground on which the judge's findings in respect of it can successfully be challenged.

- A The case based on nuisance has been of a much more formidable character and has led to arguments of skill and interest, for which I am much indebted to counsel. Clay Lane was a highway, and it is axiomatic as a general proposition that a man who obstructs a highway commits, and is liable to be charged in respect of the commission of, a public nuisance. But that short statement is, in truth, something of an over-simplification, for there is no doubt that not every obstruction of a highway constitutes a public nuisance. It is also well established that a private individual can only sue in respect of a public nuisance if he or she suffers some special damage as a result of it. So far as this case is concerned, that last point may be laid aside, for if there was here a public nuisance, and, if the first plaintiff's injuries were properly attributable to the existence of that nuisance, then beyond a peradventure she did suffer special damage as a result of it.
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- The law as regards obstructions to highways is conveniently stated in a passage in SALMOND ON TORTS (11th Edn.), at p. 303: "A nuisance to a highway consists either in obstructing it or in rendering it dangerous" and then a number of examples are given. I will not take up time reading them, but a reference to these examples seems to me to show that *prima facie*, at any rate, when one speaks of an obstruction to a highway one means something which permanently or temporarily removes the whole or part of the highway from public use altogether. To take the simplest and most obvious case, if I erect a fence or a wall half-way across the road, I obstruct it, because to that extent the road ceases to be usable at that point as such. The alternative in the text which I read ("or in rendering it dangerous") adds a different conception of wrongful interference, viz., the putting on a highway of something which, though it does not obstruct, that is, bar the highway in the sense that I have already mentioned, yet is liable to make it dangerous. Again, one example will suffice: if I make a small hole in the highway difficult to see, or put some greasy substance on it, so that treading in the hole or on the substance is liable to cause a man as a natural consequence to fall, then it may be that I have caused a nuisance to the highway, not by obstructing it, but by rendering it dangerous.
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In the present case, the learned judge, in the course of his very careful judgment, used this language:

- "With regard to the claim on the ground of nuisance, I am satisfied that if the pipe had been placed where it was by an ordinary member of the public it would amount to a nuisance, in that it obstructed the highway substantially in the case of cyclists and to a certain extent in the case of ordinary pedestrians."
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- Counsel for the plaintiffs contended that that was a finding of fact, and that, as there was some evidence on which the finding could be based, it was conclusive in this court. I do not myself regard, and I do not think it is possible to regard, as a finding of fact a conclusion based on a hypothesis: "I am satisfied that *if* the pipe had been placed where it was by an ordinary member of the public it *would* amount to a nuisance . . ." If it were necessary to come to a conclusion on this matter, I, for my part, am not entirely satisfied as at present advised that I should agree with the learned judge's statement which I have read. I do not think, however, that it is necessary to express a conclusion on this matter. By the phrase "an ordinary member of the public" I take the judge to be referring to a person other than an adjoining houseowner who put the pipe there for some purposes of his own. He is saying, in other words, that if a member of the public—though perhaps he would hardly be regarded as "ordinary"—for no purpose except for his own whim or entertainment laid a hosepipe across a road that person would be creating a nuisance. I prefer on that matter to express no final view. I am not satisfied as at present advised that a pipe of this dimension would be an obstruction within the sense in which
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I think that word is used. On the other hand, particularly having regard to the evidence in this case, it may well be that such an object is potentially dangerous if, as happened in this case, somebody just treading on it is liable by movement of the pipe to be cast off his or her balance and thereby to sustain a fall. A

Let me, however, assume in favour of the plaintiffs and as the judge indicated, that the presence of this pipe on this morning in March, 1953, would prima facie have constituted the commission of a public nuisance on the part of the defendants who put it there. Then there remains what the judge called the more difficult question: could the presence of the pipe nevertheless be justified so as to rebut the prima facie conclusion to which its presence would give rise? B

On this part of the case the argument of counsel for the plaintiffs, briefly stated, was this. He concedes that the owner or occupier of a house adjoining a highway may obstruct the highway in connection with the use and enjoyment of his premises, but only to a very limited extent and in a closely restricted number of instances. It is generally conceded that a man may temporarily obstruct the highway by causing his motor car or carriage to stop outside the house for the purpose of discharging passengers or goods going into the house. It is also clear on authority that, in certain circumstances at least, a man may temporarily block up more effectively part of the highway by erecting scaffolding in it. The plaintiffs' case is that the scaffolding cases are exceptional and are strictly related only to, and are justified only by, work of reparation or otherwise in connection with the ordinary maintenance, repair, etc., of the house. For my part I think the exception, which undoubtedly exists and which these illustrations indicate, does not consist of a number of rather distinct and special examples, but resides in a broad principle, though the application of the principle in individual cases may be, and often is, a question of difficulty. In order to state what I conceive the principle to be, I shall refer to two cases. The first is *Harper v. G. N. Haden & Sons* (1). That was a scaffolding case, but it is to be noted that the erection of the scaffolding by the householder was for the purpose, not of repair, but of adding another storey to the premises, which may be said, perhaps, to have been other than the ordinary use of premises. However that may be, this court held on the facts that the scaffolding did not amount to such a user or obstruction of the highway by the householder as rendered him liable as on a public nuisance, because the user was held in all the circumstances to be reasonable judged both from the point of view of the householder and from the point of view of the other members of the public entitled to use the highway. I take as a sufficient citation from the case the language of ROMER, L.J. After referring to the observations of VAUGHAN WILLIAMS, L.J., in an earlier case [*Lingké v. Christchurch Corpn.* (2) ([1912] 3 K.B. at p. 602)], ROMER, L.J., proceeds as follows ([1933] Ch. at p. 319): C D E F G

"It seems to me to be eminently reasonable that the owner of a house adjoining the highway should be entitled to use it for the purpose of carrying into his house the materials necessary for repairing and re-building it when occasion so requires, and if in so doing he causes an obstruction of the highway not greater in degree or longer in duration than the necessity demands, the other members of the public using the highway have no ground of complaint. In *Fritz v. Hobson* (3) the obstruction caused by such an owner was greater than the occasion required, and he was held liable to the plaintiff who had been obstructed. But the right of the defendant to create a reasonable obstruction was plainly recognised by STIRLING, J. So, too, in my judgment, is it permissible for such an owner, subject of course to obtaining any necessary licence from the local authorities, to erect and maintain for a reasonable time scaffolding and hoardings on the highway where he could not otherwise conveniently repair or re-build his house. The law relating to the user of highways is in truth the law of H I

A give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others."

B The judgment was, of course, related to the facts of that case, viz., scaffolding. But the passage which I have read satisfies me that in expressing his views of the conduct of the defendants in that case and in stating that in his opinion the defendants justifiably obstructed the highway by the use of the scaffolding in the way they used it, ROMER, L.J., was applying, not some special rule about scaffolding, but a general principle inherent in the nature of highways and the rights of people (both members of the public walking up and down them and adjacent householders) in regard to highways. He is saying that there are two kinds of rights: there is the right of the ordinary member of the public to use the highway for passage from one point to another; and there is the right of the householder to use the highway for access to his house and for other purposes properly connected with that use. The question whether a householder is or is not obstructing the highway so as to give rise to a cause of action is to be judged by balancing, on standards of reasonableness, the claims and conduct of the householder on the one side and the members of the public on the other. That, I think, is well illustrated by the language of DEVLIN, J., in the most recent case which counsel for the plaintiffs not unnaturally referred to because it related to a pipe across the pathway, *Farrell v. John Mowlem & Co., Ltd.* (4). DEVLIN, J., used this language ([1954] 1 Lloyd's Rep. at p. 439):

E "A person whose property adjoins the highway, for example, has a right of access to and from his property, and if, in the exercise of that right of access he causes as he may do sometimes an obstruction to the public using the highway, the question is whether the obstruction is reasonable or not. There are two sets of rights which have to be met and resolved on the ordinary principle that a reasonable exercise of both must be allowed."

F I need read no more, because what I have read sufficiently indicates the point I am trying to make.

Let me refer for a moment to the facts of this case. The defendants own or occupy this house adjoining the highway. The house is not supplied by main supplies of water, but a supply of water is required necessarily for the ordinary living conditions of the defendants in their house, for cooking, washing, and other uses, apart from sanitary use. If the defendants, as adjoining owners, would be entitled to obstruct temporarily the highway by causing a vehicle to pause outside it and deliver goods, then prima facie they would be able to justify some similar obstruction for the purpose of delivering, not dry goods, but water. The method adopted was that when no other source was available, i.e., in periods of drought, H the defendants took the water from the known source on the other side of the road, not by carrying it across in buckets, but by laying across the road a small garden pipe. Anyone who has enjoyed the advantages of possessing a garden has at some time or other seen a garden hosepipe lying on the lawn, and nobody, I should have thought, would be alarmed at the spectacle as being one potentially dangerous to anybody walking about the lawn. However, that is what the I defendants did. They had been warned that they should not allow this pipe to remain in the dark, for then, seeing that the roads in modern times are so even and smooth, a person might well trip against it or catch his foot under it, and a cyclist might come to grief on it. Moreover the defendants, according to the evidence, recognised their duty to keep a look-out so that if they saw any person incapacitated or overburdened they, or one of them, could give warning, and if necessary give assistance. All that appears to have been done.

On all those special facts (and they are special facts) the question then remains, according to the principle which I have tried to state: was the user by the

defendants of the highway in this manner reasonable, judged both from their own point of view and from the point of view of the other members of the public ? For, if so, the obstruction (if obstruction it were) would not constitute a public nuisance. The learned judge held that the test was satisfied, that is, that in all the circumstances the user was reasonable. He said:

“ The more difficult question is whether it can be justified as a legitimate obstruction ancillary to the enjoyment of the premises by the second defendant . . . It is, I think, clear on the authorities that the question is one of fact to be determined in view of all the circumstances of the case including, of course, the nature of the locality, the density of the traffic and the extent and duration of the obstruction. This is a quiet village street in no way comparable to a town street with pavements. The interruption was only very occasional and temporary. In so far as able-bodied pedestrians are concerned the obstruction was of the slightest. On balance it seems to me that carried out with proper precautions it is impossible to hold that this operation was improper and beyond the rights of an occupier of premises abutting on the highway.”

In my judgment the learned judge correctly introduced that passage by his statement, “ the question is one of fact to be determined in view of all the circumstances of the case ”—assuming, of course, that the principle to which the facts are to be applied or in relation to which they are to be judged has been correctly apprehended. I see no reason to doubt in this case that it had been correctly apprehended. I think, accordingly, that the learned judge found as a fact, and that he was entitled on the evidence so to find, that here, in all the circumstances, what the defendants had done was reasonable. And the judge having so found as a question of fact, I do not think that this court can, on well-established principles, possibly intervene; though in saying that I do not wish to be thought to hint that I feel doubt in my own mind of the correctness of the finding. The conclusion of fact is one at which, if it had been open to me, I think I should myself have arrived. However that may be, it was a finding of fact; the principles were properly stated, the evidence justified the conclusion, and as a result the appeal must fail.

In the circumstances I prefer to say nothing about the one outstanding matter, viz., whether assuming (contrary to the conclusion I have stated) that this was a public nuisance giving to the first plaintiff a right of action, her claim was extinguished or alternatively diminished by her own conduct, viz., what the learned judge described later as the error of judgment in failing to step clean over the pipe. Having regard to the language of the Law Reform (Contributory Negligence) Act, 1945, s. 1 and s. 4, it is not open to doubt that in a claim for damages based on nuisance the defendant may set up and rely on a fault consisting of what is commonly called contributory negligence so as to reduce or extinguish his own liability. It does not necessarily follow that, because the learned judge held on the negligence claim that any liability of the defendants in negligence was wholly extinguished by the conduct or fault of the plaintiff, therefore, in so far as the claim is based on nuisance, there should be a similar extinguishment of the plaintiff's claim. In the circumstances, however, I do not find it necessary to say anything more about the contributory negligence, and I therefore do not express any conclusion on the question whether the standard of fault in the two kinds of claim is the same or similar nor do I express any view what would have been the result if I had held that in this case there was a cause of action available to the plaintiff based on nuisance.

For the reasons which I have stated, the judge in my view was entitled to hold as he did hold, that the conduct of the defendants in laying this pipe at the time and in the special circumstances in which it was laid across the road did not constitute a public nuisance, and, therefore, I think that the action was rightly dismissed and that this appeal ought to fail.

A BIRKETT, L.J.: I am entirely of the same opinion. The county court judge decided this case on the principle which was enunciated in the passage in *SALMOND ON TORTS* (11th Edn.), at p. 259. After dealing with the question of what constitutes a nuisance and the circumstances in which there may be liability for that nuisance, the passage cited continues:

B "But 'a balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with'. Therefore there is an exception to the general rule in the case of acts reasonably done which are necessary for the common and ordinary use of land and houses. In *Bamford v. Turnley* (5) *BRAMWELL, B.*, said (3 B. & S. at p. 83): 'Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done

C without subjecting those who do them to an action' . . ."

The meaning of the word "conveniently" in that context was by using all reasonable care and skill.

[His LORDSHIP referred to the facts and continued:] The learned judge, in the passage which my Lord read in full, said:

D "On balance it seems to me that carried out with proper precautions it is impossible to hold that this operation was improper and beyond the rights of an occupier of premises abutting on the highway."

I think that that conclusion was not merely right, but was inevitable, and in my judgment this judgment of the county court judge ought to be supported and this appeal ought to be dismissed.

E PARKER, L.J.: I so entirely agree with both judgments that have just been delivered that I do not think I can usefully add anything, unless it be to sound a note of warning. In my opinion, the principle of which *Harper's* case (1) is really an example, is one which can only be applied when the facts are very special, as they are in this case. It is a principle which should be applied with

F extreme caution, but on the facts found here by the learned county court judge it is abundantly clear that he was entitled to apply the principle and to hold that the pipe in question did not amount to a nuisance. I would dismiss the appeal.

Appeal dismissed.

G Solicitors: *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the plaintiffs); *Gibson & Weldon*, agents for *Andrews, Wetherall & Co.*, Poole (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. CARVER.

H [COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Gorman, JJ.), January 31, 1955,]

Criminal Law—Sentence—Imprisonment and fine—Maximum sentence of imprisonment and also fine—Further term of imprisonment in default of payment—Validity—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 14 (1).

I The appellant was convicted at quarter sessions of permitting premises to be used as a brothel contrary to s. 13 (2) of the Criminal Law Amendment Act, 1885. She had a previous conviction of the same offence and was sentenced to six months' imprisonment and a fine of £200, and, in default of payment of the fine, to a further six months' imprisonment, making twelve months in all. Section 3 of the Criminal Law Amendment Act, 1922, which amends the penalties for offences against s. 13 of the Act of 1885, provides " . . . (b) on a second or subsequent conviction, to a fine not exceeding £250 or to imprisonment . . . for a term not exceeding six months; or, in any such

case, to both fine and imprisonment". The appellant appealed against the sentence. A

Held: as, in the present case, the enactment stated the maximum punishment for an offence to be both imprisonment not exceeding a specified duration and a fine, the court of quarter sessions not only might impose a sentence of the maximum imprisonment and of a fine not exceeding the maximum amount but also might fix a further term of imprisonment* in default of payment of a fine. B

Appeal dismissed.

[For the Criminal Law Amendment Acts, 1885 and 1922, see 5 HALSBURY'S STATUTES (2nd Edn.) 912 and 1055.]

For the Criminal Justice Act, 1948, s. 14 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 364.] C

Case referred to:

(1) *R. v. Brook*, [1949] 1 All E.R. 787; [1949] 2 K.B. 138; [1949] L.J.R. 1457; 113 J.P. 219; 2nd Digest Supp.

Appeal.

The appellant was convicted on Jan. 7, 1955, at the County of London Sessions of permitting premises to be used as a brothel contrary to s. 13 (2) of the Criminal Law Amendment Act, 1885, having been convicted previously for a like offence, and was sentenced to six months' imprisonment and to a fine of £200 with the alternative of a further six months' imprisonment in default of payment of the fine. She appealed against sentence on the ground that the total term of imprisonment, including the period fixed in default of payment of the fine, exceeded the maximum period of imprisonment allowed by the statute for the offence. D

P. A. Bruce for the appellant.

M. Corkrey for the respondent. E

LORD GODDARD, C.J., delivered the judgment of the court: The prisoner in this case was convicted of permitting premises to be used as a brothel after a previous conviction for that offence and the court imposed the maximum sentence of six months' imprisonment and ordered her to pay a fine. When I say the "maximum sentence", what I mean is this: the statute under which she was convicted authorises the court to impose imprisonment for six months and a fine not exceeding £250. The court imposed the imprisonment of six months and, as they looked on it as a very bad case, they also imposed a fine of £200. Then the court said that in default of payment she would serve a further six months making twelve months in all. F

Counsel for the appellant has contended that that sentence is not authorised by law because Parliament has provided a maximum sentence of six months and, therefore, no further sentence of imprisonment could be imposed. What the statute has said is that the sentence that can be imposed is six months plus a fine. If a person does not pay the fine obviously it does not mean that the person with no money is to be in a better position than the person who can afford to pay because it would mean that if he could afford to pay he would lose £200. G

It is necessary to consider what are the powers of the court under the Criminal Justice Act, 1948, which made very considerable changes in the law in regard to the recovery of fines. In *R. v. Brook* (1), by which we are bound, this court said that an entirely new procedure was introduced by the Criminal Justice Act, 1948, with regard to the payment of fines and, although neither the Levy of Fines Act, 1822, nor the Queen's Remembrancer Act, 1859, was repealed, with the result that certain matters of machinery still had to be carried out, as for H

* I.e., a further term not exceeding twelve months; see Criminal Justice Act, 1948, s. 14 (1); 28 HALSBURY'S STATUTES (2nd Edn.) 364. I

A instance, entry of the fine on the estreat roll and the return to the sheriff, we have now to consider simply the provisions of s. 14 (1). That says:

“Subject to the provisions of this section, where a fine is imposed by, or a recognizance is forfeited before, a court of assize or quarter sessions, an order may be made in accordance with the provisions of this section . . .”

B That seems to me to apply to any fine. Fines have always been enforced before courts of summary jurisdiction by means of a sentence of imprisonment being imposed in default of payment or in default of distress. There is a short code* of the length of imprisonment that can be imposed according to the size of the fine. The maximum sentence that can be imposed by a court of summary jurisdiction is three months for non-payment of a fine, but it has always been the policy of the legislature, certainly when the proceedings are before magistrates' courts, to deal with the question of non-payment of fines by a sentence of imprisonment. A considerable change was introduced into the law by the Criminal Justice Act, 1948. Among other things, courts before whom prisoners were convicted on indictment were given powers to impose fines for felony†. They always had power to impose a fine for misdemeanours and s. 14 (1) says “where a fine is imposed”; its application is not limited to cases where a fine but no sentence of imprisonment is imposed. It says:

“ . . . where a fine is imposed by . . . a court of assize or quarter sessions, an order may be made . . . (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered . . . ”

E In these circumstances, we think that the quarter sessions were entitled to make the order they did. It may be that the sheriff can still distrain on the goods. If the sheriff distrains on the goods while this woman is serving her sentence and recovers the sum of £200 by distraint, when her sentence of six months is up, there will be an end of it; but if distraint does not produce the £200 or the fine has not been paid, she will have to do a further six months. In all these F circumstances the appeal is dismissed.

Appeal dismissed.

Solicitors: *Alfred Bieber & Bieber* (for the appellant); *Town clerk, Paddington Borough Council* (for the respondent).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

G

DAVIES v. GILBERT.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), January 20, 1955.]

H *Rent Restriction—Land let together with house—At date of letting in 1937 house rated at £4 and land not rated—Land rated at £9 in 1953, rateable value of house not increased—Possession sought by landlord in 1954—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 12 (2) (iii), (6).*

I In 1937 a cottage and four and a half acres of woodland were let to a tenant at a rent of 7s. 6d. a week. At that time the rateable value of the cottage was £4 a year, and the woodland was not rated. In 1938 the tenant cleared the undergrowth and began to use the land as a caravan site. In 1953 the four and a half acres were rated at £9 a year, the cottage remaining rated at £4. In 1954 the landlord served on the tenant a notice to quit, but the tenant claimed the protection of the Rent Restrictions Acts, viz., of the old

* See the Magistrates' Courts Act, 1952, s. 64 and Sch. 3, para. 1 of that Act; 32 HALSBURY'S STATUTES (2nd Edn.) 470, 526.

† I.e., by s. 13 of the Criminal Justice Act, 1948; 28 HALSBURY'S STATUTES (2nd Edn.) 364.

control under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. A

Held: whether the rateable value of the land let with the house would, if let separately, be less than one quarter of the rateable value of the house must be determined for the purposes of s. 12 (2) proviso (iii) of the Act of 1920 (which applied the old control to such land) at the time when the landlord sought to enforce his rights; and accordingly the landlord was entitled to recover possession, because the land was rated in excess of that proportion at that time, with the result that the Act of 1920 did not then apply notwithstanding the provisions of s. 12 (6) of that Act. B

Observations of SCRUTTON, L.J., in *Prout v. Hunter* ([1924] 2 K.B. at p. 743) applied. C

Appeal dismissed. C

[**Editorial Note.** In the present case the old control applied to the premises and accordingly the court had to consider the provisions of s. 12 (2) of the Act of 1920. If, however, the new control had applied to the premises, the question in issue in the present case would not have arisen as sub-s. (2) of s. 12 of the Act of 1920 is excluded where the new control applies; see s. 3 (1) of and Sch. 1 to the Rent and Mortgage Interest Restrictions Act, 1939. D

As to Rent Acts applying to a House let with Land, see 20 HALSBURY'S LAWS (2nd Edn.) 316, para. 372, and 1954 Supp.; and for cases on the subject, see 31 DIGEST (Repl.) 655, 656, 7579-7581.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2) (iii) and s. 12 (6), see 13 HALSBURY'S STATUTES (2nd Edn.) 1004, 1013; and for the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 and Sch. 1, see *ibid.*, 1077, 1081.] E

Case referred to:

(1) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest (Repl.) 639, 7467.

Appeal.

The defendant appealed from an order of His Honour JUDGE ROWE HARDING at Bridgnorth County Court, dated Nov. 10, 1954, granting possession of premises to the plaintiff. F

J. P. Widgery for the defendant, the tenant.

R. J. Toyn for the plaintiff, the landlord.

DENNING, L.J.: The question in this case is whether a cottage and four and a half acres of woodland are within the protection of the Rent Restrictions Acts. In 1937 the then owner let the cottage and land to the defendant at a rent of 7s. 6d. a week. The cottage at that time was rated at £4. The four and a half acres of woodland were not rated. The reason was either because they were considered of no value or that they may have been regarded as agricultural land which was exempt from rating. At some time in 1938 the defendant cleared the undergrowth and started to carry on business as a caravan site proprietor. In 1953 the four and a half acres, having become a caravan site, were rated at £9 a year. The cottage remained rated at £4 a year. In 1954 the then owner sold this land to the plaintiff, a neighbouring farmer who owns all the adjoining land. The plaintiff wants possession of this land because he wants to put it to agricultural purposes. He duly gave notice to quit to the defendant, but the defendant claims to be protected by the Rent Restrictions Acts. G

The first question is whether on Sept. 1, 1939,* the property came within the old control. If it came within the old control, it remains governed by the H

* The material date in respect of property which was newly controlled by the Rent and Mortgage Interest Restrictions Act, 1939. This Act was passed on Sept. 1, 1939, and came into operation on Sept. 2, 1939. I

- A Acts relating to old control and is not governed by the Rent and Mortgage Interest Restrictions Act, 1939.* The question whether it came within old control in 1939 depends on this: Was the rateable value of the four and a half acres at that time less than one quarter of the rateable value of the cottage? If it was, then the whole was controlled by the Acts under the old control: see the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2)
- B (iii). There is no evidence what the rateable value of the four and a half acres was at that time, but the judge heard all the evidence as to the state of the premises in 1937, 1938 and 1939. I think he must have held that the value of the four and a half acres was so low that the rateable value would be less than one quarter of the rateable value of the cottage; it was producing virtually nothing. If that was so, then on Sept. 1, 1939, these premises were controlled
- C and new control does not come into the case at all.

- What, however, is the effect of the new rating in 1953? This caravan site has now been rated at £9 a year. That is more than a quarter of the rateable value of the cottage, which remains at £4. Does this new rating take the premises out of old control? This raises the question: What is the proper time for the test of rateable value? Is it the initial date of the letting or is it the date when
- D possession is sought by the landlord? Counsel for the defendant referred us to s. 12 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which says that where the Act has become applicable to any dwelling-house it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies. That sub-section has often been invoked, but never, so far as anyone can trace, has the court applied it, and I do not think
- E we should apply it today for the first time. I do not think it applies in this case any more than in any other of the cases in which it has been cited: see the observations of SCRUTTON, L.J., in *Prout v. Hunter* (1) ([1924] 2 K.B. at p. 743).

- In my judgment the test of rateable value under the old control is to be determined when the landlord seeks to enforce his rights. At the time when these proceedings were brought the rateable value of this woodland or caravan
- F site was £9 and the rateable value of the cottage was £4; therefore, the whole ceases to be within the Rent Restrictions Acts, and the plaintiff is entitled to possession. That is the ground on which the county court judge decided this case and I find myself in full agreement with him. It becomes, therefore, unnecessary to consider what the position would have been if this case had been one of new control, and I say nothing about it. In my opinion this appeal should be
- G dismissed.

BIRKETT, L.J.: I agree and I do not desire to add anything further to the judgment which has just been delivered.

PARKER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Stafford Clark & Co.*, agents for *Weston, Fisher & Weston*, Kidderminster (for the defendant); *Woolley & Co.* (for the plaintiff).

[Reported by *PHILIPPA PRICE*, *Barrister-at-Law.*]

* See s. 3 (1) of and Sch. 1 to the Act of 1939.

WALLACE v. FREEMAN HEATING CO., LTD. AND ANOTHER. A

[QUEEN'S BENCH DIVISION (Pearson, J.), January 24, 1955.]

Legal Aid—Costs—Taxation—Civil aid certificate issued for appeal in regard to amount of damages—Transcript of shorthand note of evidence and judgment bespoken by plaintiff's solicitors—Not authorised by certificate—Whether certificate could be amended retrospectively—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 8 (1) (a), reg. 14 (3) (b). B

On Aug. 20, 1952, a plaintiff who had been awarded damages by the High Court in respect of injuries sustained by her in an accident was granted a civil aid certificate to appeal to the Court of Appeal to vary the amount of damages. The certificate contained no specific authority to incur any particular expenditure. The plaintiff having given notice of appeal, the defendants put in a cross-appeal. The plaintiff's solicitors ordered, and had available at the hearing of the appeals, a transcript of the shorthand note of the evidence and judgment given at the trial of the action. Both appeals were allowed. On taxation of the plaintiff's costs, the taxing master disallowed the cost of the transcript. The legal aid area committee, on being informed by the plaintiff's solicitors of the disallowance, purported to issue an amended certificate, dated Nov. 19, 1954, authorising the expense of the transcript, but the taxing master refused to allow the item. On a summons to review the taxing master's decision, C

Held: (i) under reg. 14 (3) (b) of the Legal Aid (General) Regulations, 1950, the expense of a transcript must be specifically authorised by the area committee, whether or not the fact of the authorisation was expressly stated in the certificate, and a certificate which merely authorised an appeal was not enough. D

(ii) on the true construction of reg. 14 (3), authority to incur the expense of a transcript had to be given before the expense was incurred and could not be given retrospectively. E

(iii) although an area committee might amend a certificate where it appeared to them that there was an error or mistake in it, they could not so amend a certificate as to authorise the costs of a transcript to be incurred unless the incurring of the costs had in fact been approved before the certificate was issued. F

(iv) on the facts, approval of the expense of the transcript had not been given or asked for before the civil aid certificate was issued, and, accordingly, the expense of the transcript was rightly disallowed on taxation of the plaintiff's costs as an assisted person under the Legal Aid and Advice Act, 1949. G

[For the Legal Aid and Advice Act, 1949, s. 1 (5), s. 2 (2) (a) and s. 12 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 534, 535, 548.]

For the Legal Aid (General) Regulations, 1950, reg. 2 (2), reg. 8 (1) (a) and reg. 14 (3), see 5 HALSBURY'S STATUTORY INSTRUMENTS 203, 208, 214.] H

Case referred to:

(1) *Jones v. Stott*, [1910] 1 K.B. 893; 79 L.J.K.B. 766; 102 L.T. 670; Digest (Practice) 794, 3568.

Adjourned Summons. I

The plaintiff brought an action in the High Court against the defendants for damages for personal injuries. She recovered judgment at assizes for £125 and special damages. Subsequently she obtained a civil aid certificate entitling her to legal aid as appellant in connection with an appeal to the Court of Appeal against the judgment in the action "in so far as the appellant will ask the Court of Appeal to vary the amount of damages awarded under the said judgment and to enforce." No entry was made in the certificate in the paragraph (para. 4) provided for special conditions. After the plaintiff had given notice of appeal

A on the question of the amount of damages the defendants gave notice of cross-appeal raising an issue of liability, viz., the plaintiff's alleged contributory negligence. The plaintiff did not obtain a civil aid certificate extending to a defence of the cross-appeal. The Court of Appeal allowed both the appeal and the cross-appeal and directed taxation of the plaintiff's costs as those of an assisted person under the Legal Aid and Advice Act, 1949.

B The plaintiff's solicitors had obtained before the appeal, but after the civil aid certificate had been issued, a transcript of the judgment in the High Court and of the evidence there. The cost of this was £27 0s. 10d. On taxation this sum was entered in the plaintiff's solicitors' bill as a disbursement. The taxing master disallowed the amount. The plaintiff's solicitors approached the area committee who amended the civil aid certificate by adding as a special condition

C "authority is given to obtain a transcript of the evidence and judgment of the High Court . . .". The plaintiff objected to the disallowance, the taxing master overruled the objection, and the plaintiff applied by summons for the taxation to be reviewed.

R. J. S. Harvey for the plaintiff.

D The defendants were not represented.

PEARSON, J.: This is a chamber summons adjourned into court by request because it raises, or seems to raise, a problem of some general application. This arises in the taxation of the legally aided plaintiff's costs in a running-down case.

E The action was brought by the plaintiff against two defendants, a limited company and an individual. The writ was issued on Feb. 12, 1952, and pleadings closed by the end of June, 1952. On July 16 the action was heard by CROOM-JOHNSON, J., at the Glamorgan Summer Assizes, some eight witnesses were called and the learned judge decided in favour of the plaintiff and awarded a sum of £125 plus special damages. Then on Aug. 20, 1952, the plaintiff obtained a civil aid certificate to appeal to the Court of Appeal. That civil aid certificate was in the usual form and it granted legal aid to the plaintiff as appellant in connection with the following proceedings:

"An appeal to the Court of Appeal against the judgment of CROOM-JOHNSON, J., in the action . . . in so far as the appellant will ask the Court of Appeal to vary the amount of damages awarded under the said judgment and to enforce."

G Then paras. 1, 2 and 3 were filled in in the usual way and para. 4 (to which the marginal note is "Insert any special conditions") was left blank; so there was not any special authority for the incurring of any particular expenditure. On the next day, Aug. 21, the plaintiff gave notice of appeal to the Court of Appeal raising the issue mentioned in the civil aid certificate, that is to say, complaining of the alleged inadequacy of the sum awarded, and the defendants put in an appeal about contributory negligence.

H In February, 1953, the plaintiff's appeal and the defendants' cross-appeal were heard and they both succeeded; that is to say, it was held that the amount awarded should be increased to £275, but there was fifty per cent. of contributory negligence and in the result the amount net that was recovered was £137 10s.

I The plaintiff's solicitors' bill was taxed by the learned master, Master ADAMS, on Oct. 18, 1954. The only item which matters for the present purpose is that there is an entry: "Attending shorthand writer, bespeaking transcript, and subsequently attending obtaining same", followed by this item "paid his account, £27 0s. 10d.", and that amount was disallowed by the learned taxing master.

Objection was made to the disallowance of the shorthand writer's account for £27 0s. 10d. The reasons for objection raised, in substance, two points. First it was said:

"The plaintiff's appeal was on the quantum of damages, and the defendants' appeal on the issue of liability made it necessary for a transcript of the proceedings in the court of trial to be available in the Court of Appeal: (a) for the full and accurate presentation of the case to the court by counsel; (b) for the consideration by the court of all the issues involved, and (c) to enable the Court of Appeal to hear counsel for the plaintiff on the findings of the trial judge. Inasmuch as a transcript of the proceedings below was necessary for the reasons already specified, the plaintiff's solicitors were justified in assuming that under s. 2 (2) (a) of the Legal Aid and Advice Act, 1949, the civil aid certificate granted to prosecute the appeal also gave, or intended to give, authority to instruct and incur the shorthand writer's account of £27 0s. 10d.—the subject-matter of these objections."

Pausing there, I would call attention to the words "also gave, or intended to give". The objection went on to say:

"On the disallowance of the shorthand writer's account being reported to the local legal aid secretary, he confirmed he intended his first certificate to cover the shorthand writer's account, and an amended certificate was granted pursuant to reg. 8 of the Legal Aid (General) Regulations, 1950, authorising the shorthand writer's account to be incurred. With respect, it is submitted that the civil aid certificates granted are sufficient authority for the shorthand writer's account of £27 0s. 10d. to be included and allowed in the plaintiff's bill, under the order of Feb. 5, 1953."

That is the only evidence about the amended civil aid certificate. Those objections must be read as meaning, as, indeed, it is agreed and admitted is the fact, that no application to the legal aid committee to be authorised to incur the expense of obtaining from the shorthand writer a transcript of his shorthand note was made before the expense was incurred, that is to say, before the shorthand note was obtained, and that no such authority or approval was granted when the original certificate was issued in August, 1952. After this item had been disallowed on the learned taxing master's taxation, however, the solicitors went back to the legal aid committee and the legal aid committee's secretary was willing to say that the first certificate issued was intended to cover the shorthand writer's account, and, therefore, an amended certificate was issued. That is what that objection seems to say.

When the matter came before the learned taxing master he re-considered it and gave his answers to the solicitors' objections to the taxation of the bill. I will read his answers in full because they set out the matter fully and they give his point of view clearly. He says:

"This is a taxation of the costs of an assisted appellant under the Legal Aid and Advice Act, 1949, which raises two important questions: (i) Is specific authority from the area committee necessary to bespeak a transcript of the judgment and evidence in the court below for use on the appeal, or is the civil aid certificate authorising the appeal of itself sufficient authority? (ii) If specific authority is necessary and has not been obtained prior to the bespeaking of the transcript, can this subsequently be rectified by some form of retrospective authority or amendment of the civil aid certificate itself? In this case there was an appeal by the plaintiff on damages, and a cross-appeal by the defendants on liability. Although the plaintiff was an assisted person as far as her appeal was concerned, she obtained no civil aid certificate to defend the cross-appeal, which must be treated as a separate proceeding (see the note to R.S.C., Ord. 58, r. 6, in the ANNUAL PRACTICE, 1955, p. 1260, referring to *Jones v. Stott* (1)) and one for which a separate civil aid certificate would be necessary. The plaintiff was not, therefore, an assisted person in connection with the cross-appeal on the issue of liability. Having on Aug. 20, 1952, obtained her civil aid certificate

A authorising her appeal as to damages only, she bespoke a transcript of the judgment and the whole of the evidence in the court below. No specific authority to obtain this transcript was given, nor it seems was such authority requested. The matter is regulated by reg. 14 (3) (b) of the Legal Aid (General) Regulations, 1950 . . . ”

B After setting out reg. 14 (3) (b)* the taxing master went on to say:

“ The note to R.S.C., Ord. 66A, r. 4, in the ANNUAL PRACTICE, p. 1524, which is dealing with transcript of evidence for the Court of Appeal is in the following terms: ‘ Legal Aid,—Under reg. 14 (3) of the Legal Aid (General) Regulations, 1950, the solicitor for an assisted person who considers it necessary to bespeak any transcript of shorthand notes of any proceedings must first obtain the authority of the appropriate area committee . . . ’ ”

C The important words there are “ must first obtain ”. That is my own comment and not what the learned taxing master has written, though it was, no doubt, in his mind. To proceed with my reading of his answers:

D “ The certificate in this case did not provide for the obtaining of a transcript, and the cost of the transcript was therefore disallowed on taxation . . . The solicitors’ contention that s. 2 (2) (a) of the Act is sufficient authority for obtaining a transcript is fallacious. It might equally well be claimed that this section authorises obtaining reports from medical experts and tendering their evidence in accident cases, or obtaining reports and tendering surveyor’s evidence in building disputes or claims for damages for breach of repairing covenants. For all these matters specific authority is necessary under reg. 14. No doubt the legislature decided that special control should be kept on such items as being the most expensive likely to be incurred, and among which the expense of transcripts is apt to be the highest. Moreover in this case the expense of the whole transcript could not be considered as being ordinarily incurred as the assisted appeal was as to damages only, and the transcript contains evidence (pp. 16 to 28) relating solely to liability. The authority for this, if such is required, is contained in the Practice Note of the then Master of the Rolls [SIR WILFRID GREENE], dated Apr. 8, 1941 ([1941] W.N. 84, and referred to in the notes on R.S.C., Ord. 58, r. 11, at p. 1270 of the ANNUAL PRACTICE), which states: ‘ . . . if the only issue of fact is that of liability, evidence relating to damages must not be copied and vice versa.’ That an appeal is possible without any transcript of evidence being necessary there can be no doubt, so that in view of reg. 14, it would not be right to accept a civil aid certificate to appeal as constituting automatically an authority to obtain a transcript.

G “ Turning to the second question, after the taxation the [plaintiff’s] solicitors approached the area committee informing them of the disallowance of the cost of the transcript, and the committee eventually saw fit on Nov. 19, 1954, to amend the civil aid certificate to include authority to obtain ‘ a transcript of the evidence and judgment ’. The regulation providing as it does that no payment shall be allowed on taxation where the authority has not been obtained, the effect of this procedure, if accepted, would be to give the area committee power to overrule the taxation by their subsequent amendment of their certificate and thereby override the regulation. The acceptance of retrospective authority opens the door wide to many abuses. For example, in the present case, the area committee after the event have purported to give authority to obtain ‘ a transcript of the evidence and judgment of the High Court ’ whereas the proceedings for which the civil aid certificate was originally given was to appeal as to damages only and for this purpose a transcript of the evidence as to liability would not have been necessary and would, no doubt, not have been authorised at the time the civil

* The text of reg. 14 (3) (b) appears at p. 422, letter G, post.

aid certificate was originally granted, there being at that date no cross-
appeal as to liability. For all the above reasons I overrule this objection." A

There is a possible query as to the accuracy of the statement that the transcript, at pp. 16-28, contains evidence relating solely to the issue of liability and not relating at all to the other issue, namely, the amount of the plaintiff's damages, with which the plaintiff's appeal was concerned. I looked at the shorthand note and certain pages between pp. 16 and 28 do have some bearing on the issue of the plaintiff's damages, but not very much. It is not an unreasonable view for the learned master to take of that pure question of fact, but it is not necessarily correct. Subject to that query, I agree with the learned taxing master's answers to the objections and adopt them as part of my judgment. B

There is something which I have to add on the main points as well as on a specific and very interesting point which was argued before me by counsel for the plaintiff. The first of the two main points—which are the reasons why this summons was adjourned into open court—is a matter of construction of reg. 14 (3) of the regulations of 1950. First, there is a question of construction of the civil aid certificate: does it by itself expressly or by necessary implication authorise the expense of bespeaking a shorthand transcript to be incurred? The answer must be, on the face of the certificate, quite plainly "No", because the certificate only authorises the appeal and there is no entry in para. 4 where the marginal note "Insert any special conditions" occurs. If there were no special provision in the regulations, it may well be that s. 1 (5) of the Act would have been sufficient to authorise this expense. Section 1 (5) reads: C

"Legal aid shall consist of representation, on the terms provided for by this Part of this Act, by a solicitor and so far as necessary by counsel (including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings)." D

Section 12 (1), however, is a provision for regulations to be made, which provides: E

"The Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to this Part of this Act or for preventing abuses thereof." F

A possibly obvious form of abuse which needs to be prevented is the incurring of unnecessary expense. It may well be for that reason that reg. 14 was included in the Legal Aid (General) Regulations, 1950. Regulation 14 (3) reads: G

"Where it appears to the assisted person's solicitor necessary for the proper conduct of the proceedings to take or to apply to the court for leave to take any one or more of the following steps, namely . . . (b) to bespeak any transcript of shorthand notes of any proceedings . . . he shall (unless the certificate provides for the act in question to be done) apply to the appropriate area committee for authority so to do, and no payment shall be allowed on taxation for any such step taken without their approval." H

That obviously means that the question whether the bespeaking of a transcript should be authorised is one which must be specially submitted to and considered and decided by the local area committee, and it is clearly not an expense which is authorised where a civil aid certificate merely authorises an appeal. There must be a specific authorisation of the incurring of these expenses. It does not necessarily have to be in the civil aid certificate itself, but it must be, in fact, given. Therefore, I hold as a matter of construction that, quite manifestly, there is no necessary implication in the civil aid certificate that the costs of bespeaking a shorthand transcript can be incurred. I

The other main point is whether the legal aid committee's authority or approval can be given retrospectively; whether a retrospective approval or authority is an effective approval or authority. That, again, is a question of construction,

- A and in my opinion the answer is that the authority must be obtained before the expense is incurred. There are three reasons for that. First, the opening words of reg. 14 (3), "Where it appears to the assisted person's solicitor necessary . . . to take" certain steps, are, in my opinion, referring to the time before the step was taken. It is a time at which it appears to the assisted person's solicitor necessary to take a step. Regulation 14 (3) does not say "where it appears or has appeared", and does not say "where it appears to the assisted person's solicitor to be or to have been necessary". It is describing the moment of time before the step is taken. Second, there is the wording towards the end of reg. 14 (3): "he shall . . . apply to the appropriate area committee for authority so to do . . ." That again, to my mind, implies an authority to do something in the future. The authority comes first and the taking of the step comes next. Third, there are these words which seem to me clear and emphatic—" . . . no payment shall be allowed on taxation for any such step taken without their approval." In my judgment a step is taken without their approval if there is no subsisting authority at the time when the step is taken. If the step is taken first and authority or approval is purported to be given afterwards, it is still true to say that the step was taken without their approval. The step was taken when there was no subsisting authority.

- Therefore, on those two points I agree with the answers of the learned taxing master and I think that the position is clear. What was mainly argued, however, in this particular case was an ingenious point submitted by counsel for the plaintiff which was on these lines. He said that what the legal aid committee did or purported to do was not to issue a new retrospective authority, but merely to amend their certificate, and he called attention to reg. 2 (2) of the regulations of 1950 which provides:

"Any document purporting to be a certificate issued in accordance with these regulations shall, until the contrary is proved, be deemed to be a valid certificate issued to the person named therein."

- F There is, therefore, a presumption that any certificate is a valid certificate, and it was part of counsel's contention that an amended certificate is a certificate within the meaning of that regulation. He then called attention to reg. 8, which deals with the amendment of certificates. Regulation 8 (1) reads:

- G "The appropriate area committee may amend a certificate—(a) where it appears to the area committee that there has been some error or mistake in a certificate . . ."

- Counsel says that there is no other relevant power in reg. 8 to amend a certificate and, therefore, it must be inferred that the certificate issued to the plaintiff was amended by reason of some error or mistake in the certificate and in order to put right that error or mistake. He then says that the proper inference is that the error or mistake was this: that an authority had, in fact, been given but was not mentioned in the certificate, and the error or mistake in the certificate was the omission to mention the true specific prior authority which had, in fact, been given. I think that, if the prior approval or authority had in fact been given and was omitted by mistake from the civil aid certificate, it may well be that that could be put right under reg. 8 (1). It is, however, a question of what inference is to be drawn from the facts of this particular case, having regard to the evidence which is before me. The principal evidence is what the plaintiff's solicitors said in their reasons for objection. I will read the material passage again to illustrate this point:

"On the disallowance of the shorthand writer's account being reported to the local legal aid secretary, he confirmed he intended his first certificate to cover the shorthand writer's account, and an amended certificate was granted pursuant to reg. 8 of the Legal Aid (General) Regulations, 1950, authorising the shorthand writer's account to be incurred."

I find myself unable to infer from that that, in fact, a prior approval existed. A
 The proper inference is that no prior approval was applied for or given. The legal
 aid secretary, no doubt, said: "Well, I made this to cover everything and I will
 issue an amended certificate to put it right". That would be a mistake on the
 part of the legal aid committee, or their secretary, as to what is authorised, as
 to what is in fact covered by a civil aid certificate in this form; but it does not,
 to my mind, lead to the inference that in fact there was a prior approval orally B
 or in writing or at all. I think the right inference is that no prior approval was
 given and that it is not right to infer from the amendment of the civil aid
 certificate and from the facts of this case that there was any such prior approval
 in fact. For that reason I hold that this ingenious special point which was
 introduced into the argument by counsel for the plaintiff does not succeed.
 Accordingly, the application is dismissed. C

Application dismissed.

Solicitors: *Wrentmore & Son*, agents for *Thos. John & Co.*, Cardiff (for the plaintiff).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

Re CAMERON (deceased). CURRIE v. MILLIGAN AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
 January 25, 1955.]

*Annuity—Rights as to property charged—Continuing charge on income—Gift
 of share of income of trust fund to be made up to minimum sum.* E

By his will dated June 2, 1927, a testator who died on Feb. 23, 1929, constituted a residuary trust fund and by cl. 12 directed his trustees to pay one-third of the income thereof to his wife for her life and continued "... if one-third of the income of the trust fund shall in any year during the life of my said wife amount to less than £6,500 per annum free of English income and supertax my trustees shall in respect of that year pay . . . to my said F
 wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of £6,500 free of English income and supertax". By cl. 13, the testator provided that "Subject to the interest of my said wife in part of the income of the trust fund under the last preceding clause" his trustees should on his son's attaining the age of twenty-five years (which did not happen) hold the income of the trust fund on protective trusts for the son during his life. G
 The testator also made dispositions in favour of the son's issue. It was claimed that the widow was entitled to a continuing charge on the income of the trust fund during her life in respect of the difference between one-third of the income of the trust fund in any year and £6,500 free of income tax and surtax, and, therefore, that a deficiency in her income in any year ought to be made up out of accumulations of surplus income of previous years and the surplus income of subsequent years.

Held: the will as a whole displayed the intention that the payments to the widow in any year were to be made out of the income arising in that year only, and, therefore, the widow was not entitled to a continuing charge on income. H

Re Collier's Deed Trusts ([1937] 3 All E.R. 292) considered. I

Decision of ROXBURGH, J. ([1954] 3 All E.R. 329) affirmed.

[**Editorial Note.** There is a divergence of views on the approach to the question whether an annuity is a continuing charge on income. It was said in the court of first instance ([1954] 3 All E.R. at p. 332, letter H) that the court would be slow to find a continuing charge except in a very clear case. In contrast with this approach is that of SARGANT, J., in *Re Rose* (113 L.T. at p. 144), which

- A was cited in argument in the present case both at first instance and on appeal, to the effect that of the alternative constructions which might be put on gifts of annuities the construction that the annuity in each year is payable solely out of the income for that year is not adopted in the absence of clear and definite language to that effect. ROMER, L.J., in *Re Coller's Deed Trusts* ([1937] 3 All E.R. at p. 294) appears to indicate that "express words" are required to confine an annuity for any one year to the income of that year. In the present case, however, the provisions of the relevant clauses conferring the annuity on the widow and the interests given in favour of his son direct attention to the particular year in which the annuity is to be paid or otherwise indicate that the charge of the annuity for any year should be confined to the income of that year, and the Court of Appeal decided, on the construction of the will as a whole, that this charge of this annuity was so confined.

As to Rights of Annuitant as to Property Charged, see 28 HALSBURY'S LAWS (2nd Edn.) 202, para. 369; and for cases on the subject, see 39 DIGEST 143-148, 373-422.]

Cases referred to:

- D (1) *Re Coller's Deed Trusts*, [1937] 3 All E.R. 292; [1939] Ch. 277; 106 L.J. Ch. 326; 157 L.T. 84; Digest Supp.
 (2) *Re Platt*, [1916] 2 Ch. 563; 86 L.J.Ch. 114; 115 L.T. 524; 39 Digest 153, 457.
 (3) *Re Rose*, (1915), 85 L.J.Ch. 22; 113 L.T. 142; 39 Digest 148, 422.

Appeal.

- E Appeal by the testator's widow, the tenth defendant, from an order of ROXBURGH, J., dated Oct. 21, 1954, and reported [1954] 3 All E.R. 329. ROXBURGH, J., held that on the true construction of the will of the testator the deficiency in her income under the will in any year ought not to be made up out of accumulations of surplus income of previous years and the surplus income of subsequent years. The facts were set out in the report of the case at first instance
 F ([1954] 3 All E.R. 329) and are stated in the judgment of SIR RAYMOND EVERSLED, M.R.

Charles Russell, Q.C., and *Owen Swingland* for the appellant, the widow, who was the tenth defendant.

P. S. A. Rosedale (H. A. Rose with him) for the plaintiff, the surviving trustee of the will.

- G *Arthur Bagnall* for the sixth to ninth defendants, interested in ultimate trust. The remaining defendants were not represented.

SIR RAYMOND EVERSLED, M.R.: In my judgment, ROXBURGH, J., came to a correct conclusion on the problem presented to us in this appeal. The problem is the not unfamiliar one whether a limited gift to a widow—let us call it for the moment an annuity—is or is not so given as to confer on the widow a continuing charge during her lifetime on the whole income of the residue of the estate. Counsel for the widow does not contend for a further charge than that.

- I can deal briefly with the narrative. The will was made in 1927 and the testator, Mr. Cameron, died in 1929. He left his widow, the present appellant, and a son, who, at the time when the testator died, was an infant some thirteen years old. Unhappily the son, though he became of age, lost his life in the world war in 1940, when under the age of twenty-five. Those last mentioned facts become relevant, as will appear presently, when the terms of the will are examined.

The first material clause is cl. 12, which reads:

"My trustees shall pay or cause to be paid one-third of the income of the residue of the said moneys (which moneys and the property for the time being representing the same are hereinafter called 'the trust fund') to my

said wife for her life . . . I declare that if one-third of the income of the trust fund shall in any year during the life of my said wife amount to less than £6,500 per annum free of English income and supertax my trustees shall in respect of that year pay or cause to be paid to my said wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of £6,500 free of English income and supertax."

Clause 13 (1) provides:

"Subject to the interest of my said wife in part of the income of the trust fund under the last preceding clause hereof my trustees shall upon my said son Frederick John Alastair Cameron attaining the age of twenty-five years hold the income of the trust fund upon (subject as hereinafter mentioned) protective trusts for my said son . . ."

Clause 14 provides:

"After the death of my said son my trustees shall (subject to the interest aforesaid of my said wife in part of the income of the trust fund during her life) stand possessed of the capital and future income of the trust fund . . ."

and then follow trusts which, in the events which have happened, are such that the persons entitled to corpus cannot be presently ascertained. Clause 15 deals with the period between the death of the testator, the son being under twenty-five years, and the son's attainment of that age. It says:

"If at my death my said son shall be under the age of twenty-five years my trustees may until he attains the age of twenty-five years apply or cause to be applied the whole or such part as they in their discretion shall think fit of the income which my said son would if he had attained the age of twenty-five years be entitled to receive under the trusts hereinbefore contained for or towards his maintenance . . . and shall accumulate the residue of such income and hold such accumulations and the resulting income thereof for the person or persons who shall eventually become entitled to the principal fund from which the same shall have proceeded with power at their discretion to apply the said accumulations or any part thereof during the infancy of my said son as if the same were income arising in the then current year."

I think I need not read any further part of the will. Clause 16 makes further provision for increasing, in certain events, the son's income.

For a period after the testator's death, one-third of the income of the estate, which was large, was sufficient to provide £6,500 per annum. For simplicity, I will exclude further reference to income and supertax. But a time arose—perhaps not unexpectedly—when that surplus or sufficiency of income ceased to be. Occasions have arisen during which in some years the one-third of the income of the residue amounted to less than £6,500. The trustee has in hand accumulations of approximately £8,500, which represent the surplus of those years during which there was a surplus; and, put briefly, the claim of the widow now is to be entitled to resort to that accumulated surplus to make up during current, and perhaps future, years deficiencies in the one-third of her husband's income.

ROMER, L.J., in *Re Collier's Deed Trusts* (1), said at the beginning of his judgment that the reported cases on the subject were numerous and he proceeded ([1937] 3 All E.R. at p. 293):

"The question is always one of the proper construction of the instrument creating the annuity, and must, accordingly, depend in every case upon the precise language employed. No one case, therefore, can be said to govern another."

The learned lord justice then stated a number of principles, which included this:

- A In the case of the gift of an annuity generally out of income and then a gift over opening with such words as "subject to payment of the annuity", the annuitant is prima facie entitled to a continuing charge on the income of the fund out of which the annuity is expressed to be payable; and the strength of the argument for the widow in this case has been that there is nothing in the language of this will to rebut what should be regarded as the prima facie right of the widow to
- B receive in effect an annuity of not less than £6,500 a year out of all income of residue arising during her life.

For my part, I share the inclination, which ROXBURGH, J., expressed, to read cl. 12 as intended, on its proper construction and according to its special and peculiar language—I use the word "peculiar" strictly and not as meaning "odd" or "strange"—to confer only a right on the annuitant to resort in any

- C year to surplus income of that year beyond the one-third to make up the £6,500. It is quite true, as counsel for the widow observed, that the gift is "one-third of the income of residue" and not "one-third each year of the income of residue for that year"; in other words, it is a gift in strict terms of one-third of the total income of residue during the period of the widow's life. But, when I read on and find the declaration that, if one-third of income shall in any year amount
- D to less than £6,500, the trustees

"shall in respect of that year . . . cause to be paid to my said wife out of the income of the trust fund in addition to one-third . . . such further sum as will give to her a net income for that year",

- I get, I confess, a strong impression, conveyed to my mind by the language, that
- E the testator is intending only to look at the state of affairs, financially, year by year and is intending only to authorise resort to the two-thirds of income for the year in which the one-third has fallen short of the figure indicated. Again, I appreciate the force of the argument that, in the passage to which I have just alluded, the words used are "shall . . . out of the income of the trust fund" and not "out of the income of the trust fund in that year". I do not doubt
- F the force of the argument that the omission in that one place of the reference to a single year should not be regarded as insignificant, particularly having regard to the express reference in three other places to the year in question; but none the less I confess, for my part, that the language does create in my mind the same impression of the testator's intention, having regard to the nature of the gift, and particularly to the fact that it is not a case of an ordinary annuity of
- G so much per annum out of residue, as was formed in the mind of ROXBURGH, J.

- I come, however, to the later clauses which the learned judge found, and which I find, determining in this matter. It is to be noted that cl. 13 and the clauses following deal, so far as is relevant, with provisions for the testator's son; and it is impossible, I think, to read them and not to form the clear impression that the testator intended to confer on the son an interest in something which would
- H be available in reality. I am putting it somewhat loosely, because I have in mind the point which counsel for the widow made that, even though the widow had a continuing charge on income and though strictly, therefore, during her lifetime no part of income was free from her charge on it so as to be available for the son, yet there was authority for the view that, as a matter at least of administrative relaxation, an achieved surplus would be allowed to be distributed, and
- I would be properly distributed, by trustees to the person entitled subject to the interest of the annuitant. The exact limits and extent of that permission or administrative relaxation were cited by ROMER, L.J., in *Coller's case* (1) from *Re Platt* (2), and they are not, I think, entirely clear and precise. I should imagine that, in the ordinary case, unless the surplus were very secure, trustees would always require the protection of the court.

Whether those matters were in the testator's mind or no, it seems to me that the kind of interest he was conferring, or purporting to confer, on his son plainly proceeded on the view that the wife's interest in income was of a more limited

character than that of a continuing charge on the whole income. Clause 13 A began with the words "Subject to the interest of my said wife in part of the income of the trust fund"—a phrase which he repeated in cl. 14. Counsel for the widow observed that, since she has, quoad any year, an interest in the whole income, therefore the phrase "the interest in part of the income" is, on any view, inaccurate; but I am unable to go further with counsel for the widow and say that the reference, being inapt, is therefore colourless. It seems to me that B plainly the testator is referring to what may be called a "partial interest" in income conferred on his wife; and, though one may debate on, and even quarrel about, the meaning and extent of "a partial interest in income", having regard to the nature of the problem here posed, I must say, like the learned judge, that I feel no doubt that the reference indicates, and indicates tolerably clearly, that C of the two possible interests which such an annuitant might enjoy—viz., an interest in any year to have the income of that year utilised in making up £6,500 for her, on the one hand, and a continuing charge on all income during her lifetime on the other—these references are directed to the former and not to the latter alternative.

I think that the nature of the interest given to the son, as expressed by the testator, also reinforces that view. He speaks in cl. 15 of the son being "entitled to receive" something under the trusts thereinbefore declared; and there are the provisions as to accumulations which may be treated and made available as though they were income in a context indicating that they were intended to be available for the son's maintenance. Those matters seem to me to point, and point somewhat forcibly, to the view which I have already been for my part inclined, under cl. 12, to take. I will not use the word "devastating" which the learned judge used, but granted that some colour is required to make the picture of cl. 12 complete, the colour which cl. 13 and cl. 14 provide, in my judgment, produces the picture which commended itself to the learned judge. E

For those reasons, I come to the conclusion that ROXBURGH, J., rightly interpreted the language used by the testator in this particular will, and I would accordingly dismiss the appeal. F

JENKINS, L.J.: I agree that the learned judge came to a right conclusion in this case and that the appeal fails and should be dismissed.

HODSON, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Johnson, Jecks & Landons* (for the tenth defendant and the plaintiff); *Lee, Bolton & Lee* (for the sixth to the ninth defendants). G

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A SLADE v. BATTERSEA & PUTNEY GROUP HOSPITAL MANAGEMENT COMMITTEE.

[QUEEN'S BENCH DIVISION (Finnemore, J.), February 2, 3, 1955.]

Invitee—Negligence—National Health Service—Relative visiting sick patient in hospital—Visit a matter of material common interest to plaintiff and hospital authority.

B The plaintiff, a lady aged sixty-seven years whose husband was a patient under the National Health Service in a state hospital for which the defendants were under legal liability*, had been notified that her husband was dangerously ill and had been given permission by the hospital authority to visit him at any time. When she was leaving the hospital after visiting him, she slipped and fell on a part of the floor of the ward where polish had recently been spread. The polish had not been polished off at the time of the accident and its presence rendered that part of the floor slippery and dangerous to walk on. It was a rule of the hospital that warning should be given if polishing was in progress, but no warning was given to the plaintiff on this occasion, though she had been warned on previous occasions. She did not know that the polish was spread on the floor. She sued the defendants for damages for the injuries received by her as result of her fall.

C **Held:** the defendants were liable for breach of duty to the plaintiff because (i) she was an invitee, as she was in a state hospital visiting, with permission of and after notification from the hospital authority, her husband who was a patient in the hospital, and thus was there on a matter of material common interest to herself and the hospital authority, and the floor of the ward at the place where the polish was on it was not safe, or (ii), if in law the plaintiff was a licensee and not an invitee, the state of the part of the floor on which the polish was spread was a concealed danger against which she was entitled to be protected and of which she was not warned, and (iii) whether the plaintiff was an invitee or licensee the slippery state of the floor of the ward was caused by a current operation, viz., polishing, and the defendants were liable for negligence in that the plaintiff was not warned of the polish being on the floor (dictum of DENNING, L.J., in *Dunster v. Abbott* ([1953] 2 All E.R. at p. 1574) applied); accordingly, the plaintiff was entitled to recover damages, the general damages being assessed at £750.

F **[Editorial Note.** In *Indermaur v. Dames* (1866) (L.R. 1 C.P. 274) WILLES, J., said (at p. 287) that the common case of an invitee was that of a customer in a shop. Such an instance illustrates that usually an invitee is a person invited into premises by the occupier for a business purpose, and the common interest which they have, the existence of which distinguishes the relationship of invitor and invitee from that of licensor and licensee, is usually pecuniary. It has been said that the common interest must be pecuniary or material. In *Pearson v. Lambeth Borough Council* ([1950] 1 All E.R. 682) ASQUITH, L.J. (at p. 688, letter B) suggested that a common interest might exist, for the purpose of establishing the relationship of invitor and invitee, where no pecuniary gain was aimed at. In the present case one ground of the decision of FINNEMORE, J., is his view that the wife's visit to her husband in the circumstances of this case, where the visit could not be regarded as having a pecuniary motive, constituted her an invitee, as the visit was on a matter of material interest to her and to the hospital (see p. 431, letter A, post). It is thought that this is the first decision applying this view to a case where the patient was a non-paying patient.

I As to Invitees and the Duty towards them, see 23 HALSBURY'S LAWS (2nd Edn.) 600, paras. 851 et seq.; and for cases on the subject, see 36 DIGEST (Repl.) 46, 246 et seq.

* By virtue of s. 13 of the National Health Service Act, 1946; 15 HALSBURY'S STATUTES (2nd Edn.) 351; see *Bullard v. Croydon Hospital Group Management Committee* ([1953] 1 All E.R. 596).

As to Licensees and the Duty towards them, see 23 HALSBURY'S LAWS (2nd Edn.) 609, paras. 859 et seq.; and for cases on the subject, see 36 DIGEST (Repl.) 63, 345 et seq.]

Cases referred to:

- (1) *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682; [1950] 2 K.B. 353; 114 J.P. 214; 36 Digest (Repl.) 69, 373.
- (2) *Weigall v. Westminster Hospital*, [1936] 1 All E.R. 232; 36 Digest (Repl.) 52, 284.
- (3) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest (Repl.) 50, 262.
- (4) *Dunster v. Abbott*, [1953] 2 All E.R. 1572; 3rd Digest Supp.

Action.

The plaintiff's husband had been ill for some two and a half years in a hospital managed and controlled by the defendants. In October, 1953, he was put on the danger list and the plaintiff was notified and was given permission by the hospital authorities to visit him at any time. She visited him one morning and after being with him for about half an hour she decided to leave. On her way out of the ward which had a highly polished floor she slipped on a part of the floor where polish had recently been applied. The polish had been spread over the floor but had not yet been polished off and rendered the floor slippery and dangerous. She was given no warning of the presence of the polish on this occasion, though she had been warned on previous occasions. It was a rule of the hospital that people should be warned when polishing was in progress. The judge found that the plaintiff did not know that there was polish on the floor, and that she was not guilty of contributory negligence. For the purpose of the question of liability of the defendants to the plaintiff as an invitee he found that the part of the floor on which the polish was spread was a danger of which the defendants knew and was an unusual danger.

F. C. Denny for the plaintiff.

E. Daly Lewis for the defendants.

FINNEMORE, J., after stating the facts and reaching the findings summarised above, continued: The question is, of course, was the plaintiff an invitee? Many cases have been referred to, and I am much obliged to counsel for the defendants for his luminous survey of them. It is tempting to follow him to discuss them all, but I do not think it is really necessary. In modern times I think it is fair to say, having in mind *Pearson v. Lambeth Borough Council* (1), that within certain reasonable limits we tend to widen rather the definition or description of "invitee". Looking at SALMOND ON TORTS (11th Edn.), at p. 558, I see the editor quotes SIR JOHN SALMOND himself, saying that he

"thought it sufficient if the occupier had a material interest in the visitor's presence. He defined an invitee as a person who enters on the premises by the permission of the occupier granted in a matter in which the occupier himself has some pecuniary or material interest."

I know that there are other definitions or descriptions which confine it to a pecuniary interest only. *Weigall v. Westminster Hospital* (2) has been referred to. The mother of a patient visited him, and from the wards went to see the surgeon and trod on a mat which was placed on a highly polished surface. She was held to be entitled to recover as being an invitee who met an unusual danger, that is to say, a mat on a highly polished surface without anything under the mat to prevent it slipping. It is true that in that case the patient, a boy, was a paying patient. It is queried by ASQUITH, L.J., in his judgment in the case of *Pearson v. Lambeth Borough Council* (1) ([1950] 1 All E.R. at p. 688) whether that really made any difference or not. Again, I think it might well be that the position today is rather different, because a person who goes to a state hospital in these days is not a person going to a charitable voluntary hospital as in the old days; he is a

A person going to a hospital maintained by the state, towards which he himself pays his contributions through national health insurance and in other ways; and it might be even on the narrower interpretation of "invitee" that he might be brought within the definition. I would be satisfied in this case to say that in my view a visit by a wife at the invitation of a hospital to her dangerously ill husband in the hospital is a matter of material interest both to her and to the hospital.

If on the other hand that be wrong and the true position be that she was there only by leave and licence as a licensee, I think she would still be entitled to recover because, in my view on the evidence before me, this was a concealed danger. The word "trap" was often used, but, as HAMILTON, L.J., pointed out in *Latham v. R. Johnson & Nephew, Ltd.* (3) ([1913] 1 K.B. at p. 415):

C "A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger."

If this floor where the polish was spread was to the plaintiff no different in essence from the rest of the floor and looked safe, it seems to me that it was a safety which was wholly illusory. It was not safe. It was plainly slippery and dangerous for the reasons which I have already indicated, and there was not anything reasonably to bring to her attention that difference; so even if she were a licensee I still think she suffered damage as a result of coming on a concealed danger of the sort against which a licensee as well as an invitee is entitled to be protected. In the absence of any warning and in the absence of anything put in the way or any obvious appearance, I think this danger was a concealed danger. Counsel argued that it was obvious; but I do not think it was. It would be obvious, I suppose, if one walked down the ward with one's eyes fixed on the ground to see when and where and if the boards changed at all; but that is not what people are supposed to do when they walk along the ward of a hospital. A person looks in front of himself for any obvious obstruction: it does not seem to me one is called on to make a particular search of the floor as one goes along. One is entitled to assume that the person who allowed one to walk along that floor and is in charge of that floor has not left there or put there some danger which is not, in my opinion, an obvious danger—at all events, without very close and scrupulous examination.

There is a final point which I confess appeals to me because it seems to be common sense; and that is one which was indicated very plainly indeed by DENNING, L.J., in *Dunster v. Abbott* (4), and, I think, indicated by SOMERVELL, L.J., also. After all, does it matter what the plaintiff was? Everybody agrees that she was properly in the ward. She had asked permission, indeed, to go in. We need not bother ourselves with what might be the position of a trespasser. After she has gone into the ward, taking the premises as she finds them as a licensee must, whilst she is there a wholly extraneous danger, which is no part of the property itself or of the structure, is introduced into the ward on the floor. The simple question seems to me to be, was that negligence?, that is to say, was it negligent to leave that polish on the floor when someone comes walking along without giving that person a warning? In *Dunster v. Abbott* (4)—which, it has always to be remembered, was decided in favour of the defendant on appeal—I—DENNING, L.J., said ([1953] 2 All E.R. at p. 1574):

"In this case, however, it does not matter whether the plaintiff was an invitee or a licensee. That distinction is only material in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else."

I think, with perhaps certain qualifications, that is right to be applied to the present case. DENNING, L.J., continued ([1953] 2 All E.R. at p. 1574):

"In regard to current operations, the duty of the occupier—or of the person conducting the operations—is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons lawfully on the premises who may be affected by his activities, and it is the same whether the person injured is an invitee or a licensee, a volunteer or a guest. Negligence causing damage gives a cause of action, and it is not proper nowadays in this regard to draw any distinction between negligent acts of commission and negligent omissions."

It was held in that case that while there was no complaint about the premises, what the occupier had actually done in regard to providing light was to act with reasonable care and therefore, of course, the defendant succeeded and the plaintiff failed.

Here I think the position is that the defendants through their servants did not act with reasonable care, which I think required a warning to be given to this lady that as she walked towards the door there was this polish in the way. I do not think this is a case where nobody was negligent. Many slips happen without any negligence; but here there was an obvious cause for the slipping. Further, I think it is not a case of contributory negligence. I do not think this lady was negligent in the way she walked along the floor or negligent in failing to see the unpolished liquid still on the floor.

In regard to damages, the lady is some sixty-seven years of age, I think. She is not a wage earner. She has not, therefore, lost money in that way and she will not lose money in that way in future. But she has received a very serious injury. The agreed medical report says that she has got a soundly united fracture but that there is one inch shortening in her leg and permanent considerable limitation of movement of the right hip. It will be remembered that the fracture was in the thigh. She has got her thigh plated and pinned, and at least one of those pins protrudes in such a way that there might have to be another operation, though this consequence does not follow of certainty. She is severely incapacitated and can only potter about in the house, being able to walk only for a very short distance out of doors using a stick. She can do such light jobs as cooking, dusting, making her bed, etc., and she can now use the stairs. She is permanently incapable of work which involves kneeling or much stooping. From the answers which the plaintiff gave, chiefly in cross-examination, I should judge her to have been a lady of considerable activity, probably physical as well as mental; and for the rest of her life she is turned into a cripple. That is what it really comes to. Although there is no loss of wages or any future expected special damage, she is entitled to reasonable general damages for the injuries done to her. I propose to assess general damages at the sum of £750 and to add to that the agreed sum of special damage.

Judgment for the plaintiff.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *J. S. Tapsfield* (for the defendants).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

A Re BURTON'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE v. MONTEFIORE AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), January 26, 1955.]

B *Settlement—Rule in Lassence v. Tierney—Trustees directed to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each of settlor's two daughters—Daughter's share not to vest absolutely in her—Life interest to daughter with remainder to issue—Accruer clause—Both daughters dying without issue—Destination of trust fund.*

C By a voluntary settlement, made on Apr. 10, 1919, the settlor settled certain investments for the benefit of his two daughters, A.B. and I.B. In the recital to the settlement it was stated that the investments had been transferred to the trustees of the settlement "to be held by them irrevocably upon the trusts hereinafter declared concerning the same". By cl. 2 the trustees were directed to stand possessed of the trust fund and of the annual income thereof "upon trust to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each" of the two daughters, A.B. and I.B., respectively. By cl. 3, "the share of the trust fund of each of the said two daughters" was not to vest absolutely in such daughter but should be retained by the trustees on trust during the life of such daughter to pay the income of such share to her, and, after the death of such daughter, on trust for her issue. By cl. 4 it was provided, "If the trusts hereinbefore declared concerning the share of either such daughter shall fail then . . . such share shall go and accrue by way of addition to the share of such other daughter and shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning her original share or as near thereto as circumstances will admit." By cl. 5, "The trustees may at any time or times raise any part or parts not exceeding in the whole one moiety of the share of either such daughter or of the expectant share of any child or remoter issue of such daughter (but with her consent in writing during her lifetime) in the trust fund and may pay or apply the same for his or her advancement or benefit in such manner as the trustees shall think fit". On Aug. 31, 1927, A.B. died a spinster. In 1932 the settlor died. On Sept. 25, 1952, I.B. died, also a spinster. On an application to the court by the trustee of the settlement to determine the destination of the trust fund,

H **Held:** on the true construction of the settlement, cl. 2 gave to each of the daughters an absolute beneficial interest in one half of the trust fund, subject to the trusts which were engrafted on those absolute interests by the subsequent clauses; and, therefore, there being an initial absolute gift to the daughters, the rule in *Lassence v. Tierney* (1849) (1 Mac. & G. 551) and *Hancock v. Watson* ([1902] A.C. 14) applied, and, as, in the events which had happened, the engrafted trusts had not exhausted the whole beneficial interest in the fund, the original absolute gift in favour of the two daughters remained and there was no resulting trust for the representatives of the settlor.

I Decision of ROXBURGH, J. ([1954] 3 All E.R. 231) reversed.

[As to the Rule in *Lassence v. Tierney*, see 34 HALSBURY'S LAWS (2nd Edn.) 214, para. 270; and for cases on the subject, see 43 DIGEST 643-645, 790-799, and 44 DIGEST 554-556, 3715-3724.]

Cases referred to:

(1) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 43 Digest 644, 792.

- (2) *Re Gatti's Voluntary Settlement Trusts*, [1936] 2 All E.R. 1489; Digest Supp. **A**
- (3) *Re Hatch*, [1948] 2 All E.R. 288; [1948] Ch. 592; [1948] L.J.R. 1393; 2nd Digest Supp.
- (4) *Re Walter's Will Trusts*, [1948] 2 All E.R. 955; [1949] Ch. 91; [1949] L.J.R. 225; 2nd Digest Supp.
- (5) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; Digest Supp. **B**
- (6) *Re Litt*, [1946] 1 All E.R. 314; [1946] Ch. 154; 115 L.J.Ch. 114; 174 L.T. 184; 2nd Digest Supp.
- (7) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551 (41 E.R. 1379); 2 H. & Tw. 115 (47 E.R. 1620); 15 L.T.O.S. 557; 44 Digest 553, 3715.

Appeal.

The first, second and third defendants in a cause commenced by originating summons appealed from an order of ROXBURGH, J., dated Oct. 8, 1954, and reported [1954] 3 All E.R. 231. The summons was taken out by the trustee of a deed of settlement, dated Apr. 10, 1919, to determine whether on the true construction of the deed and in the events which had happened of the death without issue of the settlor's daughters, Audrey Evelyn Burton and Ida Marion Burton (the beneficiaries named in the settlement), the trust funds subject to the settlement were now held (a) on trust in equal moieties for the respective personal representatives of the deceased beneficiaries, or (b) on trust, as to the entirety, for the personal representative of Ida Marion Burton, the later survivor of the beneficiaries, or (c) on a resulting trust for the personal representative of the settlor (who died on July 12, 1932), or (d) on and for some other and what trusts. The first and second defendants were the personal representatives of Audrey Evelyn Burton, and the third defendant was the personal representative of Ida Marion Burton. The fourth defendant was the personal representative of the settlor. ROXBURGH, J., held that there was a resulting trust for the personal representative of the settlor. **C**

Raymond Jennings, Q.C., and *A. J. Belsham* for the appellants (the first, second and third defendants), the personal representatives of the settlor's daughters. **D**

R. W. Goff, Q.C., and *Ian Campbell* for the respondent (the fourth defendant), the personal representative of the settlor. **E**

E. I. Goulding for the trustee of the settlement. **F**

SIR RAYMOND EVERSLED, M.R.: In the well-known case of *Hancock v. Watson* (1) it was clearly laid down in the words of LORD DAVEY ([1902] A.C. at p. 22): **G**

"... if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts." **H**

In that case it was a will which was being construed. LORD DAVEY went on to say (*ibid.*): "But, when the court has once determined that the first gift is in terms absolute"—which I take to mean "is by or as a consequence of its language absolute"—"then if it is a share of residue (as in the present case) the next of kin are excluded in any event". **I**

That rule, so laid down with such high authority, has been regarded as well established ever since, and may be treated as part of the equipment of our law in dealing with problems such as have arisen in this case, whether they emerge from a settlement or from the terms of a will. I am inclined to think that the rule has become so well established that counsel for the appellants may be right in saying that conveyancers, having the rule in mind, may use formulae in an opening paragraph of directions or dispositions deliberately so that the settlement

A or will, as the case may be, will be complete—that is, not fail altogether of effect—even though the specific trusts which are later elaborated, for one reason or another, wholly determine. However that may be, the question in this case is one of the construction of the particular document, viz., on its true construction, is there here to be found a disposition, absolute in character, first made in favour of the two persons named in the settlement and only qualified to the extent of the detailed and more limited trusts which follow?

B We are concerned with a voluntary settlement made in 1919 by one Arthur Burton. It was a settlement contrived, to quote its own language, for the purpose of “making some provision for the maintenance, education and benefit” of the settlor’s two daughters, to whom I will hereafter refer as Audrey and Ida. Both those daughters died, the one in 1927 and the other in 1952, unmarried and without issue. The settlor had died twenty years before the death of Ida, so that the issue which has arisen is one between the estate of the settlor, on the one hand, and the estates of the two daughters, on the other. On the one hand, on behalf of the settlor’s estate, it is said that there was no effective or intended disposition by the settlement other than that which emerges from the specific trusts set out in cl. 3 and the following clauses; and that, since all those trusts failed in the events which I have stated, the resulting trust in favour of the original disponor survives and the property (which is considerable: some £20,000) is to be treated now as part of the settlor’s estate. On the other hand, it is submitted by counsel for the appellants that, on its true construction, cl. 2 of the settlement—read, not in isolation, but in the context both of the preceding recitals and of the subsequent operative clauses—is found, on its language, to confer an absolute gift on Audrey and Ida, only limited to the extent of the subsequent trusts, so that, by reason of the failure of those trusts, the absolute nature of the original disposition survives for the benefit of the daughters’ estates.

E As the learned judge stated at the beginning of his judgment ([1954] 3 All E.R. at p. 232), this difficult case is a further instalment of the chapter relating to the rule in *Hancock v. Watson* (1). ROXBURGH, J., further observed that, although the rule may be simply stated, its application in particular instances is sometimes far from simple, and in this case, indeed, very far from simple. For my part, however, having attended closely to the arguments with which the case has been illuminated in this court, I have reached a different conclusion from that which commended itself to ROXBURGH, J. I think that there was, by virtue of cl. 2, construed in its appropriate context, such a disposition in favour of Audrey and Ida as now survives for the benefit of their respective estates.

G I must now read some not inconsiderable part of the settlement. I have already indicated the recital, but I will read it in full. It says:

H “Whereas the settlor being desirous of making some provision for the maintenance education and benefit of his daughters Audrey Evelyn Burton and Ida Marion Burton respectively has transferred the investments mentioned in the schedule hereto into the joint names of the trustees to be held by them irrevocably upon the trusts hereinafter declared concerning the same Now this indenture witnesseth . . .”

I It is true, as was pointed out by counsel for the personal representative of the settlor, that the provisions which are *ipsis verbis* for the maintenance, education and benefit of Audrey and Ida and are found in cl. 3 (ii) related exclusively to income. To that general statement, only this qualification should be added: that the peculiar terms of cl. 5 of the settlement (which were not, I think, drawn to the attention of ROXBURGH, J.) also contemplate, as I read the clause, a benefit in the form of capital application for Audrey or Ida. Nevertheless the recital leaves in my mind a strong impression that the settlor is expressing an out-and-out disposition for good and all of the funds settled—with the primary object, of course, of benefiting the two daughters. The words at the end of the recital, “to be held by them irrevocably upon the trusts hereinafter declared”,

which phrase must include the trusts of cl. 2, lend some support to that view. A

I then come to cl. 2 as the first clause relates merely to investment. Clause 2 reads:

"The trustees shall stand possessed of the investments mentioned in the schedule hereto and the investments for the time being representing the same (hereinafter called the trust fund) and of the annual income thereof upon trust to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each of them the said two daughters of the settlor namely [Audrey and Ida] respectively."

In case it should be thought that I am departing from the principle that this clause must not be construed in isolation, I will not now pause to comment on it, but will first read the other relevant parts of the settlement. Clause 3 opens:

"The share of the trust fund of each of the said two daughters of the settlor shall not vest absolutely in such daughter but shall be retained by the trustees upon the trusts following . . ."

There are then life interests given in the daughters' favour, including the provision in cl. 3 (ii), to which I have earlier alluded, as regards the maintenance, education and benefit during minority only. Clause 3 (iii) contains trusts in usual and orthodox form, to the effect that "after the death of such daughter the trustees shall hold such share" for the benefit of issue of that daughter; and there is a provision at the end about hotchpot, again in conventional form, but I will refer particularly to it because of the repetition of the formula "share of such daughter". It says that, in default of appointment to the contrary, no child shall take any share of the unappointed part of "the share of such daughter" without bringing any share appointed to him or her into hotchpot.

Then come cl. 4 and cl. 5, which I will read substantially in full. Clause 4 is:

"If the trusts hereinbefore declared concerning the share of either such daughter shall fail then subject to the trusts powers and provisions herein declared and contained . . . such share shall go and accrue by way of addition to the share of such other daughter and shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning her original share or as near thereto as circumstances will admit."

Clause 5 is:

"The trustees may at any time or times raise any part or parts not exceeding in the whole one moiety of the share of either such daughter or of the expectant share of any child or remoter issue of such daughter (but with her consent in writing during her lifetime) in the trust fund and may pay or apply the same for his or her advancement or benefit in such manner as the trustees shall think fit."

The remaining clauses are, admittedly, of no value for present purposes.

On those clauses, it has been the argument of the respondent (the settlor's personal representative), which argument prevailed in the court below, that the provisions of cl. 2 amounted in their effect and on their true meaning to no more than a direction to the trustees to take the trust fund and to divide it into two equal parts, and to appropriate each such part for the trusts and purposes set forth in the following paragraphs, but for no other purposes. In a sentence, it was said that that clause with that meaning was of a merely administrative character. There is no doubt that the language, at first blush, would strike the eye of the reader as being, at any rate primarily, directed to what might fairly be called "administrative purposes". There are no words of gift in clear or express terms. On the other hand, I think it is no less clear that words of that kind (namely, trusts to divide and appropriate) are apt and competent in a proper context to convey beneficial interests. Examples, such as *Re Gatti's*

- A** *Voluntary Settlement Trusts* (2) and *Re Hatch* (3), were cited to us by counsel for the appellants. According to counsel for the respondent, what he called the "purely mechanical nature" of cl. 2 was emphasised by the use of the words "divide . . . or without actual division . . . treat the same as divided," and the only case cited to us where a closely comparable formula occurred was *Re Walter's Will Trusts* (4), which came before JENKINS, J., when he was sitting at first instance. The decision of JENKINS, J., in that case, however, did not require that he should express a view whether the language in the will or instrument before him was such as to confer absolute gifts, and he preferred (to use his own language, [1948] 2 All E.R. at p. 961) "not [to] indulge in the expression of any superfluous views" on that matter. I do not, however, think that those added words "or without actual division to treat the same as divided" are of real significance one way or the other.

- From the point of view of the appellants, I think that it is, however, significant that the only provision in the settlement which produces the all important result of *equal* division between the two principal beneficiaries and their children is cl. 2, where it speaks of division "into two equal parts"; and I think also that the direction to appropriate one of such parts as the share of each of the two daughters is equivalent to saying, what is perhaps the same thing in different language—"appropriate as the share of or in the trust fund of the two daughters". This view is supported by the opening words of cl. 3. I am inclined to think that cl. 2, if it were intended to be merely mechanical or administrative in purpose, is much more elaborate than is necessary or than one would expect; but, again, I remind myself that it is not a question of looking at cl. 2 in isolation.
- E** Nevertheless, examining the context of the other clauses tends to reinforce the view to which I have been inclined by looking at the recital and cl. 2 itself. As counsel for the appellants observed, in the later clauses the settlor speaks passim of "the share of the daughters" and "the share in the trust fund". There is also another point of considerable significance, namely, that cl. 3 opens:
- F** "The share of the trust fund of each of the said two daughters of the settlor shall not vest absolutely"—a formula which, according to the ordinary sense of the language, seems to imply that at least it vests, and that what the settlor is here saying is: "Notwithstanding what otherwise would have been an absolute disposition, I now propose to impose certain qualifications"—and those qualifications follow. The force of that particular formula clearly impressed itself on the mind of ROXBURGH, J., although he was inclined to treat the word
- G** "absolutely" as being no more than a contrast to the limited or life interests subsequently given; but, with all respect, I do not think that that is a sufficient answer to the force of the argument based on that language.

- I shall now say a word or two about cl. 4, because I think that the learned judge thought that it was of considerable significance in determining this matter. It will be recalled that cl. 4 is the accruer clause. As things have turned out
- H** it does not in the least matter, if counsel for the appellants is right in other respects—that is, if his major premise arising out of cl. 2 is established—whether the two daughters' estates take the trust property equally between them or whether the whole property goes to the estate of Ida, the daughter who lived longer, for I understand that all Audrey's property passed to Ida. That perhaps is fortunate, because I have had some difficulty in accepting the view, which counsel for the appellants was inclined to advance, that the joint effect of cl. 2 and cl. 4 was that, the whole property having gone, so to speak, together into "the Ida half," Audrey's share having been added to Ida's, consequently, in the events which happened, the whole capital went to Ida's estate. It is unnecessary for me to express any view one way or the other on that matter, but, as at present advised, I should not be prepared to assent to that conclusion.

It will be convenient at this stage for me to make a reference to *A.-G. v. Lloyds Bank, Ltd.* (5), one of the cases to which ROXBURGH, J., referred, and

which I have found useful on this matter. That was in many ways a curious case and, as regards the disposition conferring the original absolute gift, the language was far more forceful in favour of an absolute gift than the language in the present case. In the events which had happened, a settlor had, by an appointment (the power to make which she had conferred on herself by an earlier settlement), conferred what, *prima facie*, were absolute interests on three children in equal shares, and, as in the present case and in many other cases in the books, the appointment then contained, grafted on to the original disposition, limitations qualifying the absolute nature of the first disposition, the qualifying dispositions including an accruer clause which, *mutatis mutandis*, can be taken, I think, as substantially equivalent to the accruer clause in the present case. At the death of the settlor all these three children still survived, but none of them had any issue. The point in the case was one of death duties, but it was an argument put forward on behalf of the taxpayers which prevailed and was conclusive in the taxpayers' favour, that this was a *Hancock v. Watson* case (1). LORD TOMLIN referred ([1935] A.C. at p. 394) to the nature of that rule, which I need not repeat, for I have quoted* from LORD DAVEY's speech in *Hancock v. Watson* (1) ([1902] A.C. at p. 22). LORD TOMLIN continued ([1935] A.C. at p. 394):

"... I am satisfied that the frame of the appointment is such as to attract the application of the rule ... which admittedly is to be regarded in construing non-testamentary instruments as well as in construing testamentary documents ..."

After citing LORD DAVEY's language, he went on (*ibid.*, at p. 395): "In the present case it is to be observed that the gift is in the first instance absolute in form", and he then quoted the relevant words of the deed of appointment. He proceeded (*ibid.*):

"... throughout the clauses containing the engrafted trusts there are phrases indicating ownership such as the 'share of each child' or 'the shares in the trust fund of the others of the settlor's three children'."

That language is, I think, applicable also to the present case by reason of the use of the formula "share of such daughter", which I have already mentioned; but LORD TOMLIN further said ([1935] A.C. at p. 395):

"... I cannot find in the language of the engrafted trusts anything appropriate to have effect if there be a failure of the stocks of all three children."

The engrafted trusts included the accruer clause. It is true, so far as I know, that the particular point which was argued in the present case on the accruer clause was not debated in the House in *A.-G. v. Lloyds Bank, Ltd.* (5); nevertheless, LORD TOMLIN took the view that if all stocks failed the result would be that after the last surviving child had by reason of the accruer clause enjoyed the income of the whole fund, it would then go back into three portions, each portion going to the estate of one of the three children. I have found that passage of some help towards my own inclination (and, as I have said, I express no final view) that a similar result should arise, if it were necessary to decide that, out of cl. 4. However that may be, I think that the accruer clause, cl. 4, does not really help the argument here one way or the other.

Clause 5 is obviously very peculiar, because, at first sight, it appears to be an ordinary clause in common form giving the trustees power to advance part of the capital share of one or other of the daughter's children for his or her benefit; but, as JENKINS, L.J., observed early in the argument—it appears that no one had hitherto observed it—the subject-matter out of which the advancement may be made is not confined to the expectant share of the child, but includes "the share of ... such daughter"; and I find it difficult to resist the conclusion

* See p. 434, letter H, ante.

A that, on the wording of that clause, the trustees are empowered to raise up to half of the daughter's share and to apply that half share—that is, the capital—to the advancement or benefit of the daughter.

Having regard to the general nature of the settlement, to confer so far-reaching a power to apply capital for the benefit of the life tenants in such an obscure, casual, not to say accidental, manner is, indeed, surprising; it may lead one to suppose that the clause was the result of some afterthought or amendment. Be that as it may, if I am right as to the effect produced by its terms, it will be seen that the interest of the daughter is not, therefore, in any event exclusively limited, according to the expressed language of cl. 3 and the following clauses, to income. Though I do not wish to place over-much reliance on it, I think that the point which arises from cl. 5 is an indication which favours the view, to which I have already expressed my adherence, that cl. 2 is here apt to confer, and ought to be treated as conferring, vested interests in equal shares in the corpus of the fund on the two daughters limited, but only limited, to the extent of the continuing availability of the trusts expressed in the following clauses.

Matters of construction of this kind do not, I think, lend themselves usefully to over-long exposition. I do not forget the points which were argued, particularly that put forward by junior counsel for the respondent, that this is, after all, a settlement and not a will and that, although the rule in *Hancock v. Watson* (1), as LORD TOMLIN quite clearly said ([1935] A.C. at p. 394), applies indifferently to both, yet in the case of a settlement one may be less unwilling to allow a resulting trust, or even to suppose the contemplation of a resulting trust, than, in the case of a will, one would allow the possibility of an intestacy because the residuary trusts were found in the end incomplete.

Re Litt (6), to which our attention was also drawn, seems to me to have depended very much on its own special facts. In that case the terms of the clause corresponding to cl. 4 in the present case provided for accruer, not to the shares of the children, but to the children themselves, and one of the original children's shares was not thereafter settled at all. In my opinion *Re Litt* (6) is of little guidance towards the determination of the present problem. For the reasons which I have stated and which I do not seek further to elaborate, my own conclusion, as a matter of construction of this document (which is plainly, as a matter of drafting, not perfect) is that the appellants in this appeal ought to succeed; and I, therefore, would allow the appeal.

JENKINS, L.J.: I agree. The question in this case is whether, on its true construction, the settlement of Apr. 10, 1919, gave to the two daughters of the settlor absolute interests in equal shares in the trust fund subject to trusts engrafted on those interests, which, in the events which happened, did not exhaust the whole beneficial interest in the fund, or whether the only interests given to the daughters were limited interests which did not exhaust the whole beneficial interest. In the former alternative, in the events which have happened, the fund must go to the estates of the daughters, or one of them; and, in the latter alternative, the fund must go to the estate of the settlor under a resulting trust. The question depends, as my Lord has said, entirely on the construction of this particular settlement; and the question is whether it is a settlement which, on its true construction, attracts the rule in *Hancock v. Watson* (1) or *Lassence v. Tierney* (7).

I In order that this rule may apply, it is necessary to find in the will or settlement an absolute gift of the property in question. The provisions relied on here as creating absolute gifts to the two daughters are contained in cl. 2 of the settlement. The material words of that clause are:

“ . . . upon trust to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each of them the said two daughters of the settlor . . . ”

In my view, that language is well capable of being construed as having the effect of making a gift to each of the daughters absolutely of an equal share of the trust fund, that gift being made through the medium of the direction to divide the fund, or treat it as divided, and to appropriate it as mentioned in the clause. It is said that these words are purely administrative. Speaking for myself, I doubt if the argument is much advanced by using general expressions of that kind. According to the natural and ordinary meaning of the language here used, read in its entirety without adding or subtracting anything, it seems to me that it is, as I have said, well capable of being construed as giving the two daughters absolute beneficial interests each in one half of the trust fund. A

So much for cl. 2, taken by itself. Clearly it must be construed in the light of the other provisions of the settlement; and a prima facie view formed on it one way or the other may be modified by the effect of the other parts of the deed. It seems to me, looking at the other provisions of the deed, that on balance they definitely tend to support rather than to weaken the conclusion that cl. 2 did effect absolute gifts to the two daughters. The opening words of cl. 3 are: B

“The share of the trust fund of each of the said two daughters of the settlor shall not vest absolutely in such daughter but shall be retained by the trustees upon the trusts following . . .” C

Thus one has a reference there to “the share . . . of each of the said two daughters”, which supports the conclusion that by cl. 2 each of the daughters has been given a share. Then there is the provision that such share “shall not vest absolutely in such daughter”, which, as my Lord has pointed out, suggests that, apart from such a direction against absolute vesting, absolute vesting would take place. Then in the provision for hotchpot in cl. 3 (iii) of the settlement there is a reference, again, to “the share of such daughter”; and the accruer clause, again, has reference to “the share of either such daughter” and “to the share of such other daughter”. There is also a reference to “the trusts . . . herein declared and contained concerning her original share”. Lastly, in cl. 5 there is a provision as to advancement, and, if on its true construction that provision applies to the daughters as well as to the issue of the daughters, as to my mind it must, I think it is more consonant with the view that the daughters were given defeasible absolute interests than with the view that they took nothing beyond life interests. D

I agree with my Lord that little assistance on the question which we have to decide is to be found in the accruer clause, apart from the phrases to which I have referred, which are appropriate to the view that each daughter had a share in the trust fund. Accordingly, I agree with my Lord that the right view in this case is that the rule in *Hancock v. Watson* (1) or *Lassence v. Tierney* (7) does apply, and, consequently, that there was no resulting trust for the settlor, but that the original absolute gift remained and operated in favour of the estates of the two daughters, or possibly the estate of Ida, as the last survivor of the two. Whether it goes to both estates or only to one of them is a matter of indifference, on which no opinion need be expressed, inasmuch as we were told that the daughter Audrey, who died first of the two, in fact left all her property to Ida; so that the ultimate destination of the fund would be the same either way. Accordingly, I agree that this appeal should be allowed. E

HODSON, L.J.: I agree. The learned judge attached little importance to the references in the settlement to “the share” of the trust fund in which each of these two daughters were to be interested; but I am of opinion that these references, which appear in several paragraphs of the settlement, support the view that the document is drawn up on the footing that a share had vested in each daughter, a share which was subsequently cut down by the trusts engrafted on the previous gift. That view is supported by LORD TOMLIN’S F

A speech in *A.-G. v. Lloyds Bank, Ltd.* (5) when he said ([1935] A.C. at p. 395) in considering another settlement:

“ . . . throughout the clauses containing the engrafted trusts there are phrases indicating ownership such as the ‘ share of each child ’ or ‘ the shares in the trust fund of the others of the settlor’s three children ’.”

B I think that one gets assistance from that passage in saying that the use of the word “ share ” in this context indicates ownership. LORD TOMLIN continued (*ibid.*):

“ Further I cannot find in the language of the engrafted trusts anything appropriate to have effect if there be a failure of the stocks of all three children.”

C I think that that passage also applies to the present case. There being no provision for the daughters dying without issue, it is of some relevance, for, if the settlor had been trying to provide for every event, it would be, at any rate, the more difficult to argue that there was an absolute gift; but, if he does not do so, there is good ground for saying that there is a gift, which is intended to be cut down by the engrafted trusts.

D I would also respectfully dissent from the way in which the learned judge dealt with the word “ absolutely ” in cl. 3 of the settlement, treating the reference to the share not vesting absolutely as being in contrast, not to an apparent absolute vesting in the preceding clause, but to the restriction of the interest in income, which was to be without power of anticipation during coverture, the contrast being between an absolute vesting which would apply to capital and an interest in income under trusts which followed. I should have thought that the reference to the share not vesting absolutely more readily referred back to the preceding clause, which might otherwise be expected to make an absolute gift in favour of these daughters. I have nothing further to add.

E *Appeal allowed.*

F Solicitors: *Stileman, Neate & Topping*, agents for *Walker, Charlesworth & Jefferson*, Leeds (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *George Gatey & Son*, Windermere (for the respondent); *Routh, Stacey & Castle*, agents for *Orford, Cunliffe, Greg & Co.*, Manchester (for the trustee).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re DONCASTER AMALGAMATED COLLIERIES, LTD.

[CHANCERY DIVISION (Vaisey, J.), February 2, 1955.]

Coal Mining—Nationalisation of industry—Compensation—Adjustment proposal—Time for service—Date when amount of compensation is “finally determined”—Coal Industry Nationalisation (Company Adjustment) Regulations, 1948 (S.I. 1948 No. 2360), reg. 2 (5).

The amount of the compensation to be made under the Coal Industry Nationalisation Act, 1946, in respect of a company's transferred assets cannot be said to be “finally determined” within the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, reg. 2 (5), until the day whereon the review of all determinations of the value of “compensation units” by the appropriate district valuation board which are submitted for review to the referees appointed for that purpose (pursuant to s. 12 (5) of the Act of 1946 and the regulations made thereunder) has been finally completed.

[For the Coal Industry Nationalisation Act, 1946, s. 25, see 16 HALSBURY'S STATUTES (2nd Edn.) 308.]

Adjourned Summons.

The liquidators of Doncaster Amalgamated Collieries, Ltd., in voluntary liquidation, sought the directions of the court whether on the true construction of the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, they ought to distribute the assets of the company available for its contributories on the footing that the period of nine months referred to in reg. 2 (5) of the said regulations (unless extended by the Minister of Fuel and Power under reg. 23), being the period before the expiration of which any adjustment proposal under reg. 2 must be served on the company, was to be calculated from (a) the day whereon the value of those of the company's assets which by virtue of the Coal Industry Nationalisation Act, 1946, became vested in the National Coal Board, and which constituted five “compensation units”, was determined for the purposes of the said Act; or (b) the day whereon the review of all determinations of the value of “compensation units” by the Yorkshire District Valuation Board which should be or have been submitted for review to the referees appointed for that purpose pursuant to s. 12 (5) of the said Act and the regulations made thereunder should be finally completed; or (c) any and what other day.

R. B. S. Instone for the applicants, the liquidators.

T. D. D. Divine for the first respondent, a preference stockholder.

P. J. Sykes for the second respondent, an ordinary stockholder.

VAISEY, J.: In this summons the applicants are the joint liquidators in the voluntary winding-up of the Doncaster Amalgamated Collieries, Ltd., and the respondents are Mr. Charles Watson Cooper, who is a holder of preference stock in the capital of that company, and Mr. William Alfred Ball who is a holder of ordinary stock in the company. The summons raises a question on the construction of the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, and particularly of reg. 2 (5). Indeed, the question really depends on the true construction of two words in para. (5), viz., “finally determined”.

This company is one of the coal companies which come under the provisions of the Coal Industry Nationalisation Act, 1946. It was incorporated in 1937 and the coalfield which it operated is situated in the Yorkshire district. It had a very large issued share capital consisting of preference stock and ordinary stock. There have been two successive reductions of capital, one in 1948 when 6s. 8d. was paid off both classes of stock and another in 1951 when 8s. 4d. was similarly paid off.

A The question which arises is as to the period of nine months which is mentioned in reg. 2 (5) in these words:

“No adjustment proposal shall have effect for the purpose of these regulations unless notice thereof under para. (2) is served before the expiry of nine months from the date when the amount of the compensation to be made under the Act in respect of the transfer of the company's transferred interests . . . is finally determined.”

B The earlier part of reg. 2 provides for the making of proposals for adjustment, which means that in certain circumstances the preference stockholders are entitled to a further allowance in respect of their capital over and above what they would normally receive under the winding-up provisions. In point of fact, there has been no application for any adjustment; no preference stockholder has said he wants to formulate an adjustment scheme under the Coal Industry Nationalisation Act, 1946, s. 25, and the liquidators say that they have no reason to suppose that any such scheme is in the least likely ever to be propounded. Section 25 of the Act, the marginal note to which is: “Adjustments as between classes of debenture and shareholders of companies having assets transferred”, provides for the making of regulations for regard being had to the relative expectations of any income yield from the respective interests of the different classes and it is under that section that, if a scheme were formulated, it would take effect.

The liquidators have in hand over £200,000 which, in the absence of any adjustment scheme, would belong to the ordinary stockholders, and they are anxious to distribute that sum as soon as possible. The question is when are the liquidators entitled to assume that the risk of an adjustment proposal being made will no longer concern them even as a possibility.

The two suggestions which are made, one on behalf of the preference stockholders and the other on behalf of the ordinary stockholders, are to this effect. The preference stockholders say that the moment at which for the first time it can be said that the amount of the compensation to be paid under the Act of 1946 in respect of the transfer of the company's transferred interests is finally determined, is the date whereon the review of all determinations of the value of compensation units by the Yorkshire District Valuation Board, which shall have been submitted for review to the referees appointed for that purpose under s. 12 of the Act and the regulations, has been finally completed. On the other hand, it is suggested that the appropriate date from which the nine months will run is the date whereon the value of those of the company's assets which became vested in the National Coal Board, and which constituted five compensation units, was determined for the purposes of the Act.

I think it is extremely unfortunate that the company should be obliged to withhold from the ordinary stockholders a sum of money which almost certainly will go into their pockets and should be obliged to hold it up for an indefinite time. It seems to me most desirable, if it can be achieved, that that money should be distributed at the earliest possible moment, but as is pointed out by the liquidators, before the company's share of the compensation allocated to the Yorkshire district can be finally known (and it is against that compensation that the company's claim for compensation has to be set), it is necessary to await the outcome of those cases within the district which are being taken before the referees for review (that is under s. 12 (4) of the Act of 1946) for the reason that only after the value of all compensation units within the district has been conclusively ascertained will the amount of any necessary scaling down of such variations in order to adjust them to the total compensation allocated to the district be known. It is said that such cases for review are not expected to be disposed of before March, 1955. The liquidators go on to say that if the nine months' period for the purposes of reg. 2 does not commence to run until all these cases have been disposed of by the referees, it will not expire until the

end of 1955—that is assuming that the estimate of March, 1955, proves to be accurate. A

The liquidators further say that in order to avoid prejudicing any preference stockholder who may be minded to formulate an adjustment scheme and to avoid possibly exposing themselves to a risk of personal liability, they have been advised that they should retain for the duration of the nine months' period a sum sufficient to meet the maximum amount which could possibly be allocated to the preference stockholders under an adjustment scheme plus a sum for costs. They have been further advised that the maximum amount in question would be 2s. 4½d. per £1 of the preference stock as it was on the primary vesting date as defined in the Act, on the ground that the highest price at which the stock had changed hands during the three years before that date was 2s. 4½d. per £1 of stock. They point out that that would involve withholding from distribution a total sum of the order of over £200,000, and if that had to be retained by them throughout 1955 it would be a considerable hardship to the ordinary stockholders in view of the fact that no adjustment scheme has yet been, or seems likely to be, propounded. They therefore seek the directions of the court. B C

I am bound to say that it seems to me that "the amount of the compensation to be made under the Act in respect of the transfer of the company's transferred interests" under reg. 2 must have the same meaning as when those terms are used in s. 10 of the Act of 1946. I do not see how there can be any final determination while these deductions or additions are still possible owing to the action of other companies in the Yorkshire district in referring their schemes to the appropriate tribunal. It seems to me that "finally determined" is not an expression which can be construed as meaning anything short of the ultimate date on which the exact amount which is going to be paid for the company's assets under the Act has been made out to the last penny. After all, the word "finally" is a very strong word and so is the word "determined". D E

Mr. Sykes, counsel for an ordinary stockholder, who put his client's case with great ingenuity and commendable briefness, has referred me to another regulation in which the words "finally determined" also appear. Fortunately, I have not to construe that regulation, which is reg. 9 of the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, but it contains two very extraordinary expressions, one a reference to compensation being "finally or more fully determined" and the other a reference to it being "finally or sufficiently determined". What those terms mean in that regulation I do not pause to inquire, but I do not think it can throw any light on the plain and unqualified words "finally determined" as they appear in reg. 2 (5) which I have to construe. F G

I thought at one time that some difficulty would arise in my determining this point at all, because reg. 23 provides:

"Any period or date specified in these regulations as the period within which, or the date by which, anything is to be done may, notwithstanding that the period has expired or the date has passed, being a period, be extended, or, being a date, be postponed . . ."

by the Minister of Fuel and Power or by any tribunal set up under the Act. Most unfortunately, I think, that regulation only allows the Minister, as far as I can understand it, to extend a period or postpone a date and it does not allow the Minister to limit a period or anticipate a date. Therefore, however meritorious the case for an earlier distribution may be, it seems to me that once I have arrived at the conclusion that reg. 2 (5) means exactly what it says and nothing else, there is nothing in reg. 23 which would enable the Minister to anticipate what seems to me to be a date plainly indicated in reg. 2 (5). I think it is a pity that when the Minister took power to extend a period or postpone a date he did not also take power to limit a period or anticipate a date, but there is nothing in reg. 23 which apparently allows that to be done. The result is that in H I

A my view the words "finally determined" in reg. 2 (5) mean exactly what they say, and that the final determination of the amount must be, and can only be, the day whereon the review of all determinations of the value of compensation units by the valuation board which shall have been submitted for review to the referees shall be finally completed. The unfortunate result of that is, I am afraid, that the liquidators cannot anticipate the date which is apparently laid down in the regulations, with the consequence to the ordinary stockholders that they will have to be kept out of this very large sum of money for a considerable period. The liquidators might in certain circumstances obtain the leave of the court to make a further distribution on evidence that the risk of any adjustment scheme being propounded in relation to this company is non-existent, but I merely mention that as a possibility.

C Order accordingly.

Solicitors: *Linklaters & Paines* (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

D JESS B. WOODCOCK & SON, LTD. v. HOBBS.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), January 18, 19, 20, 1955.]

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—Licence to occupy rent free—Purchaser acquiring property with notice of wife's occupation.

E Before 1940 the defendant and her husband H. resided in premises of which he was tenant, paying the standard rent of £1 per week. He carried on a transport business there. In 1940 H. deserted the defendant who remained in the house, H. continuing to pay the rent. In 1948 H. bought the premises. He permitted the defendant to continue to live in them, paying her £2 per week maintenance. In 1950 the British Transport Commission compulsorily acquired the transport business, including the premises, and in June of that year they wrote to the defendant offering her a tenancy of the premises at 21s. 2d. per week, which represented the standard rent together with a permitted increase. H. replied to that letter stating that the defendant was in occupation as a caretaker and that the rent which he had paid prior to his purchase of the premises represented part of the allowance which he made to her. The commission made no further inquiry. On Apr. 12, 1954, the plaintiff company purchased the whole undertaking from the commission, whose form of tender for the sale stated that the defendant lived there rent free, under an arrangement alleged to have been made in 1943 between H. and herself, on condition that she acted as caretaker in the absence of H. and his staff; the tender further provided that the purchase was subject to the defendant's occupation. The plaintiff company made no further inquiry as to the position of the defendant. On May 17, 1954, the plaintiff company served the defendant with notice to quit. At no time had the defendant paid or offered to pay any rent nor had she ever accepted the offer of a tenancy made to her in June, 1950.

I Held: (i) (by DENNING and BIRKETT, L.JJ.) the plaintiff company was a bona fide purchaser of the premises for value but with notice that the defendant was in occupation and, in the circumstances, with constructive notice of her equity to remain in occupation, and accordingly the plaintiff company's purchase was subject to the defendant's equity to remain in occupation as a deserted wife, but

(ii) (by the COURT) the defendant's equity was a right to continue in occupation for so long only as the court in its discretion thought to be reasonable

and, in the circumstances, she would be ordered to give up possession at the expiration of three months. A

Bendall v. McWhirter ([1952] 1 All E.R. 1307), *Ferris v. Weaven* ([1952] 2 All E.R. 233) and *Street v. Denham* ([1954] 1 All E.R. 532) considered and explained.

Appeal allowed.

[**Editorial Note.** A deserted wife's right to remain in possession is an equity (see per DENNING, L.J., at p. 449, letter B, post). In accordance with general principles of equity, therefore, the right is good against a purchaser for value with notice and, presumably, against a volunteer, but should not be good, it seems, against a purchaser in good faith and for value without notice. Difficult questions may, perhaps, arise regarding the circumstances which will suffice to give to a purchaser for value notice of the wife's right, and indeed in the present case PARKER, L.J., refrained from holding that the purchasers had notice of the wife's rights. Constructive notice normally extends only to facts which would have been discovered if prudent inquiries had been made (see Law of Property Act, 1925, s. 199 (1) (ii); 20 HALSBURY'S STATUTES (2nd Edn.) 822), and does not necessarily extend to all adverse claims (see, e.g., *Smith v. Jones*, [1954] 2 All E.R. 823). It is perhaps doubtful, however, whether the term "an equity" when used to describe such a right as that of the wife in the present case bears the same meaning as did "an equity" when referred to by the old Court of Chancery. The term may be a synonym for a just entitlement rather than a right arising under the system of law known as equity. B

As to a Deserted Wife's Right to Remain in the Matrimonial Home, see 16 HALSBURY'S LAWS (2nd Edn.), 1954 Supp., para. 1211; and for cases on the subject, see 27 DIGEST, 3rd Supp., 621a-621e. C

As to Constructive Notice, see 13 HALSBURY'S LAWS (2nd Edn.) 104, para. 95; and for cases on the subject, see 20 DIGEST 300, 301, 551-553, and 329, 330, 730-748.] D

Cases referred to:

- (1) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp. E
- (2) *Street v. Denham*, [1954] 1 All E.R. 532.
- (3) *Ferris v. Weaven*, [1952] 2 All E.R. 233; 3rd Digest Supp.
- (4) *Savage v. Hubbard*, (June 11, 1953) The Times.
- (5) *Lloyds Bank, Ltd. v. Oliver's Trustee*, [1953] 2 All E.R. 1443; 3rd Digest Supp. F
- (6) *Barclays Bank, Ltd. v. Bird*, [1954] 1 All E.R. 449; [1954] Ch. 274.
- (7) *Hole v. Cusen*, [1953] 1 All E.R. 87; sub nom. *Bradley-Hole v. Cusen*, [1953] 1 Q.B. 300; 3rd Digest Supp. G
- (8) *Hunt v. Luck*, [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 35 Digest 469, 2044.
- (9) *Universal Permanent Building Society v. Cooke*, [1951] 2 All E.R. 893; [1952] Ch. 95; 3rd Digest Supp. H
- (10) *Bull v. Bull*, [1955] 1 All E.R. 253.

Appeal.

The plaintiff company appealed from an order of His Honour JUDGE ANDREWS at Bow County Court, dated Nov. 1, 1954, dismissing a claim for possession of premises known as 132, Princes Road, Buckhurst Hill, Essex. I

H. Vester for the plaintiff company.

M. P. Picard for the defendant.

DENNING, L.J.: Jess B. Woodecock & Son, Ltd. claim possession of a house, 132, Princes Road, Buckhurst Hill. It is occupied by the defendant, Mrs. Hobbs, a married woman, who has been deserted by her husband. The husband, Mr. Hobbs, carried on a transport business in a yard in Buckhurst

A Hill. He lived with his wife in this house No. 132, Princes Road, at the entrance to the yard. For a great many years he was a tenant of the house at a rent of £1 per week, which was the standard rent. In 1940 he left his wife and went to live with another woman. His wife remained in the house and the husband paid the rent. In 1948 the husband bought the house himself and no longer paid rent, but he let the wife remain in the house and paid her £2 a week maintenance.

B After the nationalisation of the road transport industry, the British Transport Commission in March, 1950, acquired from Mr. Hobbs his transport business including this house. They acquired the whole undertaking by compulsory acquisition for the sum of £7,180. On June 8, 1950, they wrote to the defendant, who was still in occupation, asking her if she had any objection to a tenancy being created in her favour at 21s. 2d. a week. The figure of 21s. 2d. represented the standard rent of £1 plus a permitted increase. The defendant did not answer the letter herself but sent it to her husband, because she thought he was responsible for keeping a roof over her head. Mr. Hobbs, through his solicitors, dealt with the letter. They wrote on June 12, 1950:

D “Mr. Hobbs was the original tenant of the premises at the time he purchased, and has separated from his wife, leaving her in occupation and whereas prior to his purchase he paid the rent, he has since that date treated the rent as part of the allowance which he makes to his wife and also as consideration for her acting as caretaker in respect of our client’s business at the adjoining premises, answering inquiries, etc., in the absence of our client or any member of his staff.”

E In subsequent letters Mr. Hobbs, through his solicitors, told the commission that his wife was there, rent free, as caretaker of the business. The reason he said this was, no doubt, that he did not want to pay any rent for the house, and wanted to saddle the commission with a contract whereby the wife would be the caretaker rent free. In fact she was not a caretaker at all; she was simply there as a deserted wife. The commission, however, did not press the matter. The learned F county court judge said that they were extremely supine in the matter. They did, however, write letters from time to time to the defendant. She passed them on to her husband who, she knew, was putting her forward as a caretaker, and he took them up with the commission. In this way three or four years passed with no rent being paid to the commission.

G On the denationalisation of the road haulage industry, the commission sold the whole of this undertaking on Apr. 12, 1954, to the plaintiff company for the sum of £9,500. The sale included the house where the defendant was living. On the form of tender the commission set out the fact that the defendant was in occupation of this house, paying no rent; and they stated the position of the defendant as they knew it. They said:

H “Mrs. Hobbs, the occupier of No. 132 Princes Road, resides therein rent free under an arrangement alleged to have been made in January, 1943, between Alfred Thomas Hobbs and herself, on condition that she acted as caretaker in the absence from the premises of the said Alfred Thomas Hobbs and his staff. The purchaser shall purchase the property subject to Mrs. Hobbs’ occupation thereof and shall raise no objection or requisition as regards such occupancy or the terms thereof.”

I Thus the plaintiff company, when they purchased, were given specific notice that they were to purchase the property subject to the defendant’s occupation and that they could raise no objection in respect thereof. They did not go to the house and make any inquiries of the defendant. They took their chance and bought the undertaking. Shortly after the conveyance was completed the plaintiff company gave notice to quit to the defendant and brought these proceedings in the county court for possession.

In answer to the claim the defendant contended that she was a deserted wife and entitled to remain there. Both she and Mr. Hobbs went into the witness-box at the county court and said that she was not a caretaker at all and never had been a caretaker; she was a deserted wife. The learned judge accepted the view that the defendant was an innocent wife who had been deserted by her husband. The story of her being a caretaker was put forward by the husband so that he might avoid having to pay any rent for this house where his wife was then living. Such being the facts, the learned judge held that on the authorities a deserted wife has a right to remain in the house, which is valid against everyone except a bona fide purchaser for value without notice. He held that these purchasers, both the commission and the plaintiff company, were purchasers for value, but he said that they were put on inquiry. The circumstances were so suspicious, especially the alleged caretaking, that they must be taken to have had notice of the position of the defendant. If they had gone to the house and made inquiries, they would have found out the true facts, namely, that she was a deserted wife. He held, therefore, that they could not recover possession in this action, but he intimated that in different proceedings there might well be a question whether the court in its discretion ought not to order her to leave.

Many cases have come before the courts lately where a husband owns the matrimonial home and then deserts his wife, leaving her there with the children. In such a case the husband cannot turn his wife and children out into the street simply because he is the legal owner of the house. He can only recover possession if the court thinks fit to order her to go. If he becomes bankrupt and the house becomes vested in his trustee in bankruptcy, the trustee cannot get possession unless the court in its discretion orders her out (*Bendall v. McWhirter* (1)). So much is well settled. But the question is: what is to happen if the husband sells the house over her head or conveys it to some one else? Can the purchaser or the assignee turn her out? The judges of the Queen's Bench Division have had to consider the question and they have held that, if the purchaser or assignee bought with full knowledge of all the facts, he stands in no better position than the husband. A striking case was where the husband went to live with another woman and conveyed the house to her, and then this woman sought to turn out the wife. The husband no doubt said to his mistress: "I know that I cannot turn my wife out, so I will convey the house to you. It will then be yours and you can turn her out". The court refused to tolerate such a cynical disregard of the married state. The mistress was not allowed to turn out the wife (see *Street v. Denham* (2), a decision of LYNKLEY, J.). Other cases have occurred where the husband has sold the house to a relative or friend at a very low price and the purchaser has sought to turn out the wife. The husband in these cases no doubt said to the purchaser: "I cannot turn her out, but if I sell to you, you can. Once you have got her out, you can sell the house with vacant possession. I will rely on you to give me some of the proceeds". In those cases, too, the courts refused to allow the purchaser to turn out the wife (see *Ferris v. Weaven* (3), a decision of JONES, J.; *Savage v. Hubbard* (4), a decision of HALLETT, J.).

Counsel for the plaintiff company said that those three cases were to be explained as cases of collusion; but they were not put on that ground and I do not think it is the correct explanation. The conveyances were real enough. They were not shams. They were intended, it is true, as a means of getting round the law; but that is not in itself a ground for denying their validity. I may instance the transaction by which hire-purchase finance companies do business. All those transactions are a means of getting round the law concerning bills of sale; but so long as there is a real purchase by the finance company and a real hiring back, the transactions are good. The true explanation of the three cases is, I think, the ground taken by the judges, namely, that the mistress and the purchasers respectively took with full knowledge of the facts. They were, therefore, in no better position than the husband and took subject to the wife's

A right to stay in the house. The husband, it is true, had an ulterior motive. He wanted the wife turned out of the house, but that does not affect the legal position. It would be the same if the husband had given the house to his mistress or to his brother-in-law by a deed of gift. If they took with full knowledge of the facts, they ought not to be able to turn out the wife any more than the husband could. This means, no doubt, that the wife's right is an equity. It does not arise on marriage but only on the actual desertion. It does not, therefore, prevail against a prior mortgagee, whether legal or equitable (see *Lloyds Bank, Ltd. v. Oliver's Trustee* (5) and *Barclays Bank, Ltd. v. Bird* (6)) but it does prevail against a subsequent purchaser with knowledge or, I would add, with notice of the facts. Counsel for the plaintiff company referred us to what JENKINS, L.J., said in *Hole v. Cuzen* (7), but those observations were by the way and the three cases* were not cited to the court. I am quite sure that the learned lord justice could not mean on this occasion to override them. I think, therefore, that we should approach this case on the footing that those cases were rightly decided. I would not myself wish to cast any doubt on them, especially as they are so much in accord with justice and good sense.

D The distinction between those cases and the present one is that here the purchasers did not have knowledge of the facts. The commission did not know that the defendant was a deserted wife: nor did the plaintiff company. They were told that she was a caretaker for her husband. Nevertheless I think they had notice of her true position. The commission were, as the judge said, "extremely supine". The story of her being a caretaker was hardly credible when there was no caretaking to be done, and they made no inquiries of the wife herself. The plaintiff company are in no better position. They took subject to the occupancy of the defendant and nevertheless they made no inquiries of her as to her position. They took their chance. In addition there are the cases to which counsel for the defendant referred us, which show that occupation is notice of the occupier's rights (see *Hunt v. Luck* (8), *Universal Permanent Building Society v. Cooke* (9)). In these circumstances I think we should approach the case on the footing that the purchasers took with notice.

F Thus far I find myself in full agreement with the county court judge, but there remains the question of discretion. The deserted wife has no right to stay indefinitely in the house. Her right is only to stay until such time as the court in its discretion orders her to leave. That is the only right she has against her husband, and it is the only right she has against his successors. The court always has a discretion in the matter. This brings me to the only point where I differ from the learned county court judge. He thought that the discretion could not be exercised in an action for possession but only in a separate application made expressly for the purpose. I think that it can be exercised in these proceedings. When the purchaser, as here, brings an action for possession and the wife sets up a claim to stay as a deserted wife, the court can, if it thinks fit, make an order for her to go. The exercise of this discretion is no doubt an anxious task, but a similar discretion is exercised in the case of statutory tenants under the Rent Acts, and in applications under the Bankruptcy Act, 1914 (*Bendall v. McWhirter* (1)), and under the Law of Property Act, 1925 (*Bull v. Bull* (10)). In the case where a husband conveys the house to his mistress or to a friend at a low price simply to defeat the wife's right, the court would no doubt refuse to order the wife to go. It would not lend its aid to such a proceeding. In the case, however, where the husband sells the house to a purchaser who buys in good faith at a fair value, not knowing the wife's right (but subject to it only because he is taken by law to have notice of it) the court would, I think, be disposed to order her to go, but it would do what it could to lessen the hardship on her.

In the present case I think we should order the defendant to go. The purchasers

* I.e., *Street v. Denham* (2); *Ferris v. Weaven* (3) and *Savage v. Hubbard* (4).

bought in good faith at a fair value and they did not know she was a deserted wife. They were told she was a caretaker. She had been many years in the house paying no rent. When she was offered a tenancy at 21s. 2d. a week, she did not accept it. If she had only accepted it, she could have been a statutory tenant with a status of irremovability, but she did not accept it. She has not at any time offered to pay any rent. She sought in these proceedings to set up the Limitation Act, 1939, and to claim a squatter's title. True it is that she left everything to her husband. She thought it was his duty to provide a roof over her head. It was he who set up the story of a caretaker so as to save himself paying rent. Innocent as she is, however, she cannot be left there much longer without paying rent. I think that we should make an order for her to give up possession in three months. That will give her time to apply to the courts for further maintenance from her husband to make up for the loss of her home.

I ought to say that counsel for the plaintiff company argued that they were entitled at law to possession on the ground that the wife had no equity, or alternatively that the plaintiff company had no notice of it. If we had held in his favour on either of those points, the order would have been for possession in four weeks. But when we told him that we were in his favour on the question of discretion, he did not seek further to argue those points, and we told him that he could argue them again on another occasion if he so wished.

In the result, therefore, differing from the county court judge (who gave a very careful judgment) only on this question of discretion, I think that this appeal should be allowed and an order made for possession in three months.

BIRKETT, L.J.: I am of the same opinion. The difference between the judgment of this court and that of the court below is really on a point of procedure rather than a substantive point. When the case was framed in the court below the line on which the contest was to be fought was quite plain from the pleadings. Counsel for the plaintiff company who conducted the case here with great ability and erudition in this complicated field of rent restriction legislation, when he presented the case in the particulars of claim, asserted in the first paragraph that the defendant was remaining in the premises

"in consideration of the defendant acting as caretaker of a transport undertaking owned by the said Hobbs."

In para. 1 of the defence it was quite clear that what was being asserted was that the doctrine of *Bendall v. McWhirter* (1) in the Court of Appeal was the all-sufficient answer. That was the leading matter of contest. The learned judge, after listening carefully to the evidence on this matter, came to the conclusion, which I think is right, that the position of the wife in this present case was that of a deserted wife. That was the position asserted in para. 1 of the defence.

When the learned judge came to deal with this matter, having resolved the question of fact by finding that the defendant was residing at No. 132, Princes Road as a deserted wife and not as a caretaker, he said:

"In the circumstances I am of opinion that the principles laid down in *Bendall v. McWhirter* (1) apply, and that I cannot in this action give possession against the defendant."

He was saying that his conclusion was, on these facts and applying the law as he understood it, that the case of the defendant does not differ from the decision enunciated in *Bendall v. McWhirter* (1). He added that therefore in this action she was secure and he could do nothing about it. Then to show that this was a considered view, he said further:

"It seems to me that the defendant or her husband would be well advised to take immediate steps about paying the plaintiffs for the use of their home; otherwise the defendant may find herself ejected on grounds which are not relied on in the present action. DENNING, L.J., speaks about the discretion of the court whether to order possession or not [*Bendall v. McWhirter* (1)]

- A ([1952] 1 All E.R. at p. 1310], and in my opinion in properly framed proceedings such discretion may be of the greatest importance.”

He is saying that he cannot consider that matter of discretion in these proceedings. That is what I call the point of procedure on which we are differing from the learned judge.

- B The passages that he had in mind in *Bendall v. McWhirter* (1) are where DENNING, L.J., says ([1952] 1 All E.R. at p. 1310):

“What is the nature of this right of the deserted wife which the courts have thus evolved? [He goes on to discuss the nature of that right and says:] This authority, like the old one [that is, the right to pledge a husband's credit under the common law] is based on an irrebuttable presumption of law. The husband cannot revoke it except by order of the court under s. 17 of the Act of 1882 . . . The authority which is thus conferred on [the wife] is an authority to stay in the [husband's] house until the court orders her to go out.”

- C What the learned county court judge was really saying was: I approve the application of that doctrine to the facts of this case, but I cannot consider here the further question whether I ought in these proceedings to order the defendant to leave. I agree with what my Lord has said, that it is open to this court to deal with, and it does in fact deal with, this matter of discretion today. I do not suppose that all the facts of this case will ever be fully ascertained, but I think that sufficient of the facts are known for this court to exercise its discretion. It is perfectly plain that the deserted wife cannot claim to have a perennial tenancy whereby she can stay there and never be removed in any circumstances.

- E For the reasons given by my Lord, I think there is proper ground here to exercise discretion. Further, I think that a period of three months should be allowed, for the reasons my Lord has indicated.

PARKER, L.J.: I agree with the proposed order. I would only add this.

- F At one time it looked as if we should have to decide, there being no decision of this court as yet on the matter, whether the protection afforded to a deserted wife in *Bendall v. McWhirter* (1) could be extended to a case where the property in which the wife continued to reside had been purchased by a purchaser for value with constructive notice of the wife's possession. Speaking for myself, I should on that matter have required considerable further argument, since, as at present advised, I see great difficulty in extending the wife's protection so as to give her any rights against a bona fide purchaser, whether with or without notice. I do not, however, in any way suggest that *Street v. Denham* (2) and *Ferris v. Weaven* (3), to which my Lord has referred, were wrongly decided, since they could in any event be justified on their special facts. In both those cases the purchases were not made by purchasers treating at arm's length, but they were purchases made at the instigation of the husband so as to enable him to have a benefit therefrom; in other words, the transaction in each case was a device to get the wife out for the husband's benefit.

- H However, counsel for the plaintiff company has very fairly taken up the attitude that, provided the court can, as a matter of discretion, give his clients possession, albeit not immediate possession, he is content. As to that, it seems to me that, even assuming the true view to be that the protection afforded to the wife extends to a case where the purchaser has constructive notice of the wife's position, nevertheless a wide discretion must reside in the court to order her to go. This case, as it seems to me, is a proper case in which such discretion should be exercised.

Appeal allowed.

Solicitors: *Ernest W. Long & Co.* (for the plaintiff company); *Van Sommer, Chillcott, Kitcat & Clark*, agents for *Trotter, Chapman & Whisker*, Epping (for the defendant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

THE EMPIRE JAMAICA.

A

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), January 27, 1955.]

Shipping—Limitation of liability—“Actual fault or privity of shipowner”—Insufficient complement of certificated officers—Breach of merchant shipping ordinance—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503.

B

The plaintiffs were the owners of a ship which on Sept. 1, 1951, collided with another vessel. The officer of the watch at the time of the collision was one S. S. was not a certificated officer and had been signed on as “chief boatswain” but was treated as, and performed the duties of, second officer.

By the relevant legislation the plaintiffs’ ship was required to be provided with “at least the first and second mates duly certificated”. The plaintiffs admitted liability for the collision, and now sought a declaration limiting their liability. The competency of S. to perform his duties was not disputed.

C

Held: although the ship had put to sea with the privity of the plaintiffs in breach of the requirement to carry two certificated mates, there was no causal connection between the fact that S. did not possess a certificate and the fact that his negligent navigation caused the collision; on the facts, the plaintiffs had provided the ship with a competent officer, were not guilty of any fault or privity in relation to the collision and were entitled to the declaration sought.

D

[As to Actions to Limit Liability, see 1 HALSBURY’S LAWS (3rd Edn.) 63, para. 126.]

E

For the Merchant Shipping Act, 1894, s. 92 (1), s. 503, see 23 HALSBURY’S STATUTES (2nd Edn.) 454, 656.]

Action.

Western Steamship Co., Ltd. brought an action claiming a declaration that they were not answerable in damages in respect of loss of or damage to vessels goods merchandise property or other things beyond the aggregate amount of £8 per ton for each ton of the tonnage of the Empire Jamaica.

F

The plaintiffs were the owners of the steamship formerly known as the Empire Jamaica (on Mar. 17, 1952, it was re-named Westway). On Sept. 1, 1951, the ship came into collision with the Dutch motorship Garoet. On Oct. 8, 1951, the owners of the Garoet began an action against the plaintiffs for damages arising out of the collision. On Dec. 5, 1952, the plaintiffs admitted liability for the collision. The plaintiffs now sought, in an action against the owners of the Garoet and all persons claiming to have sustained damage by reason of the collision, a declaration that their liability in damages for loss or damage to vessels or property should be limited to £8 per ton for each ton of the tonnage of the Empire Jamaica, on the ground that the collision occurred without their actual fault or privity (see s. 503 of the Merchant Shipping Act, 1894). By their defence the defendants pleaded that the plaintiffs caused or permitted the Empire Jamaica to be negligently navigated in an unseaworthy condition, alleging, among other allegations, that the plaintiffs did not provide a sufficient complement of certificated officers as required by the Merchant Shipping Ordinance, 1899 (No. 10 of 1899) (Hong Kong) as amended, and that the plaintiffs were privy thereto.

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H

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K. S. Carpmael, Q.C., and J. B. Hewson for the plaintiffs.

R. F. Hayward, Q.C., and D. H. Hene for the defendants.

WILLMER, J.: The plaintiffs’ vessel, which is a fairly large vessel, being of some 3,538 tons gross, carried a certificated master, a certificated chief officer, and two other officers who were not certificated. The collision happened during the watch of one of the uncertificated officers, a Mr. Sinon, who was signed on

A under the title of "chief boatswain", but, although not so called, was regarded and treated as acting second officer. There was also an uncertificated third officer who had been signed on. Section 4 (2) of the Merchant Shipping Ordinance, 1899 (No. 10 of 1899) as amended by the Merchant Shipping (Amendment) (No. 2) Ordinance, 1949, of Hong Kong, which is similar to the Merchant Shipping Act, 1894, s. 92 (1)*, provides:

B "Every British ship . . . shall, when leaving any port of the colony, be provided with officers who possess certificates of competency of a grade appropriate to their stations in the ship or of a higher grade, according to the following scale: (a) in any case, with a duly certificated master; (b) if the ship is of one hundred tons or upwards, with at least one officer besides the master holding a certificate not lower than that of only mate, or of second
C mate in the case of a sailing ship of not more than two hundred tons . . . ; (c) if the ship carries more than one mate, with at least the first and second mates duly certificated."

The plaintiffs' ship carried three de facto mates. I say "de facto" because, although Mr. Sinon is not called mate, I am satisfied that three men were carried to perform the duties of mates, and were in fact employed and paid as such. In those circumstances, it is clear that s. 4 (2) (c) was violated.

D I have had evidence not only from the master of the ship, who came here to give oral evidence, but also evidence in the form of affidavits from Mr. Leung Yew, the managing director of the plaintiffs, from Mr. Sinon, who was the officer concerned, and from Mr. James Jolly, who was the Director of Marine at Hong Kong, and as such the official charged with responsibility for supervising the opening of articles. The evidence contained in the affidavits makes it clear that
E at the material time, in that part of the world at any rate, there was a shortage of certificated officers; indeed, special provision was made in the local legislation whereby, subject to certain safeguards, a particular ship could be exempted by order of the governor from the requirement to carry a particular number of officers. Since the casualty occurred the plaintiffs' ship has in fact been
F exempted, by order of the governor, from the obligation to carry a second certificated officer. It is equally clear, however, that at the time of the casualty this ship had not been so exempted. Mr. Jolly in his affidavit says that he was under the impression (which as we now know was erroneous) that the ship had already been so exempted at the time of this casualty. It was because of that
G impression that he assented to the articles being opened in their present form, providing for the engagement of a non-certificated second officer, and he raised no objection to the clearance of the ship.

The affidavit of Mr. Leung Yew makes it clear that he, as managing director, was perfectly well aware of the facts relating to Mr. Sinon. It is conceded by counsel for the plaintiffs that the position in the company of Mr. Leung Yew is such that he is to be regarded as the alter ego of the company, so that his
H privity, if he were privy, would be sufficient to defeat the right of the company to limit their liability. In those circumstances, I entertain no doubt that this ship put to sea in breach of the requirements of the Hong Kong Merchant Shipping Ordinance, and the conclusion seems to me to be inescapable that she did so with the privity of Mr. Leung Yew, and, therefore, with the privity of the plaintiffs.

I If that had been the only question which I had to decide, the case would, I think, be easy to determine. It may well be that for this breach of the specific requirement of the Hong Kong ordinance, the master, and I suppose the plaintiffs, could be subjected to criminal proceedings. I am not concerned, however, with the penal consequences of this breach of the relevant government legislation. What I am concerned with is the question whether the plaintiffs have satisfied me that the collision and consequent damage happened without their fault or

* The sub-section was amended by the Merchant Shipping Act, 1906, s. 56.

privity. This involves the question whether they have satisfied me that this A
breach on their part of the Hong Kong ordinance had no causal connection with
the collision. That it was *a* cause, in the sense of it being a *causa sine qua non*,
there can be no doubt, because we know that Mr. Sinon was in fact the officer
of the watch at the time when the collision happened, and the officer in respect
of whose negligent navigation the plaintiffs have already admitted their liability. B
But that, to my mind, does not conclude the matter. The plaintiffs have given
evidence, both in the affidavit of their managing director and in the oral evidence
of the master, that Mr. Sinon, although uncertificated, was a perfectly competent
man, with a sound knowledge of navigation, with a long experience at sea, and
a considerable experience of watch-keeping as an officer. That evidence has not
been contradicted; indeed, on the pleadings, no issue is raised as to the com- C
petence of Mr. Sinon. The only matter relied on by the defendants is the fact
that Mr. Sinon had not a certificate. He is, however, still serving in the same
ship, and in the same capacity. He has in fact been serving with the plaintiffs
for many years. This ship, with Mr. Sinon still serving in the same capacity,
has now been exempted by order of the governor from complying with the strict
requirements of the ordinance. From that I infer that Mr. Sinon must have
satisfied the Director of Marine that he was sufficiently competent to perform D
his duties notwithstanding the fact that he holds no certificate.

In those circumstances, it is argued by counsel that the mere fact of the
officer of the watch not possessing a certificate does not by any means necessarily
involve that that was a cause of the collision. I think that counsel might have
pressed his argument further, because, even if the ordinance is strictly complied
with, there can never be any guarantee that the officer in charge on the bridge E
at any given time will be a certificated officer. Neither the Hong Kong ordinance
nor our own Merchant Shipping Act lays it down that a certificated officer must
always have charge of the bridge. On the contrary, many of the smaller ships
plying in the coastal trade, as is well known, carry no certificated persons at all
and are not required to do so. There have been many cases that have come to F
my knowledge in proceedings in this court where not even the master has been the
possessor of any certificate. Clearly, therefore, although the possession of a
certificate is cogent evidence of the competence of an officer, it is not the beginning
and end of the matter, or by any means the only evidence of an officer's com-
petence. In the present case, the evidence as to the competence of Mr. Sinon
is all one way. Having regard to that evidence, it appears to me to be impossible G
to say that there was any causal connection between the fact of his not having
a certificate and the fact of his negligent navigation which led to this collision.
I might remark in passing, as was pointed out by counsel for the plaintiffs, that
the possession of a certificate by no means prevents the happening of collisions.
In the circumstances, it seems to me that, on the facts of the present case, the
plaintiffs have satisfied me that, having supplied the ship with an officer whose H
competence (apart from his having no certificate) is not otherwise challenged,
they cannot be held to be guilty of fault or privity in relation to this collision,
notwithstanding the fact that the particular officer who was on duty on the bridge
at the time of the collision, and whose negligence brought it about, was not the
possessor of a certificate.

I only desire to add this, in deference to the arguments of counsel. I have had I
cited to me a number of authorities, but I do not think that any of them takes
the case any further. So far as I know, this is the first case in which the question
has been directly raised, whether the non-provision of the requisite number
of certificated officers is of itself enough to render an owner guilty of fault or
privity in relation to a casualty subsequently occurring. It seems to me, at any
rate in the absence of any authority directly in point, that that is necessarily a
question of fact in each case. For the reasons that I have given, on the facts of

A the present case I decide that question in favour of the plaintiffs. In my judgment they are entitled to the declaration sought.

Declaration accordingly.

Solicitors: *Hill, Dickinson & Co.* (for the plaintiffs); *Waltons & Co.* (for the defendants).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

B

C

D

Re LONGMAN (*deceased*). WESTMINSTER BANK, LTD. v.
HATTON AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), February 4, 1955.]

E

Will—Forfeiture clause—Gift over on any act whereby income would become vested in another person—Authority to pay dividend from trust shares to creditors—No dividend declared.

F

By her will dated Oct. 11, 1949, a testatrix who died on Oct. 12, 1949, directed her trustee to hold her residuary estate on trust to pay the income arising therefrom to her son until he attained a certain age and further directed that if her said son “shall commit permit or suffer any act default or process whereby the said income or any part thereof or the capital of my residuary estate or any part thereof would or might but for this present proviso become vested in or payable to any other person or persons then the whole of such income as aforesaid shall immediately thereupon absolutely cease and determine as if my said son were dead . . .” In May, 1953, the son gave a written authority directed to the trustee to pay to creditors of the son “for the satisfaction of a debt due to them the dividend due to me in July next from” W., Ltd. W., Ltd. passed its dividend in 1953 so that no dividend was payable by the company in 1953. On the question whether the forfeiture clause took effect,

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Held: the condition on which the forfeiture clause was to operate, viz., that there should be an act of the son “whereby the . . . income or any part thereof . . . would or might” but for the proviso “become vested in or payable to any other person”, had not been satisfied because, there having been no dividend of W., Ltd. in 1953, the authority given by the son was nugatory and, moreover, no such income had accrued to the testatrix’s estate as could be affected by the authority; accordingly, the son had not forfeited his interest in the income of the testatrix’s residuary estate.

I

[As to Forfeiture on Alienation, see 34 HALSBURY’S LAWS (2nd Edn.) 421-423, paras. 468, 469; and for cases on the subject, see 44 DIGEST 1232, 10,653-10,657.]

Cases referred to:

- (1) *Re Baker*, [1904] 1 Ch. 157; 73 L.J.Ch. 172; 89 L.T. 742; 44 Digest 1232, 10,656.
- (2) *Re Mair*, [1909] 2 Ch. 280; 78 L.J.Ch. 711; 101 L.T. 70; 44 Digest 1232, 10,657.
- (3) *Re Forder*, [1927] 2 Ch. 291; 96 L.J.Ch. 314; 137 L.T. 538; Digest Supp.

Adjourned Summons.

The plaintiff as trustee of the will of the testatrix applied to the court by originating summons to have determined whether on the true construction of the will of the testatrix Evelyn Mary Longman and in the events which happened the first defendant, John Christopher Hatton (in the will called John Edward Hatton Longman), the son of the testatrix, had incurred a forfeiture of his interest in the income of the estate under the trusts thereof.

H. Hillaby for the plaintiff, the trustee of the will.

M. J. Fox for the second defendant, the infant grandson of the testatrix.

The first defendant did not appear.

DANCKWERTS, J.: This case depends on a forfeiture clause contained in the will dated Oct. 11, 1949, of Mrs. Evelyn Mary Longman, a widow, who died on Oct. 12, 1949. She disposed of her residuary estate on the usual trusts for sale, directing her residuary estate to be held on the following trusts, viz.:

"(a) Upon trust to pay the income arising therefrom to my son John Edward Hatton Longman until he attains the age of fifty-five years Provided always and I hereby direct that if my said son shall commit permit or suffer any act default or process whereby the said income or any part thereof or the capital of my residuary estate or any part thereof would or might but for this present proviso become vested in or payable to any other person or persons then the whole of such income as aforesaid shall immediately thereupon absolutely cease and determine as if my said son were dead and both capital and income of my residuary estate shall be held by the bank upon trust for my said grandson On my said son attaining the age of fifty-five years then subject as aforesaid (b) Upon trust as to both capital and income of my residuary estate for my said son absolutely."

The trouble arises in this way. The son has suffered financial difficulties, and in 1953 he executed a series of authorities by which he attempted to direct payment to his creditors of either the whole or certain sums out of the dividend which he expected to be paid in July, 1953, by a company called W. E. and J. Pebody, Ltd., in which the estate held 4,893 shares. It is sufficient for me to refer to an authority dated May 20, 1953, directed to the plaintiff as trustee whereby the son says:

"I hereby authorise and request you to pay to Messrs. Lithgow, Pepper & Eldridge, solicitors, of 84, Wimpole Street, London, on behalf of Kenjean Properties, Ltd. for the satisfaction of a debt due to them the dividend due to me in July next from W. E. and J. Pebody, Ltd."

The other three authorities were in similar terms in the case of other creditors except that they refer to the payment of a sum out of the dividend due to him in July next in W. E. and J. Pebody, Ltd.

The first mentioned authority has in fact been withdrawn. I do not think that that makes any difference to the decision which I have to reach in this case. A much more important matter was that both in 1953 and in 1954 the company in question passed its dividend and consequently there was no dividend in fact which became payable by the company in July, 1953, or at any time in 1953 and 1954. Consequently, it seems to me that the authorities given by the son were completely nugatory and there was nothing on which they could in fact operate, and they never did operate on anything whatever. Therefore, in the events which happened, the words of the forfeiture clause were not operative.

Any decision in a case of this kind must depend on the precise terms of the clause which is involved and also on the events which have happened. Counsel for the grandson referred me to three cases: *Re Baker* (1), *Re Mair* (2), and *Re Forder* (3). But, in my opinion, none of those three cases touches the point on which the present case turns. The important words in the will are

"shall commit permit or suffer any act default or process whereby the

A said income or any part thereof or the capital of my residuary estate or any part thereof would or might but for this present proviso become vested in or payable to any other person or persons."

B In the events which happened, the dividend payable in July, 1953, or indeed in any other part of 1953, was never paid, and, therefore, it never did form any part of the income of the residuary estate. Consequently, it seems to me there was no act by the son which in any way directed any payment of income of the estate to anybody else. It seems to me that the word "might" carries the matter no further. In my view, therefore, though one may consider the son to be very lucky, in the events which have happened, he has not forfeited his interest in the income of the estate.

C *Declaration accordingly.*

Solicitors: *Peacock & Goddard*, agents for *Buchanan & Llewellyn*, Bournemouth (for the plaintiff); *Official Solicitor* (for the second defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

D

E

ALVION STEAMSHIP CORPORATION OF PANAMA v. GALBAN LOBO TRADING COMPANY S.A. OF HAVANA.

F [COURT OF APPEAL (Lord Goddard, C.J., Singleton and Romer, L.J.J.), February 2, 3, 1955.]

Shipping—Charterparty—Construction—"Weather working days".

G A charterparty provided: "Lay days for loading to begin at the next working period according to the custom of the port after captain reports ship ready to receive cargo . . ." "Lay days at the average rate of [specified numbers of bags at ports indicated] provided vessel can receive at those rates per weather working day . . ." "If longer detained, demurrage to be paid at the rate of \$1,000 per day, or in proportion for any part of a day . . . Such time lost or saved is to be calculated separately for each loading port and in accordance with the custom of the port." On an arbitration on a claim H for demurrage, the umpire found that the normal working periods at the two ports called at were eight hours per day and four hours on Saturday, and, in calculating the time lost when the ship was on demurrage, he took eight hours as a working day and deducted from this time for each day the time when work was suspended owing to the weather.

I **Held:** this was the correct method of computation since the period of time described as a "working day" was the number of hours customarily worked on the day in the port and not a day of twenty-four hours (dictum of LORD ESHER, M.R., in *Nielsen v. Wait* (1885) (16 Q.B.D. at p. 72) followed); and the expression "weather working day" meant a period of time so computed from which, however, the number of hours during which work was suspended owing to the weather was deducted (*Branckelov S.S. Co. v. Lamport & Holt* ([1897] 1 Q.B. 570), approved as regards the meaning of weather working day but disapproved as regards method of computation).

Decision of McNAIR, J. ([1954] 3 All E.R. 324) affirmed.

[As to the meaning of Working Days, see 30 HALSBURY'S LAWS (2nd Edn.) A 342, 343, para. 523, text and note (t); and for cases on the subject, see 41 DIGEST 572, 3965 et seq.]

Cases referred to:

- (1) *Branchelow S.S. Co. v. Lamport & Holt*, [1897] 1 Q.B. 570; 66 L.J.Q.B. 382; 2 Com. Cas. 89; 41 Digest 573, 3975.
- (2) *Nielsen v. Wait*, (1885), 16 Q.B.D. 67; 54 L.T. 344; sub nom. *Neilson & Co. v. Wait & Co.*, 55 L.J.Q.B. 87; 41 Digest 527, 3555. B
- (3) *Orpheus Steam Shipping Co. v. Bovill & Sons*, (1916), 114 L.T. 750; 41 Digest 573, 3969.
- (4) *Saxon S.S. Co. v. Union S.S. Co.*, (1900), 69 L.J.Q.B. 907; 83 L.T. 106; 41 Digest 574, 3980. C

Appeal.

This was an appeal by the shipowners, the claimants, from an order of McNAIR, J., dated Oct. 20, 1954, and reported [1954] 3 All E.R. 324, upholding an award by an arbitrator that, on the facts found and on the true construction of a charterparty and the weight of the evidence, the respondents were correct in applying the principle of a day of eight hours and four hours on a Saturday to their computation of lay time. The shipowners contended that the words "weather working days" used in the charterparty meant days of twenty-four hours. D

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the shipowners.

A. A. Mocatta, Q.C., and *P. T. Bucknill* for the charterers.

LORD GODDARD, C.J.: This is an appeal from a judgment of McNAIR, J., who upheld the award of an umpire in an arbitration which took place on the amount of demurrage to be paid by the charterers on a charterparty in respect of a ship called the *Rubystone*, which was engaged in the carriage of sugar from the island of Cuba to the port of Piraeus, the charterparty being on a printed form, prepared for this particular trade, and no doubt well understood in the trade. The point at issue is mainly one of construction. The umpire was a layman, not a lawyer, and the Special Case is perhaps not stated quite as it would have been if a member of the Bar had been appointed the umpire. I think McNAIR, J., was right in his view that the umpire meant to submit only one point to the court, i.e., what is the meaning of the expression in the charterparty "weather working days"? E

In opening this case, no doubt in an endeavour to show us the importance of the point and how it arose, counsel for the shipowners gave us a great many mathematical calculations into which I do not find it necessary to go, because once this point of principle is decided the parties themselves can easily work out the demurrage payable. The amount involved is trivial, a few pounds, but the question is important because the shipowners and charterers are both engaged in this trade, and say there is no decision directly on the meaning of the words referred to, and hope to get a decision on them. We were also asked during the argument to express an opinion on the judgment of LORD RUSSELL OF KILLOWEN, C.J., in *Branchelow S.S. Co. v. Lamport & Holt* (1) on a matter germane to this case (although it does not, in our view, decide it). F

The charterparty was for the loading of a cargo of sugar in one or two ports in Cuba, either on the north or south side, and it provided, *inter alia*: G

"Lay days for loading to begin at the next working period according to the custom of the port after captain reports ship ready to receive cargo. Sundays and holidays excepted. If ship arrives between 5 p.m. and 7 a.m., time not to count till 7 a.m., or as customary at loading port." H

Then comes the particular clause on which this case turns: I

"Lay days at the average rate of 5,000 bags (of 330 pounds) at ports on the

A north side and Cienfuegos; 4,500 bags (of 330 pounds) at other ports provided vessel can receive at those rates per weather working day, Sundays and holidays and Saturday afternoons excepted, shall be allowed to the said charterers (if steamer is not sooner loaded) for loading and waiting for orders."

B That shows how the lay days are to be calculated. It is also provided that stevedores for loading and discharging, recommended by the charterers or their agents, are to be employed at rates not exceeding current rates at the ship's risk and expense.

The only other clause that I need read is:

C "If longer detained, demurrage to be paid at the rate of \$1,000 per day, or in proportion for any part of a day. Ship to pay \$500 per day, or in proportion, dispatch money for all time saved in loading and discharging. Such time lost or saved is to be calculated separately for each loading port and in accordance with the custom of the port."

These clauses, except the clause with regard to the lay days, all refer to the custom of the port, and I have read them because they seem to me to point to the fact that, in construing this charterparty, one must have regard, in making the calculations, to the custom of the port.

The umpire arrived at the number of bags to be loaded by reference to a rate of 16,500, and no one disputes that method of calculation. The umpire also found that, at all material times, in conformity with the established custom of the port at Cardenas and Havana, which were the two ports at which the ship loaded, the normal working periods were as follows: 7 a.m. to 11 a.m., and 1 p.m. to 5 p.m.; that equals eight hours; on Saturdays 7 a.m. to 11 a.m.; that equals four hours. The umpire then set out the holidays which occurred, during the time and which would have to be excluded, and the time when the vessel was preparing her holds for the reception of cargo. In calculating the time lost when the ship was on demurrage, he has taken eight hours as a working day, and then, having deducted from the eight hours the time that the men were stopped for rain, he has found the actual time by which this ship exceeded the lay days provided in the charterparty.

The whole question depends on the construction of the words "per weather working day". McNAIR, J., has taken the same view as the umpire and has held that "working day" means a working day according to the hours customarily worked in the port. Counsel for the shipowners says that that is not right, and that a working day is a day of twenty-four hours, and, accordingly, that the men could have worked a good deal longer than they did, and therefore he is entitled to a larger sum of demurrage than has been awarded.

The first thing to ask in the construction of this clause in the charterparty is: what is meant by "working day"? The word "day" is one thing; a day is a day of twenty-four hours. It may be qualified, however, by the word "working", and if a workman or an employer were asked—"What is your working day? How many hours is your working day?"—he would not say "Twenty-four hours". That is not the working day; one is asleep for a good part of the twenty-four hours. To say a working day is a period of twenty-four hours seems to me to ignore entirely the fact that the word "working" qualifies the word "day" and cuts it down, and, in my opinion, the expression "working day" means the part of a day during which work is carried on. Therefore, to find the working day, one must find what are the customary or ordinary hours worked either at a particular place or in a particular trade.

Authority for this proposition, which seems to me self-evident, is found in *Nielsen v. Wait* (2), decided in 1885. LORD ESHER, M.R., dealing with the words "working days" and "running days", said (16 Q.B.D. at p. 72):

" 'Working days' are distinguished from 'days'. But I suppose and

take it, that there might be another dispute as to what 'days' would mean. If 'days' are put in, there is sure to come some discussion about what is the length of the day during which the charterer is obliged to be ready to take delivery or the shipowner to deliver, because the length of days may vary according to the custom of the port."

If the length of days may vary according to the custom of the port, I take it that so may the length of working days. The working day may be eight hours in one port or ten hours or twelve hours in another in some other part of the world. In this case the umpire has found that eight hours is the working day.

Does the use of the word "weather" before those words "working day" alter the construction which one would otherwise put on "working day"? I think it does to this extent. The expression "weather working days" appears to have come into use in shipping matters at about the end of the last century, the 1890's. There does not seem to be any doubt between the parties as to what the word "weather" means. It means that, from the working day, whatever it may be, is to be deducted the time which the men are stood off, or the loading is suspended, by reason of rain or other weather conditions, e.g., a hurricane, preventing work being done. The working day must be reduced by the time during which working is suspended by reason of the weather. Apart from any authority, therefore, I think the umpire calculated the demurrage on proper lines, and I agree with McNAIR, J., in upholding his award.

In *Brancelow S.S. Co. v. Lamport & Holt* (1), in which LORD RUSSELL OF KILLOWEN, C.J., gave the judgment (notwithstanding one or two verbal differences, I cannot see that there is any real difference between the LAW REPORTS and the COMMERCIAL CASES so far as what he laid down is concerned) the headnote reads ([1897] 1 Q.B. 570):

"A charterparty provided that cargo should be loaded at a certain rate per weather-working day. On certain days owing to bad weather cargo could only be loaded for a few hours:—HELD, that the time so occupied in loading cargo was not to be reckoned against the charterers as a whole, but as a part only, of a weather-working day. Where work is stopped by bad weather, but a substantial quantity of work is done, though not amounting to half a day, it is to be reckoned as half a day; where substantially more than half a day's work is done, though not amounting to a whole day, it is to be counted as a whole day; no smaller fraction than half a day should be taken into the calculation."

I agree that the headnote accurately sums up the learned lord chief justice's judgment. I will read one passage which goes some way to destroy the force of the argument of counsel for the shipowners and which certainly appeals to me. The learned lord chief justice said (*ibid.*, at p. 572):

"It is suggested by the plaintiffs that when any substantial amount of work is done upon a particular day the ship is entitled to reckon that as a whole weather-working day. I hope I am not contradicting any authority when I say that I consider that contention to be absurd. The charterparty provides that the charterers are to have so many weather-working days: suppose a particular day to begin with fine weather and that two or three hours' work is done; then the weather changes, and a state of things arises in which it would be unreasonable for the charterers' men to work at all: are the charterers to be charged with two or three hours' work as a whole day? I think that such a view is unreasonable and inequitable, and in the absence of any binding authority in its favour I decline to assent to it. There might be many days on which work was begun in the morning but stopped in a short time because of rain, and, if effect were given to the plaintiffs' contention, the charterer might not in a given case have half the number of days for loading to which he was entitled under the charter. It would

- A be more equitable to reject the portion of a day from the calculation altogether, for the ship would gain something in the way of dispatch by reason of the work done. I think, however, that the most equitable view is to charge half a day against the charterers where substantial work is done, though not amounting to half a day, and to charge a full day against them where substantially a full day's work, though not amounting to twelve hours, is done; no smaller fraction than half a day should, however, be taken into consideration, and if the time worked is quite insignificant it should not be charged at all."
- B

- I agree with the meaning which the learned lord chief justice gave to the words "working days", and I think the argument which he uses is convincing. But he then applies what I may call a somewhat rough-and-ready rule or a
- C rule-of-thumb, and says: "If a small amount of work is done, you are not to charge it as a day at all. If a substantial amount of work is done, though not a full day, you are to charge half of it." With great respect to that great lord chief justice, I cannot agree that that is a proper way of working out this particular clause. I do not see any ground on which one can lay down a rule-of-thumb (if I may put it in that way) in the way he did. I think that the umpire
- D in the present case has done it in the right way. He has deducted the actual time during which the weather has stopped work on any particular day from the day, so that, if, in the ordinary way, the charterers would be entitled to eight hours on any day, he has said: "As you were stopped for an hour, your day was only seven hours, and therefore you get the advantage of that, and that will prevent demurrage running against you." I think the umpire has calculated it rightly, and I find it impossible to agree with the way in which the lord chief justice dealt with the matter in *Branckelov S.S. Co. v. Lamport & Holt* (1). That imports into such a contract an arbitrary rule which is not provided for in the contract. It might work substantial fairness between the parties, but the right way, I think, is to deal with the matter as the umpire has dealt with it.
- E

- Counsel for the shipowners has relied on the judgment of SCRUTTON, J., in *Orpheus Steam Shipping Co. v. Bovill & Sons* (3) and particularly on the following passage (114 L.T. at p. 752):
- F

- "A day or running day is a consecutive day of the calendar from midnight to midnight. You cut down a running day by speaking of working day. It has been decided in several cases, and the case of *Saxon S.S. Co. v. Union S.S. Co.* (4) is one example that a working day does not mean the day on which the work is done, but a day on which it can be done, and that a working day ordinarily is twenty-four hours from midnight to midnight, part of it being the time in which work is ordinarily done."
- G

- The learned judge, as he says early in his judgment, was dealing with the point, what does "working days of twenty-four hours each" mean? for the charterparty had referred to working days of twenty-four hours each. In his well-known work SCRUTTON ON CHARTERPARTIES (15th Edn.) at p. 346, he says:
- H

"The number of hours in a working day on which a ship must load must be settled by the custom of the port, or express agreement."

- He cites, among other cases, *Orpheus Steam Shipping Co. v. Bovill & Sons* (3) as authority on the phrase "per working day of twenty-four hours", and says (ibid., at p. 347):
- I

"Held to mean that each twenty-four hours on which work was done was to count as a conventional day, though the hours might be on several days. It does not mean such a period of time as includes in it twenty-four ordinary working hours of the port."

That seems to me to show clearly that the learned judge decided that case on the words "per working day of twenty-four hours." If a contract provides that

a working day is to be regarded as twenty-four hours, that is an end of the matter, but otherwise I think the statement which the learned author makes in the earlier part of the previous page (p. 346): A

“ The number of hours in a working day on which a ship must load must be settled by the custom of the port, or express agreement ”,

is exactly in accordance with the opinion that I have formed in this case. B

I do not think it necessary to go through any of the other cases cited, because they do not really deal with the point we have to decide, on which there has been no express decision before. No question is raised in the Special Case whether charterers are bound to have cargo ready on a day or at a time when weather prevents work, so I say nothing about this. For these reasons I think a working day is a length of time consisting of the number of hours which, according to the custom of the port of discharge or loading, as the case may be, are usually worked at the port and the presence of the word “ weather ” seems to qualify it so that, from the number of hours which would be the ordinary hours of the port, is to be deducted the length of time during which the weather interferes with the work. I think that the *prima facie* meaning to be attributed to the words is strongly supported by the clauses which I read at the opening of this judgment and which contain, as I indicated, a number of references to the custom of the port which are useful as a pointer to enable us to decide the meaning of the words the subject of this appeal. For these reasons, I think this appeal fails and must be dismissed. C
D

SINGLETON, L.J.: I agree that this appeal should be dismissed, and there is nothing that I wish to add to the reasons given by my Lord. E

ROMER, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Stokes & Mitcalfe* (for the shipowners); *Stocken, May, Sykes & Dearman* (for the charterers).

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

A

JONES v. RICHARDS AND OTHERS.

[CAERNARVON WINTER ASSIZES (Barry, J.), January 24, 25, 26, 1955.]

B

Agriculture—Threshing machine—Accident—Fencing of dangerous parts—“Sufficiently fenced”—Feeding mouth guarded only by adjustable door—When machine is “working”—Liability of owner of machine and employer of operator—Liability of farmer to whom machine hired—Threshing Machines Act, 1878 (41 & 42 Vict. c. 12), s. 1.

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The first and second defendants owned a threshing machine and a baling machine which from time to time were hired to farmers. The threshing machine was fed by a man standing in a feeding box some twelve inches deep at the rear of a platform at the top of the machine, assisted by two other men, one of whom moved sheaves of corn from a rick to the platform, and the other of whom handed the sheaves to the man feeding the machine. The machine was fed by spreading the corn evenly over a sloping metal-covered feeding board from which it dropped through an aperture, or feeding mouth, about six inches wide, into a revolving drum, where it was beaten. The feeding mouth was guarded by a door, which was opened or closed by operating a spring and cam, but, while the machine was being fed, it was essential that the door should be open. When the door was closed the feeding mouth was substantially covered. The two machines were hired by the third defendant to thresh his corn and the plaintiff was employed by the first and second defendants to feed the threshing machine. During threshing and baling operations in a barn belonging to the third defendant, the baler became choked and threshing was temporarily suspended. The threshing machine was not stopped, but was slowed down, and the plaintiff went to the front of the platform to watch the clearing of the baling machine. He omitted to close the guard over the feeding mouth, although he knew that it was his duty to close it. As he returned to the feeding box, his foot inadvertently passed through the feeding mouth and was injured. The plaintiff claimed damages against all three defendants for breach of the statutory duty under the Threshing Machines Act, 1878, s. 1, and against the first and second defendants for breach of duty at common law.

Held: (i) the threshing machine was “working” within s. 1 of the Act of 1878 at the time of the accident although no corn was then being fed into it and threshing was not taking place (see p. 468, post).

(ii) as the threshing machine was not sufficiently and securely fenced at the time of the accident the first and second defendants were in breach of their duty under s. 1 of the Act of 1878, and, as the machine was being worked for the service or benefit of the third defendant who had permitted it to be used when it was insufficiently fenced, he also was in breach of duty under the section.

(iii) the first two defendants were also in breach of their duty to the plaintiff at common law (see p. 470, letter H, post), viz., the duty, to take reasonable care to provide safe machinery and so to carry on the operation as not to subject the plaintiff to unnecessary risk.

(iv) accordingly the defendants were liable to the plaintiff in damages which were assessed at £4,000 general damages and £382 agreed special damage; but (a) as the plaintiff must, on the facts, be deemed to have been responsible for one-third of the total damage which he suffered, the liability of the defendants would be reduced accordingly, viz., to £2,921 6s. 8d., and (b) the third defendant must be wholly indemnified by the first two defendants.

Per CURIAM: (i) the Act of 1878 is intended to protect all persons who may be in the vicinity of the dangerous parts of a threshing machine (see p. 468, letter I, post).

(ii) a fence which depends for its efficacy entirely on the memory and concentration of a single workman is not a sufficient and secure fence (see p. 470, letter B, post).

[**Editorial Note.** This case is of considerable importance to farmers as it shows that a civil action for damages lies for breach of statutory duty by failing to keep a threshing machine sufficiently and securely fenced during its working. The statutory duty is imposed by s. 1 of the Threshing Machines Act, 1878, and is a qualified duty because secure fencing is required only so far as is reasonably practicable and consistent with the due and efficient working of the machine. The Act creates a criminal offence and imposes a penalty not exceeding £5 on summary conviction. No question was raised whether a civil action, as distinct from criminal proceedings, lay for failure to comply with the section; it must have been accepted, therefore, that the enactment was intended for the benefit of those who worked at the threshing machine and to have imposed a duty towards them, breach of which was a private, as distinct from a public, wrong. The principle on which a penal statute may be construed as giving rise also to a civil remedy for contravention has been considered in many cases, of which a leading case is *Cutler v. Wandsworth Stadium, Ltd.* ([1949] 1 All E.R. 544, see per LORD SIMONDS at p. 548).

As to Protective Provisions concerning Threshing Machines, see 1 HALSBURY'S LAWS (3rd Edn.) 485, para. 945.

For the Threshing Machines Act, 1878, s. 1, see 1 HALSBURY'S STATUTES (2nd Edn.) 635.]

Action.

The plaintiff claimed damages from all the defendants in respect of injuries sustained by him while he was employed by the first two defendants to operate a threshing machine, hired to the third defendant, for the purpose of threshing corn belonging to the third defendant. The plaintiff based his claim against all the defendants on an alleged breach of the duty to fence dangerous parts of threshing machines imposed by the Threshing Machines Act, 1878, s. 1, and also, against the first two defendants, on an alleged breach of the duty owed by them to him at common law to take reasonable care to provide safe machinery and not to subject the plaintiff to unnecessary risk.

The facts appear in the judgment.

W. L. Mars-Jones and *R. G. Waterhouse* for the plaintiff.

R. Geraint Rees for the first and second defendants.

Elwyn Jones, Q.C., and *E. B. B. Richards* for the third defendant.

BARRY, J.: In many respects this is an anxious and difficult case. The plaintiff, Mr. John Gwilym Jones, is an infant, now twenty years of age, and he brings this action against the three defendants, Mr. William Richards, Mr. Owen Thomas Morris and Mr. John Owen, to recover damages for very serious injuries which he sustained as a result of an accident which took place on Feb. 25, 1953. At that date, the plaintiff was eighteen years old and since leaving school at the age of fifteen he has worked on his father's farm in Merionethshire. He was not earning wages in the ordinary sense. He lived at home; his father maintained him, provided money for his clothes and other expenses and also provided him with spending money as and when required. It is common ground that at the date of the accident the agricultural wage appropriate to a man of his age would have been £6 a week. When he was sixteen years old, i.e., some two years before his accident, he had worked for a period of about six weeks

A with the Merionethshire War Agricultural Committee and during that period he spent some fifteen to twenty days in all, working on a threshing machine and feeding corn and other grain crops into the machine.

The first defendant, Mr. Richards, and the second defendant, Mr. Morris, are the joint owners of a threshing machine and a baling machine, together with two tractors, which, no doubt, draw those machines to their places of work and

B subsequently provide them with motive power. Mr. Morris is a farmer on his own account, but Mr. Richards' principal means of livelihood is the hiring out of these machines to farmers in the vicinity. A large number of farmers are clients of his, and of Mr. Morris, and for several years before this accident Mr. Richards and Mr. Morris hired these machines to forty or more farmers in their neighbourhood, in many cases twice each year. The first two defendants were in the sole

C control of these machines. They were responsible for their operation and adjustment, but labour for carrying the sheaves of corn or other crops to the machines and for carrying away the grain and straw after the threshing and baling had been completed was normally provided by the farmer who hired the machines on any particular date. The first two defendants invariably operated the machines themselves, and, in particular, fed the crops into the threshing

D machine, but owing to his other duties as a farmer on his own account it was not always possible for the second defendant to accompany the machines when they were hired out to farmers and whenever he was unable to accompany the machines he hired a man to assist the first defendant to carry out the work which the second defendant otherwise would have done.

Prior to the date of the accident the plaintiff had been engaged by the second

E defendant on some four or five occasions. On those occasions he accompanied the first defendant and assisted in the operation of the machines and in particular with the feeding of the threshing machine, but, as he says, he was paid at the rate of 15s. per day. On Feb. 25, 1953, the plaintiff was engaged to carry out this work for the first two defendants at a farm belonging to the third defendant, Mr. John Owen. On that date, the third defendant had arranged to hire the

F threshing machine and baler belonging to the first two defendants, and when the plaintiff arrived at the third defendant's farm at about 8.15 a.m. the threshing machine and the baler were in position.

The corn which the third defendant required to be threshed on that day was stacked in a barn on his farm. For the purpose of convenience the threshing machine had been pulled into the barn. The barn has two doors facing each

G other. These doors provide the only light for the interior of the barn with the exception of narrow ventilating slits. The threshing machine was driven by a tractor which was placed outside the large door, power being transmitted from the tractor to the threshing machine by means of pulleys and a belt. After threshing the grain emerges from the rear of the machine, and it is there collected into sacks and carried away by the men supplied by the third defendant to assist

H in the threshing operations. The baler was placed just outside the small door and opposite the front end of the threshing machine from which the straw ultimately emerges. The baler was driven by another tractor and the straw, after emerging from the front of the threshing machine, was carried to the baler and baled by that machine.

After the plaintiff's arrival on the morning of Feb. 25, the first defendant

I set the belts on their appropriate pulleys and started the machines. Threshing proceeded throughout the whole of the morning and during that time the plaintiff and the first defendant worked in alternate shifts in feeding the crop into the threshing machine. While feeding the machine, the plaintiff, or the first defendant when he was carrying out this part of the work, stood in what was known as a feeding box or feeding pit at the top of the threshing machine, on what has been described as the threshing floor. This pit is some twelve inches deep and it is situated at the rear of the platform on top of the threshing machine. When

working in this pit the plaintiff, or the first defendant, was assisted by two other men. One man moved sheaves of corn from the rick in the barn to the threshing platform on top of the threshing machine and another man handed these sheaves to the plaintiff, first having cut their twine. The plaintiff's duty was to feed these sheaves into the machine and he did so by spreading the straw as evenly as possible over what is described as a feeding board, from which the corn dropped into the drum of the machine. It dropped in fact through a comparatively narrow aperture, about six inches wide, which was situated about the same distance above the threshing drum, or, more accurately, above the eight beaters which are attached to that drum. During threshing operations the drum and beaters revolve, and ultimately the grain is separated and emerges from one end of the machine, whereas the straw emerges from the other. This feeding board is a sloping board which slopes down towards the mouth of the drum and it is covered with metal. Beyond this feeding mouth and the aperture above the drum, and further towards the front of the machine, there is a protective door, or a guard. This door is controlled by a spring and cam which hold it either in the open or a closed position. When it is closed it is pulled down to floor level and the door does substantially cover the feeding mouth. That statement does, however, require certain qualification, because in fact the feeding board is adjustable and can be moved over a range of about three inches forward towards the feeding mouth or backwards away from it. When this feeding board is adjusted to the fully forward position, i.e., has its forward end as near as possible to the feeding mouth, there is only a gap or aperture of $1\frac{1}{2}$ inches between the end of the protective door or guard and the front of the feeding board. In its backward position, i.e., when it is adjusted to a point furthest from the feeding mouth, that aperture or gap is extended to $3\frac{1}{2}$ inches.

Threshing operations proceeded without any untoward incident throughout the whole morning. The work of feeding the straw into the feeding mouth, though not particularly skilled, is, I believe, somewhat arduous. As a result the plaintiff and the first defendant changed shifts fairly frequently, the change being made at approximately half-hour or three-quarter-hour intervals. Work stopped for dinner at about mid-day. After dinner the machinery was re-started.

The first defendant worked at feeding the threshing machine from the feeding box for a shift and then the plaintiff took his place. Soon after this there was some trouble with the baler which became choked. The plaintiff was told by someone to stop feeding the machine with corn. This, of course, was a necessary precaution, because, so long as the baler was out of working order, those responsible—and particularly Mr. Richards—did not want large quantities of straw to accumulate at the front of the machine. When the plaintiff was told to stop feeding corn he did so. It was not anticipated that this trouble with the baler would take long to put right, and, in consequence, the mechanism of the threshing machine was not stopped, but was merely slowed down. It is possible to take the drum of the threshing machine out of gear altogether, but that was not done. Someone slowed down the tractor and that resulted in the drum of the threshing machine continuing to revolve, but at a slower speed than during normal work.

After he had stopped feeding, the plaintiff decided to go to the front of the machine—still, of course, on the threshing platform—in order to see when the baler was put right. His evidence is that before he left the feeding box, and stepped up from it on to the threshing floor, he closed down the door or guard and so covered the feeding mouth, or at least substantially covered it, leaving only a gap of at the least $1\frac{1}{2}$ inches, or, at the most, $3\frac{1}{2}$ inches, according to the adjustment of the feeding board at that particular time. The plaintiff told me that it was his habit, whenever he left the feeding box to do some other work or on account of any breakdown in the machinery, to close the guard and he fully understood that it was his duty to do so. Although it is a matter of very

A little moment in the present case, I think that the usual practice for a man who left the box on a change of shift was to close the guard and for that guard to be reopened by the man who took over from him when he in turn entered the pit and was about to start feeding the machine. One thing is quite certain. While the machine was being fed it was essential for the door or guard to be in the open position otherwise the corn could not slip down the feeding board and into the drum mouth.

Having, as he says, closed the guard, the plaintiff left the feeding box, and proceeded to the front of the machine. After an interval of a few minutes, while the men had been working on the baler, the plaintiff received a signal from someone to the effect that the baler was now all right and that the threshing could recommence. His case is that he then turned round to go back to the feeding pit and he says that as he turned he slipped and found his right leg in the drum, it having slipped down through the feeding mouth. He says that as he turned to regain the feeding pit he heard the speed of the drum increasing. He says he has no idea of what caused him to slip, but he says, and indeed there is little dispute about this, that there is always a certain amount of corn, chaff and straw on the top of the threshing machine and that this to some extent made it slippery. He also says that when the speed of the drum increased, immediately before this accident, there was an increase in the quantity of dust which made it more difficult for him to see.

The results of this accident were disastrous. The plaintiff's right leg went right down into the drum and was grossly injured. It was found necessary for the lower part of the limb to be amputated and ultimately an amputation took place below the right knee. The plaintiff is left with a sufficient stump—indeed some of the doctors considered it to be a more than sufficient stump—on which an artificial ankle and foot can be fitted. An artificial limb has in fact been fitted and the plaintiff now has recovered to as great an extent as he ever can recover having regard to the permanent loss of the lower part of his right leg.

There are a number of issues of fact which I have to determine before considering the law applicable to this case. The first and most important of these issues is whether or not the plaintiff closed the guard before he left the box to go to the front of the machine to watch the progress of the work on the baler. After giving the matter very anxious care and thought I have come to the conclusion that it is impossible for me to accept the plaintiff's evidence that he did in fact close that guard. [HIS LORDSHIP found that the feeding board was in the forward position. HIS LORDSHIP continued:] I feel bound to conclude that the plaintiff inadvertently failed to close the guard before he left the box on this particular afternoon. I am also bound to say that I am not satisfied that the plaintiff slipped. On balance of probability I think that what happened here is that the plaintiff took an incautious step on his attempted return to the box, and, thinking he had reached the box, or stepping slightly out of his path which he had chosen to the box, his foot was placed either right into the mouth leading to the drum, or, perhaps, on the sloping board from whence it slid into the mouth and became caught by the beaters in the drum below.

On these facts I have to consider the legal position of the three defendants. As against the first two defendants the plaintiff principally relies on the provisions of the Threshing Machines Act, 1878. He also alleges that the first and second defendants, as his employers on the date of the accident, were negligent in that they failed to provide him with proper machinery and a safe place of work. As against the third defendant, Mr. Owen, the plaintiff's case is based solely on the provisions of the Act of 1878, an Act, which, no doubt, was unknown to either the first or the second defendant, or to the third defendant on the date when this accident happened. The Act is, however, part of the law of this country

and I am bound to administer it and to give it, if I can, its correct interpretation in law. A

The Act is described as, "An Act for the prevention of accidents by threshing machines." The preamble reads:

"Whereas by certain Acts of Parliament provision is made for the fencing of dangerous machinery in factories and mines, and it is expedient that similar provision should be made with respect to threshing machines:" B

Then by s. 1 it enacts:

"The drum and feeding mouth of every threshing machine as defined by this Act shall at all times during the working thereof be kept sufficiently and securely fenced so far as is reasonably practicable and consistent with the due and efficient working thereof. If any person permits any threshing machine belonging to him or used for his service or benefit to be worked without its being fenced as aforesaid: Or, if any foreman, engineer, or other person in charge of any threshing machine, works it or permits it to be worked without its being fenced as aforesaid: . . . " C

then such persons shall be guilty of a criminal offence and shall be liable to prosecution. D

The plaintiff's case is that, contrary to the provisions of that Act, the feeding mouth of the threshing machine in question was not kept sufficiently and securely fenced in accordance with the terms of the Act, and that the persons responsible for the failure to comply with those provisions are the first two defendants, who were the persons to whom the machine belonged, and the third defendant, in whose service or for whose benefit the machine was being worked. E

The principal question is, was this machine sufficiently and securely fenced? Before considering that question it is also necessary to consider perhaps an even more fundamental one, viz., was the machine working at the time when the accident happened? It is contended by counsel on behalf of the defendants that because the machine was not actually threshing corn at the moment when the accident happened it was, therefore, not working, and that the provisions of the section cease to have any application. It is also suggested by counsel for the first two defendants, as I understood his argument, that the provisions with regard to fencing were designed only to protect men who were actually working in the threshing process, and when they ceased to work on that process the protection was no longer available for them. F G

I think it is much too narrow a view to hold that this machine was not working at the time of the accident merely because there had been a hitch in the operation of another machine and corn was not actually being fed into the threshing machine at the very moment when the plaintiff sustained his injury. The machine was working, as I find, because it was being turned by a tractor which was supplying its motive power; the engine had never been stopped, the drum had never ceased to revolve, and I am quite satisfied that this machine was working even though for a very short period it was not in fact threshing corn. H

Having decided, as I do, without any hesitation, that the machine was working I must then turn to the more difficult question whether or not it was kept sufficiently and securely fenced, bearing in mind the qualifications provided in the Act, viz., "That the fencing should only be sufficient and secure insofar as is reasonably practicable and consistent with the due and efficient working thereof". I am quite satisfied that this Act is intended to protect all persons who may be in the vicinity of all these dangerous parts of a threshing machine, viz., the drum and the feeding mouth. I am satisfied that the plaintiff can rely on the protection of the Act as can any other workman so long as the machine is working, whether they be at their normal place of work or moving about the I

- A threshing floor for any lawful purpose connected with their work or for the purpose of leaving or returning to their place of employment. When one considers the words, "Kept sufficiently and securely fenced", I think one is bound to accept the view submitted to me by counsel for the plaintiff that those words necessitate (a) the provision of sufficient and secure fencing, and (b) the maintenance of that fencing in a sufficient and secure state throughout the whole period
- B which the machine is in fact working. I regret to say that my intelligence cannot follow the view put to me with great force on behalf of the first two defendants that the word "sufficiently" in some way cuts down the meaning of the word "securely", and that a machine can be sufficiently and securely fenced without being securely fenced. That is a conception which I regret to say I am unable to appreciate. I think this Act means that secure fencing must
- C be provided and maintained in position at all times throughout the working periods of the machine, subject to the limitation that the fencing need only be as secure as is reasonably practicable and consistent with the due and efficient working thereof.

- On the findings which I have made it is of course at once apparent beyond
- D any possibility of argument that when this accident occurred the feeding mouth of this machine was not fenced at all. It is quite impossible to say that at that time it was sufficiently and securely fenced, because, as I have already held, in fact the fence was not then in position and the feeding mouth was open and wholly unguarded; except perhaps to the extent that the open door might have provided some protection for someone walking straight towards the mouth from
- E the front portion of the threshing floor, such a person, when he stumbled against the open door, might in fact have closed it and so to some extent at least obviated danger to himself. Over each side there was no sort of guard protecting the feeding mouth and the entrance to this highly dangerous drum. It is said, of course, that the absence of fencing at the crucial moment when this accident occurred was due not to any breach of statutory duty on the part of any of the
- F defendants, but to the action of the plaintiff himself in failing to place in position the guard which had been provided for his use. There is no evidence here of delegation in the sense in which the courts now construe that word. Even if that were the case it would not necessarily mean that the defendants were not guilty of a breach of this statute. If, on the other hand, the true fact was that
- G the plaintiff was entirely responsible owing to his own conduct for this unfortunate accident then that might place very great difficulties in his path when seeking to recover damages from the defendants.

- As I find the facts, however, no sufficient and secure fencing was ever provided for the feeding mouth and I have also come to the view that there is no practical difficulty in providing reasonably secure fencing and that the provision of such
- H fencing would have no effect on the due and efficient working of the machine. It was obviously impracticable to keep the guard provided, the opening and shutting gate, in the downward position protecting the feeding mouth when threshing operations were in progress. When the gate was in the open position the man actually engaged in feeding the machine, was, I am satisfied, in a position of at least relative safety, and the criticisms of the gate or guard—in so far
- I as they are concerned with the position of a man in the feeding box—have not been sustained to my satisfaction. The position to my mind is quite different with regard to other people who might quite properly be on the threshing floor. The man responsible for cutting the twine which held the sheaves together was moving, it is true perhaps only a few inches, but he had to reach for a sheaf, cut the twine and hand it to the plaintiff. In his normal place of work he would therefore be several feet from the feeding mouth. However, some incident in connection with the work might always make it necessary for him to move

perhaps a yard or two in one direction or another on the roof of the threshing machine, and, if he did so and inadvertently approached the ends of the feeding mouth while the machine was in operation and being fed, there was nothing to prevent his feet being trapped. Therefore, during feeding operations even on the very best view of the matter there were two ends of this highly dangerous area entirely exposed and unguarded, not guarded with sufficient and secure fencing. The feeding mouth has two sides and two ends and whatever protection was provided for the two sides, the two ends—in which a foot or any other limb could enter that danger area with equal ease—were without protection of any kind. More than that, I am satisfied that a fence which for its efficacy entirely depends on the memory and concentration of a single workman is not in truth a sufficient and secure fence. Whether that be so on the true construction of the statute is perhaps more open to doubt than on a consideration of this matter under the common law. However, I have come to the conclusion that the makers of the threshing machine do not comply with the requirements of this Act by providing merely a fence which has to be placed in position by a man engaged on other work, when, as part of the necessary operation of the machine, the fence is out of position and wholly inoperative during a very long period of a day. I do not think that I am setting an unduly high standard in reaching those conclusions. One must always guard against making industry impossible and against slowing down production by setting unduly high standards or by placing wholly unreasonable requirements on the makers and owners of machinery of this kind. However, it seems to me that it is not unreasonable to hold that in order to comply with the requirements of this Act there should at the very least have been two substantial end boards or side boards protecting the two open ends of the feeding mouth. [His LORDSHIP referred to the evidence concerning guards fitted by certain makers of threshing machines and continued:] Anyone who directed his attention to the guarding of this mouth would at once see that it was necessary to protect the ends, and to protect them against just the sort of happening which resulted in this disaster to the plaintiff; a false, inadvertent step, leading to his foot going into the beater and being almost inevitably destroyed. I am quite satisfied that if a twelve-inch board had been fitted to guard the two ends of this feeding mouth this accident would never have happened. I am very much inclined to think that if a board of considerably less height had been fitted the accident would also have been prevented. If the plaintiff had had to lift his foot to any appreciable height in order to get it into this feeding mouth, I do not think that he would have got it in, as he did. By one ordinary step, not lifting his foot more than was necessary to carry it forward, he was able, perhaps thinking he was stepping into his feeding box, to step into this very dangerous trap. In those circumstances, I am bound to find that the requirements of this Act have not been complied with. In dealing with the first two defendants, I think it is clear that they are the persons responsible for keeping the fencing of this machine sufficient and secure, and on that finding (a breach of statutory obligation) there can be no doubt that they must be liable in damages to the plaintiff. Without pursuing the matter further, I think I should say that in the light of the evidence I would hold, if necessary, that the first two defendants were also in breach of their common law duty to the plaintiff, and that irrespective of the provisions of this statute they would have been liable to him in damages.

The position of the third defendant has caused me very much greater doubt. I think it is a very serious, and I am bound to say a very distasteful task to construe this statute in such a manner as to make the third defendant liable in any way for this unfortunate accident. I am satisfied that he knew nothing about the provisions of this Act, and, being ignorant of them, it is impossible to see that any act or omission on his part was in any way reprehensible. I accept all that counsel has said on his behalf. He had no reason to think that the first

- A two defendants were anything other than perfectly competent contractors, as indeed I think they were except for their unfortunate omission to comply with the requirements of this Act in this one respect. The third defendant had engaged them and hired their machines for many years and there had never been a mishap. I do not think that the third defendant, apart from the provisions of this Act, had any reason to do anything other or more than he did. However,
- B here is the Act and I have to construe it. I find it necessary to agree with counsel for the plaintiff on this part of the case—I confess I do so with very great reluctance—that one is bound to look at the penal provisions of this statute in order to ascertain on whom the obligation to comply with the requirements of the Act is in fact imposed. It is clearly imposed on the persons owning the machine and there can be no doubt that in every true sense of the word the first
- C two defendants permitted this machine to be used unguarded or insufficiently guarded. However, the Act also provides that not only shall the owners of the machine be liable if they permit the machine to be used when improperly fenced, but also any person for whose services or benefit the machine is worked. There can be no doubt that this machine was being worked at the time when this accident happened for the service or benefit of the third defendant. The only
- D question is, did he permit the machine to be used without its being fenced in accordance with the provisions of the Act? I have very carefully considered the authorities here. Counsel for the plaintiff concedes that permission does involve an element of knowledge or connivance or carelessness. I feel bound, very reluctantly, to take the view that the third defendant's conduct must be judged as though he had been aware of the provisions of the Threshing Machines
- E Act, 1878. That leads one, I am afraid, to a somewhat curious result, but none the less he is assumed to know the law of this country. Assuming he did know the law of this country, then I am bound to find that he permitted this machine to be used in an unfenced condition or insufficiently fenced to comply with the requirements of the Act. In circumstances of this kind, when the whole of the means of knowledge were available to the third defendant, when, knowing that
- F he was under a duty in the matter—as I am bound to assume he did—it was easy for him to see how the machine was guarded and to see whether it was properly guarded, I do not think that I can say that he did not permit the machine to be used merely because of an actual lack of knowledge of a particular defect. If I did, it would be placing a premium on carelessness. Had the third defendant realised that he was under a duty in connection with this machine I am quite
- G satisfied that he could easily have acquired the requisite knowledge regarding its guarding or fencing arrangements, and in that knowledge, if available to him, it seems to me it avails him not to say, "I did not take advantage of the opportunity which was open to me."

I do not propose to analyse the cases cited, but bearing in mind the purport of the various decisions which have been brought to my notice I feel I am to hold

- H here that the third defendant did permit this machine to be used contrary to the provisions of the Threshing Machines Act, 1878. I am sorry that it should be so and I have no doubt that this decision may well come as a considerable shock to many members of the farming community, not only in this part of the British Isles, but in the other parts as well.

- I This does not conclude the matter. Counsel for the defendants have pressed on me that on any view of this case the plaintiff was to a very substantial extent the author of his own misfortunes. Having held that the feeding board was in the forward position, I am bound to reach the conclusion that if the plaintiff had closed the guard no accident could have happened. With equal confidence, I have reached the conclusion that if, as they should have done, the first two defendants had provided an adequate side board at each end of the feeding mouth then equally that accident would not have happened despite the fact that the plaintiff failed to close the guard before he left the feeding box. I entirely

absolve the plaintiff from any blame as regards the false step he took which resulted in his accident. I cannot, however, take a similar charitable view with regard to his failure to 'utilise the guard which was there, and which, if used, would have prevented this accident. I think it would be wrong to say that a workman who fails to use a guard which he knows ought to be used, and, as a result suffers a horrible injury of this kind, is in no sense responsible for the disaster which befalls him. I think he is responsible and responsible to a very substantial degree.

In the whole of the circumstances of this case I do not think it would be right to say that the plaintiff and the defendants are equally responsible for such damages as may be awarded to the plaintiff. On the whole I think that the proper view here is to say that the losses should be borne two-thirds by the defendants and one-third by the plaintiff. It thus remains for me to consider the proper damages which should be awarded in a case of this kind. The medical evidence, although not agreed, is not now in any real dispute. There is very little I need say about it. This unfortunate young man is left with the lower portion of his right leg amputated; nothing anyone can do or say will return his leg to its full use. I am sure that everything which can be done has been done to provide him with a satisfactory artificial limb, but having regard to his pre-accident occupation as a worker on a farm this is a very grievous handicap. It is true that an amputation below the knee is very much less serious provided there is a sufficient stump above the amputation.

On the other hand, an injury of this kind is particularly crippling and incapacitating to one who hoped to make his living on the land, and particularly so as the plaintiff's father's farm is situated in a hilly district. I am quite satisfied that the plaintiff is incapacitated in the way he describes, and in the way in which his doctor also describes, for very many forms of farm work. There is, of course, a great deal which he can do, but he cannot do very many, if not all, of the heavier portions of the work.

This is a difficult case in which to assess proper damages, because the plaintiff was only earning a relatively small wage when this accident happened, indeed he was not earning at all except occasionally. He is an intelligent young man and with suitable training he will be able, no doubt, to fit himself for many other forms of occupation in which his damaged leg will cause him little if any incapacity. Whether he can obtain these alternative occupations near his home is a matter open to very much graver doubt. To a very large extent I think he may be able to minimise and perhaps wholly reduce and eliminate any lack of earning power resulting from this accident, but he can only do so at the expense of his life ambition to become a farmer, at the expense of the future which was so bright for him with the expectation of succeeding to his father's farm and running it thereafter. If he does succeed to his father's farm it is clear that he will not be able to do all the work himself and will have to engage paid labour to do jobs which otherwise he could have done. Whatever view one takes of this case I think that the plaintiff, despite the fact that this is a less serious injury than an amputation above the knee, is entitled to very substantial damages. I think that he is, or would have been, had he not been partially to blame, entitled to the sum of £4,000 in addition to the agreed special damages of £382, but unfortunately that total sum will have to be scaled down in the manner which I have indicated [viz., by one-third. to £2,921 6s. 8d.]

[His LORDSHIP heard argument on the question of contribution by the first and second defendants and the third defendant under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, and said:] The plaintiff is an employee of the first two defendants. It is a most artificial conception which arises, purely from the provisions of the Threshing Machines Act, 1878, that the third defendant should owe any responsibility to him at all. Whatever might have been the position if one of these other men working there had been injured, I am quite

A satisfied that the proper order in this case is that the third defendant should receive complete indemnity from the first two defendants.

Judgment accordingly.

Solicitors: *Gwyndaf Williams & Roberts*, Pwllheli (for the plaintiff); *Breese Jones & Casson*, Portmadoc (for the first two defendants); *Porter & Co.*, Conway (for the third defendant).

[Reported by SEYS LLEWELLYN, ESQ., Barrister-at-Law.]

WATT v. KESTEVEN COUNTY COUNCIL.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), January 21, 24, 25, 26, February 7, 1955.]

E *Education—Local education authority—Grant towards tuition fees at school chosen by parents—Obligation to educate in accordance with parents' wishes—Breach of statutory duty—Whether right of action—Education Act, 1944 (7 & 8 Geo. 6 c. 31), s. 8, s. 76—Education (Miscellaneous Provisions) Act, 1953 (1 & 2 Eliz. 2 c. 33), s. 6.*

F The plaintiff, a Roman Catholic, sent his two sons to Roman Catholic preparatory and public schools. He made application to the defendants, the local education authority for the area in which he was resident, for a full grant for the tuition fees. The defendants did not provide a school for secondary grammar school education in their area but, in discharge of their duties under the Education Act, 1944, s. 8, they made available education at an independent school in their area and paid the fees for boys qualified to attend it. The plaintiff's sons were so qualified. At all material times G the defendants were willing to provide places for the boys at the independent school with which they had made arrangements but the plaintiff did not wish his sons to go there. The defendants made grants towards the cost of the education of the plaintiff's sons at both schools they attended, but it was insufficient to cover the full amount of their tuition fees. In an action H by the plaintiff for a declaration that the defendants were under a duty to provide secondary grammar school education for the two boys at the school chosen by him, and for payment to him of the full amount of the tuition fees paid by him to the schools concerned,

I **Held:** (i) if the defendants, in performance of their duties under the Education Act, 1944, s. 8, made available secondary grammar school education at an independent school, the extent of the duty was to make it available at an independent school with which they had made arrangements, not at any such school as parents chose; and, accordingly, there was no duty on the defendants to pay full tuition fees at an independent school chosen by the plaintiff.

(ii) although it was the defendants' duty under s. 76 of the Act of 1944 to have regard to the general principle that pupils were to be educated in accordance with the wishes of their parents, yet the defendants were not under an absolute obligation to educate pupils in accordance with those

wishes nor were they bound to have regard exclusively to those wishes; and in the circumstances the defendants were not in breach of their duty under that section.

Per CURIAM: although an action for damages may lie for breach of statutory duty under s. 76 of the Education Act, 1944 (in the exercise of duty under s. 8 of the Act), no such action was maintainable in law in the present case because the proper remedy for breach of s. 8 of the Act, on its true construction and in the circumstances of the case, was by complaint to the Minister under s. 99 of the Act (see p. 477, letter A, and p. 480, letter D).

Gateshead Union v. Durham County Council ([1918] 1 Ch. 146) considered. Decision of ORMEROD, J. ([1954] 3 All E.R. 441) affirmed.

[For the Education Act, 1944, s. 8, s. 76, and s. 99, see 8 HALSBURY'S STATUTES (2nd Edn.) 153, 210, 225; and for the Education (Miscellaneous Provisions) Act, 1953, s. 6, see 33 HALSBURY'S STATUTES (2nd Edn.) 59.]

Case referred to:

(1) *Gateshead Union v. Durham County Council*, [1918] 1 Ch. 146; 87 L.J.Ch. 113; 117 L.T. 796; 82 J.P. 53; 19 Digest 553, 7.

Appeal.

The plaintiff appealed from an order of ORMEROD, J., dated Oct. 5, 1954, reported [1954] 3 All E.R. 441, dismissing the plaintiff's claim for a declaration that the defendants were and are under a duty to provide secondary grammar school education for his sons at certain specified schools (being independent schools chosen by the plaintiff), a mandamus, and payment of the difference between the full tuition fees at the schools and the amount of the defendants' contributions towards them or the like sum as damages for breach of contract.

The facts appear in the judgment of DENNING, L.J.

Gerald Gardiner, Q.C., R. E. A. Elwes, Q.C., H. Hope and P. J. Fitzgerald for the plaintiff.

Sir Frank Soskice, Q.C., and J. G. Le Quesne for the defendants.

Cour. adv. vult.

Feb. 7. The following judgments were read.

DENNING, L.J.: BIRKETT, L.J., asks me to say that he has read the judgments which we are about to deliver and agrees with them.

Mr. Watt [the plaintiff] lives at Stamford in Lincolnshire. He has twin sons, John and Richard, who are now just fifteen years of age. They have passed the necessary examination which entitles them to a grammar school education. But there is as yet no state grammar school in that part of Lincolnshire: and on that account the Kesteven County Council, the defendants, arrange for the boys of their district to go to an independent school of high repute at Stamford, known as the Stamford School; and the county council pay the fees. In 1951, for instance, forty-four boys went to the Stamford School and the county council paid their tuition fees of £61 10s. a year for each boy. In 1952 thirty boys attended at £63 15s. a year each. The county council are quite willing that the twin sons of the plaintiff should go to the Stamford School as day boys and to pay the full fees for them there. But the plaintiff does not want them to go there. He is a Roman Catholic and wants to send them away to a Roman Catholic boarding school. He has already sent them there. He sent them to a Roman Catholic preparatory school in Monmouthshire and now they are at a Roman Catholic public school in Northamptonshire. These schools are recognised to be efficient and the tuition fees (excluding the boarding fees) are a little less than those at Stamford. They are only £60. The plaintiff claims that the Kesteven County Council are liable by law to pay the full tuition fees at these schools to which he has chosen to send the boys.

- A I desire to say at the outset that the question in this case does not depend in the least on the religious views of the parent. The question would be the same if a member of the Church of England living in Stamford wished, for some reason or other, to send his boys away to a boarding school in some other part of the country. He might wish to send them there because it was his old school, or because the classics were well taught there, or because it was a co-educational school. The question in such a case would be just the same as this: Is the parent entitled to have the tuition fees paid by the county council?
- B

- The rival contentions can be simply stated: The county council say to the plaintiff: "If you wish to send your boys to a school of your own choice, you are of course at liberty to do so. Moreover, we are quite ready to help you with the fees. It depends on what you can afford. We will see that you are put to no hardship. If you are poor, we will pay the whole fees. If you are well off, we will expect you to pay something yourself." I pause to say that the county council are in fact paying quite a substantial part of the fees. The plaintiff's retort is this: "That would be all very well if you had a state school in Stamford. I know that in that case, if I did not choose to send them to that school, I could not expect you to do more for me than you do. But you have no state school in Stamford. All you do is to make arrangements for the boys to go to an independent school in Stamford. You pay the tuition fees for the boys who go to that school without regard to the father's means. You should do the same for me at whatever school I choose to send them."
- C
- D

- The short answer to the plaintiff's argument is, I think, this: whilst education is free in this country, it is only free at the schools which the county council make available. I can find nothing in the Education Act, 1944, which compels the county council to pay the fees at any school which the father chooses. The duty of the county council is plain. They must make schools available for all the pupils in their area. But they can fulfil this duty, not only by maintaining schools themselves, but also by making arrangements with certain other schools. They may, for instance, make a grant to aid a school and in return get a right to a number of free places. Or they may make arrangements with some particular independent school to take the boys. At all the schools which the county council maintain themselves, no fees are payable. At the other schools with which they make arrangements, they must provide free places or pay the fees in full. Once they have fulfilled their duty in one or other of these ways—either by maintaining schools themselves, or by making arrangements with certain other schools—there is no more which they are bound to do. If a father wishes his child to go to yet another school of his own choice, with which the county council have no arrangements, then he cannot claim as of right that the county council shall pay the fees. He can then only expect assistance according to his means. Regulations* have been made which empower the county council to pay the whole or any part of the fees in any case where it would involve financial hardship on the father to pay them.
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- I I think the position is clearly as I have stated it: but it was urged before us that independent schools stand in a special position. It was said that if the county council had no school of their own, or no grant-aided school to which to send the boys, but had to send them to an independent school, then the father had a right to choose to which independent school they should go; and that corresponding to this right, the county council were bound to pay the fees in full. This argument was based on s. 76 of the Education Act, 1944, which provides that:

"In the exercise and performance of all powers and duties conferred and

* The Regulations for Scholarships and Other Benefits, 1945 (S.R. & O. 1945 No. 666), amended by the Scholarships and Other Benefits Amending Regulations, No. 1, No. 2, (S.I. 1948 No. 688, No. 2223).

imposed on them by this Act, the Minister and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents."

It is obvious that that section cannot stand by itself. It only applies in the exercise of some other power or duty contained in the Act. In this case it was said to apply in the exercise of s. 8. It was said that, when there was no maintained or grant-aided school, the county council had a duty under s. 8 to make available an independent school and to pay the fees in full; and that, in exercising that duty, they were bound under s. 76 to have regard to the general principle that pupils were to be educated in accordance with the wishes of their parents. Hence if there are two independent schools, one in Stamford and the other far away, both of which are efficient and charge the same tuition fees, the pupils should be educated at the one desired by the parents. All the more so when the school chosen by the parents is the cheaper.

I think that argument is mistaken. It assumes that the duty of the county council under s. 8 is to make available for the pupils any of the independent schools over the length and breadth of the country. That is not correct. Their duty is only to make available the particular independent school with which they have made arrangements. They must make arrangements for an efficient independent school to take the pupils from their area. They must get the Minister's approval to these arrangements: and they must then offer this school to the parents. This duty was fulfilled by the Kesteven County Council when they made the Stamford School available. Having done this, there was no occasion for s. 76 to come into operation at all.

Even if it were the duty of the county council to make available all the independent schools in the country, nevertheless I do not think that s. 76 means that every parent has a right to choose any of them he likes. Section 76 does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It only lays down a general principle to which the county council must have regard. This leaves it open to the county council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so. It cannot, therefore, be said that a county council is at fault simply because it does not see fit to comply with the parent's wishes; and that is all that the plaintiff's complaint comes to in this case. I cannot myself see any evidence to suggest that the county council in this case did not have regard to the general principle. The correspondence which passed on the matter showed that it was specifically brought to their attention and nevertheless they thought that

"they would place themselves in an impossible position vis-à-vis parents in other parts of the county if they were to do what has been asked of them."

I can well see what they mean. If they paid the full fees in this case, it would mean that every parent in the county, who sent his boys to boarding school, could come and ask the county council to pay the tuition fees, no matter how rich he was. The plaintiff in this case is asking for preferential treatment for himself over and above the other parents who send their children to boarding schools. The county council only helps those other parents according to their means. They cannot reasonably be expected to do more for the plaintiff. They cannot pay his fees irrespective of his means when they do not do it for others.

This being so, the appeal must be dismissed: and there is no need to consider the question which was much debated before us whether a breach of s. 76 gives rise to a cause of action for damages. It could not itself do so, but only in connection with the exercise of some other power or duty in which the general principle was not observed. In view of *Gateshead Union v. Durham County*

A *Council* (1), I should not like to say that there can be no cases under the Act in which an action would lie, but I do not think that an action lies in this case. It is plain to me that the duty under s. 8 (to make schools available) can only be enforced by the Minister under s. 99 of the Act and not by action at law. That being so, a breach of s. 76 in the exercise of s. 8 can also only be enforced by the Minister and not by action at law.

B In my opinion, therefore, the appeal should be dismissed. It will be noticed that I have refrained from analysing the sections of the Act in detail, but PARKER, L.J., has done this.

C **PARKER, L.J.:** The plaintiff puts his case in this way. It is the duty of the local education authority to make education available, which he contends means, in the case where sufficient maintained schools are not available, that the authority must pay full tuition fees at an independent school; that in deciding to what independent school the children are to go, the authority is bound to have regard to the general principle set out in s. 76; that, there being no question in this case as to efficient instruction or unreasonable public expenditure, the true inference from the facts proved is that the authority had no regard to that general principle; and that, having suffered injury, he has a cause of action for that breach of duty.

D Section 76 provides as follows:

E “In the exercise and performance of all powers and duties conferred and imposed on them by this Act the Minister and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.”

F It will be seen, therefore, that the obligation to have regard to the general principle is one to be observed by both the Minister and authorities in the exercise and performance of all their powers and duties under the Act. It is not an obligation which stands on its own but the effect of the section is that there must be read into each provision of the Act conferring a power or imposing a duty, an obligation in the exercise of that power or the performance of that duty to have regard to the “general principle”. In the present case the duty in connection with which that obligation is to be observed is s. 8 which lays down the duty to secure that there shall be available sufficient schools. Accordingly, in the performance of that duty an authority must have regard not only to the matters set out in s. 8 (2) but to that general principle.

G So far the position is, I think, clear, but the next step in the argument is the vital one, namely, that the obligation to secure that sufficient schools are available involves an obligation to pay full tuition fees at an independent school where sufficient maintained schools are not available. This is a vital point since if such obligation arises in such circumstances the plaintiff's claim to be paid full tuition fees at an independent school of his choice fails in limine. The answer to this question involves some analysis of the Act. Section 7 lays down the general duty of the authority to make efficient education available in its area to meet the needs of the population of that area. Section 8 to which I have referred

I provides so far as it is material as follows:

“ (1) It shall be the duty of every local education authority to secure that there shall be available for their area sufficient schools . . . (b) for providing secondary education, that is to say, full-time education suitable to the requirements of senior pupils, other than such full-time education as may be provided for senior pupils in pursuance of a scheme made under the provisions of this Act relating to further education; and the schools available

for an area shall not be deemed to be sufficient unless they are sufficient in number, character, and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, and of the different periods for which they may be expected to remain at school, including practical instruction and training appropriate to their respective needs."

Section 9 gives the authority the necessary power to fulfil these duties. It is given power to maintain schools, whether established by it or not. Such maintained schools are either county schools, which are established and maintained by the authority, or voluntary schools which are maintained but not established by the authority. Authorities are also given power

"... so far as may be authorised by arrangements approved by the Minister to assist any ... school which is not maintained by them."

This would include not merely grant-aided schools but independent schools.

Pausing there, it will be seen that, whereas duties and powers have been laid down with regard to making education "available", nothing has been expressly said as to whether such education is to be "free". Section 61 (1), however, provides:

"No fees shall be charged in respect of admission to any school maintained by a local education authority or to any county college, or in respect of the education provided in any such school or college."

Accordingly, education at maintained schools is to be free, but nothing is there said as to independent schools. Section 81, however, enables the Minister to empower authorities to pay the whole or part of the fees payable at independent schools. So far as it is material, s. 81 provides:

"Regulations shall be made by the Minister empowering local education authorities, for the purpose of enabling pupils to take advantage without hardship to themselves or their parents of any educational facilities available to them ... (b) to pay the whole or any part of the fees and expenses payable in respect of children attending schools at which fees are payable."

So far from any obligation being laid down that full tuition fees at independent schools are to be paid by authorities there is merely provision for the Minister empowering authorities to pay the whole or part of such fees. This he has done by making regulations*. It is unnecessary to refer to these regulations in detail. It is enough to say that under them every authority may, for the purpose of enabling pupils to take advantage without hardship to themselves or their parents of any educational facilities available to them, pay the whole or part of the tuition fees at independent schools as approved by the Minister. As from July 14, 1953, however, when the Education (Miscellaneous Provisions) Act, 1953, came into force, authorities became under an obligation to pay the whole of the tuition fees at an independent school with which arrangements had been made with the approval of the Minister for the provision of education (see s. 6 (2) (a) (ii) of that Act). The position, therefore, seems to me to be this. Education at maintained schools is absolutely free. In all other cases prior to July 14, 1953, there was no right to free education but authorities could pay the whole or part of the expenses and fees approved by the Minister according to an income test. Subsequent, however, to July 14, 1953, there was an obligation to pay full tuition fees at an independent school if arrangements had been made with that school by the authority with the approval of the Minister. While, therefore, the authority was in this case prepared to pay

* The regulations are noted at p. 475, ante.

A full tuition fees at Stamford School, there was not until July 14, 1953, any obligation or authority to do so. There has not been, and is not now, any obligation on it to do so at any other independent school of a parent's choice. A parent can send his children to another school, but if so he can only get a contribution towards the fees based on an income test.

Strong reliance, however, was placed on *Gateshead Union v. Durham County Council* (1) and in particular on the following passage from the judgment of SWINFEN EADY, L.J. ([1918] 1 Ch. at p. 159):

"I am of opinion that the Acts which require a parent to cause his children to attend school give him the right to comply with their provisions and enable him to insist that the child which he tenders shall be permitted to 'attend' school—that is, to be and remain at the school—during school hours and receive the instruction which similar children receive, and that the defendants have not any right to refuse to receive his child unless they receive some payment or money contribution. He is entitled to free education for his child—that is, education without making any payment whatever. The accommodation in the school cannot be said to have been made 'available' for children if they are refused admission unless and until their parents comply with some request to pay money which the statutes do not confer upon the local education authority any right to demand."

It is to be observed that in that case there was an express provision (the Education Act, 1902, Sch. 3, para. 5) that the duty of authorities to provide a sufficient amount of public school accommodation,

"shall include the duty to provide a sufficient amount of public school accommodation, without payment of fees, in every part of their area."

In other words, the position in that case was just as if under the Act of 1944 an authority contrary to s. 61 sought to exact a payment by way of fees as a condition of a child attending a maintained school. If this conclusion is correct, that is an end of this case. The plaintiff is not entitled to full fees. The authority is, in fact, making a contribution and it is agreed that this court should not be concerned with the amount of the contribution.

As, however, the other points have been fully argued, it is proper that I should state my views shortly on them. Assuming, therefore, that I am wrong in the conclusion I have reached, the next question is whether in offering to pay full tuition fees only at Stamford School the authority has failed to fulfil the obligation imposed on it by s. 76. This depends, of course, on the true construction to be placed on that section and on the facts as proved at the trial. The wording is somewhat unusual, but this is clear, that some obligation is placed on the Minister and authorities. It was, I think, at one time contended on behalf of the plaintiff that the obligation to "have regard to the general principle that . . ." meant that the authority must have exclusive regard to that general principle and, accordingly, that if and in so far as the parent's wishes were not incompatible with the two matters referred to, effect has to be given to these wishes. This, it seems to me, is plainly wrong, and indeed it was in the end admitted that there might be other matters which an authority could take into consideration. I say that it is plainly wrong because there must be a number of administrative matters—and the authority in exercising its powers and performing its duties is acting administratively—which one would expect it to be in a position to consider, and the wording used, and in particular the words "general principle", contemplating as it does exceptions, point to the obligation meaning no more than that the authority must take into account the general principle, weighing it in the balance together with and against other considerations. Provided that the authority has regard

to the general principle in this sense, I think that it fulfils its obligation. So far as the facts are concerned, I find it impossible to hold that the plaintiff has shown on a balance of probabilities that this authority has not complied with that obligation. I need not refer to the correspondence in detail, but I think that on a fair reading the inference is irresistible that the authority had regard to the general principle in the sense indicated above. A

Finally, the point remains whether the breach of the obligation imposed by s. 76 [of the Education Act, 1944] enables a parent who has suffered injury to bring a civil action. While it is plain that the breach of some provisions of the Act would not give rise to a cause of action, I am certainly not prepared to say that no breach of any obligation imposed by the Act affords a cause of action to a parent who has suffered damage. To do so would be to fly in the face of authority and in particular in the face of the decision in *Gateshead Union v. Durham County Council* (1), a decision of this court. It is necessary, I think, in every case to consider the duty in question and, where the allegation is that there has been a breach of s. 76, to consider the duty in connection with which it is shown that the provisions of s. 76 have not been observed. Assuming, contrary to the conclusion I have reached above, that there is an obligation to pay full tuition fees at an independent school of the parent's choice, it seems to me that *Gateshead Union v. Durham County Council* (1) is directly in point and that an action would lie. On the other hand, if, as I think, the duty under s. 8 is merely to secure that facilities are available, the only remedy for a breach of that duty would be by action by the Minister on complaint under s. 99. I would dismiss the appeal. B C D

Appeal dismissed. E

Solicitors: *O'Brien & Brown*, agents for *Stapleton & Son*, Stamford (for the plaintiff); *Bircham & Co.*, agents for *J. E. Blow*, Stamford (for the defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

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MARTELL AND OTHERS v. CONSETT IRON CO., LTD.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ., and Vaisey, J.), December 7, 8, 9, 10, 13, 1954, February 3, 1955.]

B

Maintenance of Action—Common interest—Pollution action—Action brought by riparian owner and owners of fishing rights—Deeds of indemnity executed by trustee of anglers' association to provide for plaintiffs' costs—Application by defendants to stay proceedings.

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The Anglers' Co-operative Association, an unincorporated body, was formed to promote the interests of anglers and others interested in fisheries and inland waters. The association had some five thousand members, counting each member club (of which there were between seven and eight hundred) as a single member. The total of associated individuals, including members of member clubs, was about 250,000. The association had formed an incorporated trustee company, which the association wholly owned and controlled, for the purposes, among others, of managing the association's property and affairs and undertaking or assisting financially or otherwise in promoting or opposing litigation affecting anglers and others interested in fisheries and inland waters. A fighting fund had been established in the form of guarantees given by supporters, most of whom were members of the association. A member club applied to the association for help in connection with the alleged pollution of the River Derwent, county Durham, by effluents from the defendants' works. The association advised the club to arrange for the riparian owner to be joined as a co-plaintiff. She was enrolled as and continued to be a member of the association, her annual subscription being paid by the club, and she was the first plaintiff when the action was instituted. The trustee company executed two deeds of indemnity addressed to the first plaintiff and the six trustees of the club, who became the other plaintiffs in the action, undertaking to indemnify them against all liability from legal proceedings against the defendants for an injunction and damages in respect of the alleged pollution, on the understanding that the association should control the conduct of the proceedings. In the ensuing action by the seven plaintiffs against the defendants for an injunction and other relief, the defendants applied for a stay of the proceedings on the ground that the action was illegally maintained.

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Held: (i) a stay of the action was not the proper remedy in the case because the alleged maintainers were not before the court and the crime of maintenance had not been proved and, even if proved, would not have been a defence to the action (*Skelton v. Baxter* ([1916] 1 K.B. 321); *Hilton v. Woods* (1867) (L.R. 4 Eq. 432); and dictum of SIR WILLIAM JAMES, V.-C., in *Elborough v. Ayres* (1870) (L.R. 10 Eq. at p. 373) applied).

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(ii) (by JENKINS and HODSON, L.JJ.) in such a case as that of the pollution of a river, as distinct from a more personal wrong such as libel or slander, a wider conception of common interest justifying one person in assisting the prosecution of an action by another without committing the illegality of maintenance was justified; accordingly an association of persons individually interested, as riparian owners or holders of fishing rights, in the protection of the waters of rivers from pollution could lawfully support actions brought by individual members to restrain the pollution of rivers to which the interests of members related, as they had a legitimate and genuine business interest in the contributing of the financial support: and, therefore, illegal maintenance was not established in the present case.

Plating Co. v. Farquharson (1881) (17 Ch.D. 49), *Greig v. National Amalgamated Union of Shop Assistants, Warehousemen, & Clerks* (1906) (22 T.L.R. 274), and *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* ([1908] 1 K.B. 1006) applied.

Alabaster v. Harness ([1895] 1 Q.B. 339) and *Oram v. Hutt* ([1914] 1 Ch. 98) distinguished.

(iii) (by JENKINS and HODSON, L.JJ., VAISEY, J., dissenting) the association was not within the exception from illegality of maintenance which existed in favour of charity to permit the support of a poor man in the prosecution of his suit, as the protection of the recreation of angling was not a charitable object.

Per JENKINS, L.J.: (a) the crime of maintenance is committed whenever a third party aids the prosecution or defence of an action in the absence of circumstances sufficing in law to justify the giving of such aid, whatever the motive or purpose of the person giving such aid may have been, the element of impropriety or officious intermeddling being supplied by the fact of interference in the suit by giving aid to one party or the other, coupled with the absence of legal justification for so doing; while, on the other hand, the giving of such aid will not be criminal if it is justifiable in law by reference to one of the established specific exceptions, or if the person giving such aid has such an interest in the action as can be held in law sufficient to justify him in giving it (see p. 488, letter I, and p. 489, letter A, post).

(b) persons engaged in a particular trade, or in a particular profession, or individually possessed of proprietary interests of a particular kind, may lawfully form themselves into an association with a view to protecting at the expense of all, and if necessary by litigation at the common expense, the interests of each in the common field (see p. 499, letter D, post).

(c) even if some members of the association in the present case had no relevant interests (i.e., in the sense indicated at (b) above) justifying their lending financial support to an action to restrain the pollution of the river, yet, if the association was in substance a body of persons individually possessed of legal interests as riparian owners or holders of fishing rights or having other such relevant interests, so that it could fairly be held as a matter of substance to be supporting the action in defence of the collective interests of its members on the principle of mutual protection, then the association would not be guilty of illegal maintenance (see p. 501, letter F, post).

Decision of DANCKWERTS, J. ([1954] 3 All E. R. 339) affirmed.

[As to common interest in an action of Maintenance, see 1 HALSBURY'S LAWS (3rd Edn.) 40, para. 82; and for cases on the subject, see 1 DIGEST 79-84, 638-685.]

Cases referred to:

- (1) *Bradlaugh v. Newdegate*, (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 1 Digest 69, 569.
- (2) *Wallis v. Portland (Duke)*, (1797), 3 Ves. 494; 30 E. R. 1123; *affd.* H.L., (1798), 8 Bro. Par. Cas. 191; 3 E.R. 508; 1 Digest 68, 566.
- (3) *Findon (Finden) v. Parker*, (1843), 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S. 289; 7 J.P. 385; 152 E.R. 976; 1 Digest 81, 661.
- (4) *Fischer v. Naicker*, (1860), 8 Moo. Ind. App. 170; 2 L.T. 94; 19 E.R. 495; 1 Digest 82, 664.
- (5) *Master v. Miller*, (1791), 4 Term Rep. 320; 100 E.R. 1042; *affd.* Exch., (1793), 5 Term Rep. 367; 101 E.R. 205; 1 Digest 78, 631.
- (6) *Alabaster v. Harness*, [1895] 1 Q.B. 339; 64 L.J.Q.B. 76; 71 L.T. 740; 1 Digest 83, 681.
- (7) *Oram v. Hutt*, [1914] 1 Ch. 98; 83 L.J.Ch. 161; 110 L.T. 187; 78 J.P. 51; 1 Digest 84, 683.
- (8) *Neville v. London "Express" Newspaper, Ltd.*, [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 17 Digest (Repl.) 168, 638.
- (9) *Plating Co. v. Farquharson*, (1881), 17 Ch.D. 49; 50 L.J.Ch. 406; 44 L.T. 389; 45 J.P. 568; 1 Digest 83, 680.

- A (10) *Greig v. National Amalgamated Union of Shop Assistants, Warehousemen, & Clerks*, (1906), 22 T.L.R. 274; 1 Digest 84, 682.
- (11) *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.*, [1908] 1 K.B. 1006; 77 L.J.K.B. 649; 98 L.T. 875; 1 Digest 84, 685.
- (12) *Fitzroy v. Cave*, [1905] 2 K.B. 364; 74 L.J.K.B. 829; 93 L.T. 499; 1 Digest 76, 617.
- B (13) *Holden v. Thompson*, [1907] 2 K.B. 489; 76 L.J.K.B. 889; 97 L.T. 138; 1 Digest 82, 670.
- (14) *Baker v. Jones*, [1954] 2 All E.R. 553.
- (15) *Wild v. Simpson*, [1919] 2 K.B. 544; 88 L.J.K.B. 1085; 121 L.T. 326; Digest Supp.
- (16) *Skelton v. Baxter*, [1916] 1 K.B. 321; 85 L.J.K.B. 181; 114 L.T. 56; 9 B.W.C.C. 97; 1 Digest 68, 561.
- C (17) *Elborough v. Ayres*, (1870), L.R. 10 Eq. 367; 39 L.J.Ch. 601; 23 L.T. 68; 1 Digest 83, 678.
- (18) *Hilton v. Woods*, (1867), L.R. 4 Eq. 432; 36 L.J.Ch. 491; 16 L.T. 736; 31 J.P. 788; 1 Digest 86, 705.
- (19) *Allen v. Francis*, [1914] 3 K.B. 1065; 83 L.J.K.B. 1814; 112 L.T. 62; 7 B.W.C.C. 779; 3 Digest 329, 184.
- D (20) *Bobbey v. Crosbie & Co.*, (1915), 84 L.J.K.B. 856; 112 L.T. 900; *reversd.* H.L., 85 L.J.K.B. 239; 114 L.T. 244; 9 B.W.C.C. 142; 34 Digest 240, 2056.

Appeal.

This was an appeal by the defendants against an order of DANCKWERTS, J., dated Oct. 22, 1954, and reported [1954] 3 All E.R. 339, dismissing an application by the defendants that all proceedings might be stayed in an action for an injunction and damages for the alleged pollution of the River Derwent, county Durham, on the ground that the action was illegally maintained and was oppressive and vexatious and an abuse of the process of the court. The facts appear in the judgment of JENKINS, L.J.

Sir Andrew Clark, Q.C., and *K. J. T. Elphinstone* for the defendants.
Charles Russell, Q.C., and *G. H. Newsom* for the plaintiffs.

Cur. adv. vult.

Feb. 3. The following judgments were read.

JENKINS, L.J.: The plaintiffs in the action in which this appeal arises are the first plaintiff, Mrs. Laline Marguerite Lucie Martell, who is the estate owner in fee simple and beneficial tenant for life of certain areas of land on either bank of the River Derwent at or near Consett in the county of Durham, and six other persons who, as trustees for an unincorporated society known as the Derwent Angling Association, hold a yearly tenancy granted by the first plaintiff's predecessor in title of the right of fishing in the waters of the River Derwent, to which the first plaintiff's riparian interests extend. The defendants are the Consett Iron Co., Ltd., who maintain and operate certain works near the River Derwent at a point upstream of the first plaintiff's riparian property.

The plaintiffs' claim in the action is for an injunction and damages in respect of the alleged pollution of the waters of the River Derwent flowing past or over the first plaintiff's land by the discharge into the river, through a tributary known as the Howden Burn, of heated and noxious effluents from the defendants' works. The appeal is brought by the defendants from an order of DANCKWERTS, J., dated Oct. 22, 1954, refusing an application by the defendants that all proceedings in the action might be stayed until further order, on the ground that it was illegally maintained and was oppressive and vexatious and an abuse of the process of the court.

The general allegations to the effect that the action is oppressive and vexatious and an abuse of the process of the court are grounded solely on the allegation of illegal maintenance. The defendants' contention is that the action is being

illegally maintained and is for that reason alone an action which is oppressive and vexatious and an abuse of the process of the court and should, accordingly, be stayed unless and until it ceases to be so maintained. The persons by whom the action is said to be illegally maintained are an unincorporated body known as the Anglers' Co-operative Association (hereinafter referred to as "A.C.A.") and a company known as the A.C.A. Trustee Co., Ltd. (hereinafter referred to as "the trustee company").

A.C.A. was formed in 1948, and is governed by rules, of which r. 1, headed "Objects", is in these terms:

"The objects of the association are: (a) To promote and protect the interests of anglers, the owners and occupiers of fisheries (actual or potential) in Great Britain and Northern Ireland and to assist such owners and occupiers (financially or otherwise) to secure the protection of the law against any invasion of their legal rights. (b) To watch over, maintain and improve the condition, purity and volume of rivers, lakes and other fresh water, and of the coastal sea water in and around Great Britain and Northern Ireland. (c) To promote, encourage and assist improvements in methods of preventing pollution and of purifying effluents generally and research in such matters and all other matters affecting angling, fish culture and kindred subjects."

Rules 2 to 12, headed "Membership and subscriptions", contain a number of provisions concerning these matters. Rules 2 and 3 are in these terms:

"Membership and subscriptions. 2. Any person, firm, incorporated company, club, or association interested in angling, fish culture, the manufacture or sale of fishing tackle or accessories, catering for the condition, purity or volume of inland or coastal waters, shall be qualified to be a member of this association. 3. The membership shall consist of ordinary members, trade members and club members, and such other class or classes as the committee shall determine."

The remaining rules in this group include provisions under which the annual subscription for an ordinary member is £1 with reductions in certain cases, the subscription for life ordinary membership is £10 and the subscription for club membership is at a graduated rate, according to the membership of the club, with a minimum of £1 1s. for a club with a membership of fifty or less and a maximum of £10 10s. for a club with a membership of more than five hundred. Trade membership is thus defined in r. 8:

"8. Trade members shall be persons, firms and companies engaged or interested by way of trade or business in the manufacture or sale of fishing tackle, accessories or gear, fish culture or in catering or any other trade or business connected directly or indirectly with angling."

Rule 9 provides that the annual subscription for a trade member shall be such a sum not being less than £1 1s. as the committee shall assess.

The rules also provide for the constitution of a council of the association, by which, under r. 19, "the policy of the association shall be determined and controlled", and for the management of the affairs of the association by a committee which, under r. 28,

"shall have control of the finances and affairs of the association and shall have absolute discretion in administering the funds of the association in accordance with its objects and the policy laid down by the council, or otherwise carrying out the objects of the association"

under the rules. The rules also contain (in r. 25) provisions designed to ensure that the members for the time being of the committee shall also constitute the board of directors of the trustee company, their qualification shares being paid out of the funds of, and held in trust for, the association, and liable to transfer as directed by the committee on the holder vacating office.

A The trustee company was incorporated on June 5, 1949, with a nominal capital of £100 divided into two thousand shares of 1s. each, of which twelve shares have been issued for cash. Eight of these shares are held by the eight directors of the trustee company who hold one share each. The main objects of the trustee company as set out in cl. 3 of its memorandum of association are the following:

B “ 3. (1) To manage the property and affairs of the Anglers’ Co-operative Association. (2) To hold in trust for the benefit of the members from time to time of the said association . . . the whole assets and undertaking of the association . . . (3) To promote and protect the interests of anglers, the owners and occupiers of fisheries and land under water, and all persons, companies, firms, clubs and associations and other organisations concerned or interested or engaged in or connected directly or indirectly with the sport of angling . . . (4) To watch over, maintain and improve the condition, purity and volume of all rivers, lakes and other fresh water in Great Britain and Northern Ireland which now contain . . . fish . . . (13) To undertake or assist financially or otherwise in promoting or opposing litigation in any cases affecting the interests of anglers, fishery owners, and others interested in angling, the preservation, improvement or purity of fresh water fisheries or any inland water in Great Britain and to indemnify any members of the association in respect of any action taken or to be taken or defended or to be defended or any liability incurred or to be incurred by him in any case in which the association may consider it conducive to the interests of its members so to do, so far as may legally be done without infringing the law against maintenance and champerty . . . (19) To provide or procure for members of the association such insurance or indemnities as may be required by the association for the benefit of its members and generally to act as insurance agents or brokers for the association and its members.”

E

The articles of association of the trustee company include the following provisions as to directors:

F “ 14. So far as may legally be practical and possible the directors of the company shall be the persons from time to time constituting the officers and committee of the association elected in conformity with the rules thereof. 15. The qualification of a director shall be that he is an elected officer or member of the committee of the association and the holder of one of the said shares of the company.”

G A.C.A. has some five thousand members, on the footing that each club member is counted as one, but there are between seven hundred and eight hundred club members, and, if each member of each of these clubs is taken into account, the total number of persons associated with A.C.A., either directly as members of it themselves or indirectly as members of clubs who are members of it, is of the order of 250,000. During the period since its formation, A.C.A. has conducted, by means of pamphlets and periodicals and other forms of publicity, an active campaign against the pollution of rivers by industrial effluents, sewage, and so forth, and has frequently lent its support to negotiations or litigation directed to the prevention of pollution in particular cases. There is nothing in the rules of A.C.A. to confine the giving of assistance of this sort to members of the association, but I understand that, as might be expected, it has in practice been so confined.

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A.C.A., in conjunction with the trustee company, has established a fighting fund in the form of guarantees given by supporters to the trustee company, whereby the guarantors undertake to contribute up to a specified amount towards any sum which the trustee company may be called on to pay, under any guarantee or indemnity given by the trustee company, in respect of the costs of an action to stop or prevent pollution. It appears that, as a general rule, the persons giving guarantees for the fighting fund would either be, or on the occasion

of giving the guarantee become, members of A.C.A., but it is not clear that there have not been cases in which guarantees by non-members have been given and accepted. A.C.A. has also, in the course of its campaign, solicited donations as well as exhorting new members to join its ranks, and it would seem that donations have been accepted from members and non-members alike. Membership of A.C.A. is not confined to persons having legally enforceable interests as riparian owners or owners or lessees of fishing rights. Nor, indeed, is such membership confined to anglers, as is sufficiently shown by the wide terms of r. 2, ante.

The Derwent Angling Association has a maximum membership of 150 and its present strength is slightly under that figure. Its members are drawn mainly from weekly wage earners, such as miners, steel workers and shop assistants, in the district, with an average income of some £8 per week. The subscription is 10s. yearly, reduced to 5s. in the case of old age pensioners. The Derwent Angling Association became a club member of A.C.A. in 1949. In or about the following year, it applied to A.C.A. for assistance with regard to the alleged pollution of the River Derwent by effluent from the defendants' works, and was advised by A.C.A.'s solicitors that arrangements should, if possible, be made for the riparian owner (i.e., the first plaintiff) to join as a plaintiff in any proceedings. The first plaintiff's assent to this course (on terms that the Derwent Angling Association was not to look to her for any costs) was obtained in June, 1951, and she became, on or about Oct. 23 of that year, and has since continued to be, a member of A.C.A., her annual subscription of £1 being paid by the Derwent Angling Association.

On Oct. 29, 1951, the trustee company executed two deeds of indemnity addressed respectively to the first plaintiff and the trustees of the Derwent Angling Association which are relied on by the defendants as constituting illegal maintenance of the present action. The indemnity given to the first plaintiff was in these terms:

"The A.C.A. Trustee Co., Ltd., hereby undertake to indemnify you as a member of the A.C.A. against all costs, charges, expenses and liability which may be incurred by you and may not be recovered from the defendants in connection with the claim and consequent legal proceedings by you either alone or jointly with any other person or persons against the Consett Iron Co., Ltd., for an injunction and/or damages in respect of the pollution of the River Derwent (county Durham) provided that the A.C.A. shall be entitled to control the conduct of such proceedings in your name and for that purpose to retain solicitors, counsel and expert witnesses on your behalf and to require you to settle compromise or discontinue such proceedings at any time or to refrain from doing any of such things and in the event of your refusing or failing so to do or if you shall cease to be a member of the A.C.A. this undertaking shall thereupon become null and void save as to any costs, charges and expenses incurred on your behalf up to the date of such refusal or failure and not recoverable against the defendants."

Then it was given under the common seal of the trustee company. The indemnity given to the trustees of the Derwent Angling Association was in precisely similar terms, save that it was limited to costs, charges and expenses and liability in excess of £50.

The writ in the action was not in fact issued until Jan. 7, 1954. The documents disclosed by the plaintiffs under the usual order for discovery included the two indemnities of Oct. 29, 1951, and the disclosure led the defendants to make the application for a stay of proceedings to which the present appeal relates.

The defendants' case, as opened by their counsel, was to the effect, first, that the instigation by A.C.A. of the joinder of the first plaintiff as a plaintiff in the action amounted to illegal maintenance of the action by A.C.A. so far as the first plaintiff was concerned, and, secondly, that the giving of the two indemnities of Oct. 29, 1951, by the trustee company amounted to illegal maintenance of the

- A action by A.C.A. and/or the trustee company as regards all the plaintiffs. The separate allegation of illegal maintenance quoad the first plaintiff, as distinct from the remaining plaintiffs, can be shortly disposed of. In my view, it is plain that, if all A.C.A. had done had been to advise the Derwent Angling Association to procure the joinder of the first plaintiff as a co-plaintiff with their trustees, there could, as the law now stands, be no sufficient ground for holding
- B that in so doing A.C.A. had been guilty of illegal maintenance. Moreover, the separate allegation of illegal maintenance quoad the first plaintiff adds nothing to the defendants' case, for, if the trustee company was not acting illegally in giving the two indemnities of Oct. 29, 1951, a fortiori A.C.A. was not acting illegally in advising the joinder of the first plaintiff, while, conversely, if the giving of the two indemnities did amount to illegal maintenance quoad all the
- C plaintiffs, or, for that matter, quoad the first plaintiff as distinct from the others, the question whether the giving of the advice as to the joinder of the first plaintiff could also be held to amount to illegal maintenance quoad the first plaintiff would be immaterial.

- One other preliminary point requires notice. The two indemnities were given, not by the unincorporated association A.C.A., but by its trustee company, the
- D A.C.A. Trustee Co., Ltd. The trustee company is, of course, a distinct legal entity. The argument for the defendants, as I understood it, did not seek, however, to draw any distinction on this ground with a view to excluding the trustee company from the benefit of any justification A.C.A. might have had for giving the indemnities, if they had been given by A.C.A. itself. In other words, I take it to be accepted on the part of the defendants that, for the present
- E purpose, A.C.A. and the trustee company should, in effect, be treated as one, so that, if what was done by the trustee company could have been lawfully done by A.C.A., it should equally be regarded as lawfully done by the trustee company. At all events, I think this is, for the present purpose, the right way of treating the relationship between the trustee company and A.C.A. The trustee company is, as I understand the facts, wholly owned by A.C.A. and was formed and is
- F operated by A.C.A. simply and solely as an instrument to facilitate the carrying out of the objects and purposes of A.C.A.

- These preliminary matters being out of the way, the substantial arguments presented by counsel for the defendants may be thus summarised : (i) Maintenance is a common law misdemeanour punishable by fine and imprisonment. It is also at common law a tort actionable by any person who can show he has
- G suffered damage thereby. It is also a crime under various ancient statutes, but for the present purpose no reliance is placed on its character as a statutory offence as distinct from a misdemeanour at common law. (ii) With the exceptions mentioned below, the crime and tort of maintenance is committed by any person who gives financial support to the plaintiff or defendant in any action to which that person is not a party. (iii) There are certain specific exceptions to this
- H general rule, of which the only one that could conceivably be suggested as having any relevance here is the exception allowed in favour of a person who, out of charity, supports a poor man in the prosecution or defence of a suit. It is, however, submitted that this exception is not available to A.C.A. or the trustee company in the present case. The first plaintiff is plainly not an object of charity. The members of the Derwent Angling Association are no doubt persons of
- I limited means, but the assistance given to them in the present action cannot properly be held to be charitable within the meaning of the exception, which should, it is submitted, be confined to cases where the assistance given can fairly be brought within the head of legal charity comprising the relief of poverty. Even if the members of the Derwent Angling Association might, by reference to their individual resources, be classed as "poor" so as to bring within this exception the giving of assistance to them individually in the prosecution or defence of some kinds of actions, the object of the present action is not to relieve

them individually in any matter touching their necessities of life or means of livelihood, but merely to preserve their collective enjoyment of a particular form of recreation. (iv) Apart from the specific exceptions, maintenance by a third party of the prosecution or defence of an action can only be excepted from the general condemnation of maintenance as a criminal and tortious act if the maintainer has an interest in the action. But authorities binding on this court show that the interest required in order to bring a case within this exception is "an actual valuable interest in the result of the suit itself", or "an interest recognised by the law in the subject-matter of the action or some issue between the parties to the action". The members of A.C.A., other than the plaintiffs in the present action, have not, either individually or collectively, any such interest in the present action. (v) It follows that A.C.A. and the trustee company are, in relation to the present action, guilty of the crime and tort of maintenance. (vi) It follows, further, that the court should stay all further proceedings in the action until it is purged of all taint of maintenance; for the court should not lend itself to proceedings which owe their origin and continuance to a crime, and which are, as such, an abuse of the court's process, besides being vexatious and oppressive to the defendants as the party against whom the criminal act is directed.

The earlier authorities on this curious branch of the law are reviewed in the judgment of LORD COLERIDGE, C.J., in the famous case (decided in 1883) of *Bradlaugh v. Newdegate* (1), and I do not propose to refer to them at length. It is, however, worth noting that, whereas in *Wallis v. Duke of Portland* (2) (decided in 1797), one finds LORD LOUGHBOROUGH, L.C., roundly declaring that (3 Ves. at p. 502):

"... maintenance is not *malum prohibitum*, but *malum in se*: ... parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense",

and qualifying this general statement only by reference to the established specific exceptions, LORD ABINGER, C.B., in *Findon (Finden) v. Parker* (3) (decided in 1843) uses much less sweeping language. He said (11 M. & W. at p. 682):

"The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make."

It will be seen that this definition makes impropriety in the motive or purpose of the maintainer an essential element in the offence. The same notion appears in other definitions noticed by LORD COLERIDGE in *Bradlaugh v. Newdegate* (1) (11 Q.B.D. at pp. 5 and 6). Thus BLACKSTONE is there cited as calling maintenance

"an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it"

and STORY as terming it

"the officious assistance by money or otherwise, proffered by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it."

On the authorities as they now stand, I think that LORD LOUGHBOROUGH's general condemnation of all aid by third parties in suits of any kind, except in cases falling within one or other of the established specific exceptions, must be regarded as too wide, while LORD ABINGER's more cautious definition of the offence as confined to cases where there is some impropriety of motive or purpose on the part of the maintainer must be regarded as too narrow. In the present state of the authorities, the right view appears to be that the crime of maintenance is committed whenever a third party aids the prosecution or defence of an action

- A in the absence of circumstances sufficing in law to justify the giving of such aid, whatever the motive or purpose of the person giving such aid may have been, the element of impropriety or officious intermeddling being supplied by the fact of interference in the suit by giving aid to one party or the other, coupled with the absence of legal justification for so doing; while, on the other hand, the giving of such aid will not be criminal if it is justifiable in law by reference to one of the specific exceptions, the existence of which I have already noticed, or if the person giving such aid has such an interest in the action as can be held in law sufficient to justify him in giving it.
- B This, I think, appears from the judgment in *Bradlaugh v. Newdegate* (1) itself. LORD COLERIDGE, C.J., said (11 Q.B.D. at p. 9):

- C "It results, I conceive, from all these cases, and the number might be largely increased, that to bind oneself after the commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance; and that for such maintenance an action will lie. It is said, however, that this general statement requires two qualifications: first, that the acts of the maintainer must be immoral, and that the maintainer must have been actuated by a bad motive; next, that if he has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, cease to be so."
- D Then on the question of bad motive, he said, referring to the decision of the Privy Council (8 Moo. Ind. App. at p. 187) in *Fischer v. Naicker* (4) (11 Q.B.D. at p. 10):

- E "The words are remarkable 'it (i.e., maintenance) must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary.' The decision of the House of Lords shows, I think, that Mr. Newdegate's conduct was against good policy and justice, and tended to promote unnecessary litigation—but what is immoral in a legal sense? What in a legal sense is a bad motive? It is not perhaps quite easy to say";
- F and a little further on LORD COLERIDGE, C.J., said:

- G "At least in any view it must mean as much as this, that to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive. In this sense I do not hesitate to call Mr. Newdegate's conduct immoral and his motive bad."

On the question of common interest, he said (11 Q.B.D. at p. 11):

- H "It is said, however, that the defendant had or believed that he had a common interest with Mr. Clarke in the result of the suit, and that, therefore, his finding Mr. Clarke the whole money for the litigation was not maintenance. As a general rule there is no doubt that such common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. BROOKE, FITZHERBERT, ROLLE, HAWKINS, VINER, COMYNS, to cite no more, all concur in this. BULLER, J., in his celebrated judgment in *Master v. Miller* (5) strongly insists upon it. But then the instances they give show the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he
- I

would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, e.g., as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them."

I should next refer to *Alabaster v. Harness* (6), on which counsel for the defendants strongly relies. This was an action for maintenance brought by the proprietors of a newspaper in respect of an action for libel unsuccessfully brought by one, Dr. Tibbits, against the plaintiffs at the instigation and with the financial assistance of the defendants, one Harness and a company of which he was managing director. The defendants had employed Dr. Tibbits to report as an expert on certain electrical appliances for the treatment of disease, in the sale of which the defendants were interested, and he had reported favourably thereon. The alleged libel was contained in an article commenting adversely on the report and casting serious reflections on Dr. Tibbit's qualifications as an expert and on his conduct and that of the defendants in connection with the report and the sale of such appliances. The company having gone into liquidation, the maintenance action proceeded against the defendant Harness alone. It was contended on behalf of the defendant Harness that the maintenance action should fail on the ground that the case fell

"within a well-established exception to the rule against maintenance, inasmuch as the defendant [Harness] had a common interest with Dr. Tibbits in the result of the action by the latter",

because the article complained of therein attacked the defendant Harness as well as Dr. Tibbits. It was also contended for the defendant Harness

"that the result of the authorities is that a belief on reasonable grounds in the existence of a common interest is sufficient to justify maintenance, although no interest recognised by law exists",

and that, in order to constitute maintenance, there must be a mens rea, something in the nature of an immoral motive. The Court of Appeal, affirming *HAWKINS, J.*, rejected both these contentions. *LORD ESHER, M.R.*, said ([1895] 1 Q.B. at p. 342):

"The doctrine of maintenance, which appears in the Year Books, and was discussed briefly by *LORD LOUGHBOROUGH* in *Wallis v. Duke of Portland* (2), and more elaborately by *LORD COLERIDGE, C.J.*, in *Bradlaugh v. Newdegate* (1), does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful. *LORD LOUGHBOROUGH*, in *Wallis v. Duke of Portland* (2), says that the rule is . . ."

—then he cites the passage which I have already quoted (see p. 488, letter E), and goes on:

"But the law from the earliest times has countenanced some relaxation of the utmost strictness of that rule; and some particular cases have been specifically allowed as constituting excuses for that interference in the suit of another which would otherwise have amounted to maintenance. There are some cases in which a landlord has been allowed to maintain his tenant

- A in a litigation. It matters not, as it appears to me, for what reason this exception was made. It must be treated now as an exception founded upon specific authority, which all courts have adopted on the strength of that authority. Then there is the exception which has been made on the ground of charity. There are other exceptions. All of them are exceptions which
- B into the text-books on the subject; but, if a case is not within any one of these specific exceptions established by authority, it seems to me difficult to say otherwise than that it must fall within the strict rule. If, however, it is open to us to go beyond the exceptions which have been specifically allowed, I should adopt the rule indicated as the result of the cases by LORD COLERIDGE, C.J., in *Bradlaugh v. Newdegate* (1) . . .”
- C Then LORD ESHER quoted the passage from LORD COLERIDGE’s judgment, to which I have already referred (see p. 489, letter C), and he continued ([1895] 1 Q.B. at p. 343):

“The present case is clearly not within the grounds of exception there mentioned by LORD COLERIDGE, and it is within the general rule enunciated by LORD LOUGHBOROUGH in *Wallis v. Duke of Portland* (2). I am not disposed to extend the exceptions from the rule against maintenance, and the present case appears to me to be as strong a case of maintenance as could be. The defendant instigated an action, the verdict in which could not affect him, on account of some fancied interest which was not an interest at all. Adopting the test laid down by LORD COLERIDGE, C.J., I think that the only interest which could have justified him in what he did would be some interest recognised by the law in some matter at issue in the suit. The defendant had no such interest. For these reasons, I think the appeal must be dismissed.”

LOPES, L.J., said ([1895] 1 Q.B. at p. 344):

- F “It is said that in this case the defendant was justified in his maintenance of Dr. Tibbits’ action because he had a common interest with him. In my opinion, he had no such common interest as could justify his interference in the action. In order to justify such interference on the ground of common interest, I think there must be some interest recognised by the law in what is called by HAWKINS in his *PLEAS OF THE CROWN* ‘the thing in variance’; by which I understand an interest in the subject-matter of the action at issue
- G between the parties. In my opinion, there must be some legal, as distinguished from a sentimental, interest in the result of the action about to be tried, or in some question at issue between the parties in the action. The matter in issue in the action brought by Dr. Tibbits was whether the plaintiffs had libelled him. No question arose as between the defendant and the plaintiffs. It seems to me that it would be strongly against public policy
- H that in such a case persons who have no interest whatever in the action, and who cannot be affected by the verdict in it, or made liable to pay costs, should be allowed to assist another person in maintaining it against the plaintiffs, as the defendant has done. The ground on which the defendant’s conduct was sought to be justified was, as I have said, the existence of a common interest. There are no doubt other cases recognised by the law as exceptions from the rule against maintenance, such as those of consanguinity, affinity, charity, and the relation of master and servant, none of which are here in question. These are exceptions which have been long introduced and are well recognised; but I must say that I should be sorry to see any new exceptions engrafted on the rule.”
- I

RIGBY, L.J., said (*ibid.*, at p. 345):

“I do not feel called upon in this case to attempt the difficult task of defining what constitutes maintenance. The general rule is clear and has

been laid down over and over again in the authorities on the subject. The difficulty arises on account of the very various exceptions which have been allowed by judicial decisions to be defences where the general rule has been violated. I am unable to reduce those exceptions to any simple rule. We were asked by the defendant's counsel to say that the various exceptions from the rule could all be accounted for by saying that a mens rea was essential to maintenance, i.e., that there could be no infringement of the law against maintenance unless it was shown that the particular defendant had done something which he knew to be wrong; for it was argued that, though what he did was really wrong, if he believed it to be right, it was enough. That argument seems to me to go so far as to defeat itself. I am content to express a general concurrence with the passage cited by the Master of the Rolls from the judgment of LORD COLERIDGE, C.J., in *Bradlaugh v. Newdegate* (1), with regard to what constitutes an excuse for maintenance . . . The present case appears to me to be a very clear case of maintenance which does not fall within any of the exceptions from the general rule against maintenance. I cannot accept the contention that, whenever questions which affect a person not a party to an action incidentally arise in the action, the case falls within the exception from the rule as being one where there is a common interest. In any case I should have grave doubts whether a person who is really the author of the litigation could claim the benefit of an exception depending on the fact that in an action which he has himself instigated certain questions affecting him may incidentally arise."

Next in the sequence of the argument of counsel for the defendants, though not in order of date, comes the case in this court of *Oram v. Hutt* (7). The question in that case was whether the payment by a trade union of the costs of a slander action brought by one of its officers who had been slandered by way of his office as well as personally was obnoxious to the law of maintenance and ultra vires, and it was held, following *Alabaster v. Harness* (6) and affirming SWINFEN EADY, J., that this question must be answered in the affirmative. LORD PARKER OF WADDINGTON said ([1914] 1 Ch. at p. 104):

"In my opinion SWINFEN EADY, J., was bound and this court is bound to hold this agreement void unless this case can be distinguished from the case of *Alabaster v. Harness* (6). Several grounds of distinction were suggested in argument, but upon consideration I think there is little substance in them. A person who maintains the action of another can only justify by proving the existence of a common interest or bringing himself within certain recognised exceptions to the common law rule. A common interest means an interest recognised by law in the subject-matter of the action or some issue between the parties to the action. It was decided in the case in question that a libel action is a personal action which in point of law concerns only the parties to it—the matters legally at issue are merely whether the plaintiff has been libelled, and if so to what damages he is entitled. The mere circumstance that in the libel action there must or may arise questions of fact in the determination of which a third party has an interest will not constitute a common interest sufficient to justify maintenance by such third party."

LORD SUMNER said (*ibid.*, at p. 106):

"That the action of maintenance is now in small favour and that indictments for maintenance have been drawn by few among living men are nothing to the point. Maintenance has not ceased to be a part both of the law of torts and of the law of crimes . . . There is no question here of the business of insurance or of mutual protection associations. I think it makes no difference to the validity of the payment whether the association paid Mr. Johnson money for the action in advance, or paid him sums as it proceeded, or promised to pay his bill of costs when it was over and did so,

A thus giving effect to an unlawful contract . . . In this action it had no legal interest: to its fruits it had no legal right; the wrong that that action was brought to vindicate was no wrong done to the association . . . They possessed identical causes of action; they had a common aim, namely, the confutation of McNicholas and his reduction to silence. But a common cause is not a common interest. Victory for either would serve the other's turn. Doubtless it did not much matter which sued, if one judgment against McNicholas was obtained. Still their wrongs, their causes of action, their damages, and their costs were all separate. The association had no right to fight Mr. Johnson's battles. *Alabaster v. Harness* (6), in my opinion, so far as the question of maintenance is concerned, covers this case."

C WARRINGTON, J., delivered a concurring judgment, in which he held the question to be concluded by the decision in *Alabaster v. Harness* (6).

To complete the tale of authorities mainly relied on by counsel for the defendants, I should next refer to *Neville v. London "Express" Newspaper, Ltd.* (8). That case concerned an action for maintenance brought by Mr. Neville against London Express Newspapers, Ltd., in briefly the following circumstances. In the course of developing certain land for sale in plots as a building estate, Mr. Neville induced large numbers of persons to contract for the purchase of plots by means of representations which London Express Newspapers, Ltd., stigmatised in their newspaper as fraudulent, offering at their own expense to take proceedings against Mr. Neville on behalf of any of the persons defrauded who sent in their names to the company's solicitors. In the result proceedings financed by the company were successfully taken against Mr. Neville by a large number of persons. In the meantime Mr. Neville brought an action for libel (with which we are not concerned) and maintenance against the company. Mr. Neville succeeded in this action in the court of first instance, but the Court of Appeal allowed an appeal by the company and ordered a new trial, and from that decision Mr. Neville appealed to the House of Lords.

F Two questions arose in the appeal, viz., (i) whether an action for maintenance would lie in the absence of proof of special damage and (ii) whether the success in a maintained action of the party maintained was a bar to the right of action for maintenance. A majority of the House (LORD FINLAY, L.C., and LORD SHAW OF DUNFERMLINE and LORD PHILLIMORE, VISCOUNT HALDANE and LORD ATKINSON dissenting) answered the first question in the negative. A differently constituted majority (LORD FINLAY, L.C., VISCOUNT HALDANE and LORD ATKINSON, LORD SHAW OF DUNFERMLINE and LORD PHILLIMORE dissenting) answered the second question also in the negative. The nature of the two questions involved in the appeal was not such as to call for any critical examination of the character or degree of the interest in an action which a third party assisting the plaintiff or defendant in such action, and not falling within any of the specific exceptions, must possess, in order to repel a charge of illegal maintenance. It was, I should have thought, as plain as it well could be that the company had no interest whatever in the actions brought against Mr. Neville by the defrauded purchasers, and equally plain that the company could not bring itself within any of the specific exceptions, though the exception in favour of charity seems to have been suggested. The points in the case were simply whether it was of the essence of the offence of maintenance, not only that the maintaining party should have no interest in the action and not be within any of the specific exceptions, but also that the maintained party should be found to have had no valid claim or defence as the case might be: and further whether the offence of maintenance constituted an actionable tort without proof of special damage. The majority decision of the former point in a negative sense left the position regarding the definition of the crime of maintenance, and in particular regarding interest in the action as an exculpation or defence available to a

person charged with illegal maintenance, substantially as it stood under the earlier authorities. The majority decision of the latter point in a negative sense prevents counsel for the defendants at this stage from pointing to an actionable tort, but that does not materially affect his case. He could not prove the tort without proving the crime, which is the basis of the tort, and it is enough for the purposes of his argument if he can prove the crime. The support for counsel's argument afforded by *Neville v. London "Express" Newspaper, Ltd.* (8), is, I think, adequately summarised by saying: (i) that it is a decision of a majority of the House to the effect that the success of the maintained action is no answer to a charge of illegal maintenance; and (ii) that it confers the express or implied approval of a majority of the House on the decisions in *Alabaster v. Harness* (6) and *Oram v. Hutt* (7). On the other hand, counsel for the plaintiffs can justly say that *Neville v. London "Express" Newspaper, Ltd.* (8), contains no indication of disapproval of the three cases to which I am about to refer.

In *Plating Co. v. Farquharson* (9) the question was whether the publishers of a newspaper were guilty of contempt of court in publishing, at the instance of defendants who were appealing from a judgment given against them in an action for infringement of a patent for nickel plating, an advertisement inviting subscriptions from the trade towards the expense of the appeal and offering a reward of £100 to anyone who could procure documentary evidence that nickel plating had been done before 1869. The motion by the plaintiffs to commit the publishers for contempt was made on the ground that the advertisements tended to interfere with the course of justice, but in dealing with that general allegation it was necessary for the court to consider whether there was any impropriety in the solicitation by the defendants by means of such advertisements of financial support from the trade in the prosecution of their appeal. In other words, it was, I think, necessary for the court to consider, in effect, whether in publishing such advertisements the publishers were lending themselves to the solicitation by the defendants of illegal maintenance. SIR GEORGE JESSEL, M.R., in the course of his judgment refusing the motion, in which the other members of the court concurred, said (17 Ch.D. at p. 54):

"All the trade is interested in freeing the trade from monopoly of any kind, whether by patent or otherwise; and we know that it is customary for the members of a trade to combine for that purpose, on the same principle that people claiming a right of common are allowed to combine to assist a defendant who is interfered with by the lord, on the ground that right of common does not exist, the doctrine being that where you have a common interest you have a right to contribute to the defence. It is, within my certain knowledge, and has been for many years, a common practice that if a patentee attacks one manufacturer the other manufacturers combine together to defend the case, so that the whole expense shall not be thrown on the one that is attacked. Otherwise, they might be attacked in detail, and although it might be a bad patent, they might all lose their cases owing to the great expense of defending them effectually."

In *Greig v. National Amalgamated Union of Shop Assistants, Warehousemen, & Clerks* (10) the plaintiff had dismissed an employee of his named Rumins, who was a member of the defendant union, and the union had brought proceedings in Mr. Rumins' name against the plaintiff for a week's salary due to Mr. Rumins, and for damages in respect of an alleged libel on Mr. Rumins by the plaintiff. The claim for the week's salary succeeded but the claim for damages for libel failed. The plaintiff thereupon sued the defendant union for maintenance in respect of the claim for libel, and LORD ALVERSTONE, C.J., held the defendant union liable, but in the course of his judgment he said (22 T.L.R. at p. 275):

"Rumins's original statement of complaint to the union was a perfectly proper one, and, if the union had merely taken the proper steps to protect

A his interest in recovering the wages due, he did not think—though he would not actually decide the question—that an action such as this would lie. The original intervention of the union appeared to him to be legitimate and justifiable, and no complaint could be made of its action in assisting him to obtain his wages. So far the matter was clear.”

B In *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) the defendants, who were manufacturers of cash-conveying equipment for use in shops, secured business from customers of a rival concern on terms that the defendants would indemnify these customers from, and support their defence of any action brought against them in respect of, any breach of their contracts with the rival concern involved in their so transferring their custom. Actions were in fact brought by the rival concern against the customers concerned and the defendants paid the damages and costs payable by the customers as they had agreed to do. The rival concern then brought an action for illegal maintenance against the defendants, and the Court of Appeal, reversing the decision of the trial judge, who had directed judgment to be entered for the plaintiffs for nominal damages and granted an injunction, held that the action should be dismissed.

C SIR HERBERT COZENS-HARDY, M.R., said ([1908] 1 K.B. at p. 1011):

D “Apart from the injunction, we have had a very learned argument in support of the view that the conduct of the defendants in the three instances I have described gave the plaintiffs a common law action for maintenance. I am unable to accept this contention. Beyond all doubt there was a time when what the defendants did would have been regarded as criminal. But there is little use in citing ancient text-books on this branch of law. The law has been modified in accordance with modern ideas of propriety. The language of LORD ABINGER in *Findon (Finden) v. Parker* (3) is explicit.”

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Then he cites the passage to which I have already referred (see p. 488, letter F), and he continues ([1908] 1 K.B. at p. 1012):

F “And in the sixty-five years which have elapsed since *Findon (Finden) v. Parker* (3) this principle has been carried even further. I may refer also to *Fitzroy v. Cave* (12). It is common knowledge that contracts of indemnity are recognised and unquestionably valid, and none the less because they may involve and indeed contemplate the institution or the defence of an action. The whole business of marine insurance depends upon this. And perhaps the familiar insurances against claims under the Workmen's Compensation Act are a still better example. In my opinion all that was done by the defendants falls under and is protected by this principle. The defendants had a business interest, a commercial interest, which fully justified the indemnities or guarantees which they gave. And on this short ground I think the appeal must be allowed, and judgment entered for the defendants.”

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FLETCHER MOULTON, L.J., said ([1908] 1 K.B. at p. 1013):

I “The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete. As pointed out by the present Master of the Rolls in *Fitzroy v. Cave* (12), the purchase of a chose in action amounted to maintenance in the olden times, and therefore was not only a civil wrong, but a crime. Yet for hundreds of years such transactions have been held valid, and the rights arising out of them have been enforced by the courts

of equity and are now enforceable in all the courts of the realm. Similarly in olden times it was maintenance to give evidence without being subpoenaed so to do. Today it is looked upon as part of the duty of citizens to be ready and willing to assist the administration of justice by giving evidence when they can do so usefully. In the presence of changes such as these it appears to me to be idle to look upon the courts as administering the old common law as to maintenance. The present legal doctrine of maintenance is due to an attempt on the part of the courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. The position of the courts in this respect is not unlike that which may be observed in their treatment of contracts in restraint of trade, though the change of view with regard to maintenance is far more complete. Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful. They suffer from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day, and these old definitions are sought to be made serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. These exceptions only indicate such cases as have suggested themselves to the mind of the court, and it is impossible to be certain that there are not many other exceptions which have equal validity."

Then, after a reference to *Holden v. Thompson* (13), which counsel for the defendants criticises on the ground that the learned lord justice mistakenly treated that case as having decided that community of religion constituted a sufficient common interest for the purposes of the law of maintenance, FLETCHER MOULTON, L.J., continued ([1908] 1 K.B. at p. 1014):

"That there is still such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the mischief against which it is directed is familiar to us all. It is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. But in my opinion it is far easier to say what is not maintenance than to say what is maintenance. One point is clear. No transaction can constitute maintenance if the court treats it as valid and enforces obligations under it."

The same learned lord justice, after referring to the undoubted validity of a wide variety of contracts of indemnity involving claims by and against third parties, and the prosecution and defence of actions brought in respect of such claims, and referring to the facts of the cases then before the court, said (*ibid.*, at p. 1016):

"In each of these cases, therefore, we find a proper contract of indemnity entered into by the defendants not wantonly or officiously, but in the reasonable defence of their own trade interests. As I have said, such contracts of indemnity are in no wise contrary to law or tainted with invalidity. They do not necessarily involve any action, for a claim may be settled by an adequate offer being made and accepted, and an action becomes necessary only in case the parties do not agree, a state of things which may be due to the unreasonable conduct of the one or the other party or of mistaken views of law or fact on their part which prevent an agreement being arrived at."

BUCKLEY, L.J., said ([1908] 1 K.B. at p. 1020):

"The cases, I think, divide themselves into two classes—the one where the person accused of maintenance has a common interest with the party

- A to the litigation (an instance of which is *Plating Co. v. Farquharson* (9)), and the other where the party charged with maintenance has no such interest, in which case he is guilty of maintenance unless his case falls within certain exceptions which have from early times been specifically allowed. The respondents pressed us with an argument which I think was fallacious, that the party accused of maintenance is guilty of an offence unless he falls
- B within some one of these exceptions, relying for that purpose upon the judgment of LORD ESHER in *Alabaster v. Harness* (6). The point in *Alabaster v. Harness* (6) was that the action as to which the question arose was an action for libel, and LORD ESHER commenced his judgment by pointing out that that was a personal action which in point of law concerns only the person who brings it. In other words it was one of the class of cases
- C in which there was no common interest and in which maintenance was established if the case did not fall within one of the specific exceptions. That does not in any way affect the proposition, which I think is true, that it is not maintenance to uphold a party in litigation in whose result the party accused of maintenance has a real and bona fide interest. I do not think it necessary to go in detail into the facts of the present case. The substance
- D of them is that the defendants, being rivals in trade of the plaintiffs, obtained by legitimate means orders from certain persons, accepting the responsibility of litigation if litigation should ensue by reason of the plaintiffs setting up that the order given to the defendants created some right of action by the plaintiffs against the party who gave the defendants their order. The first head of complaint which I indicated at the commencement of this judgment
- E having failed, the plaintiffs cannot say that the defendants had not a bona fide legitimate interest in the protection of their customers in the matter, and, that being so, there was in my judgment no maintenance."

In this state of the authorities, how does the present case stand? Counsel for the defendants presses us with the statement of LORD ESHER, M.R., in *Alabaster v. Harness* (6) ([1895] 1 Q.B. at p. 343) to the effect that the interest required to repel a charge of maintenance is "some interest recognised by the law in some matter at issue in the suit", the concurring observations of LOPES and RIGBY, L.J.J., in the same case, the statement of LORD PARKER OF WADDINGTON in *Oram v. Hutt* (7) ([1914] 1 Ch. at p. 104) to the effect that for this purpose

- F "a common interest means an interest recognised by law in the subject-matter of the action or some issue between the parties to the action",
- G

and LORD SUMNER's epigrammatic observation in the same case (*ibid.*, at p. 106) that "a common cause is not a common interest". He says that these were decisions of the Court of Appeal and, moreover, decisions expressly or impliedly approved by a majority of the House of Lords in *Neville v. London "Express" Newspaper, Ltd.* (8), and that we are bound to follow them. He says further

H that, following these decisions, as we are bound to do, we can come to no other conclusion than that the charge of illegal maintenance against A.C.A. and the trustee company is made out, because no members of A.C.A. other than the plaintiffs in the action and the persons represented by the trustee plaintiffs had any interest recognised by the law in the subject-matter of or any issue in

I the action, the subject-matter of the action being the alleged pollution of the first plaintiff's part of the River Derwent, to the detriment of her rights as riparian owner and the rights of the remaining plaintiffs as tenants of the fishing in the same waters, and the issues in the action being whether the defendants were in fact polluting the relevant part of the river and, if so, whether the plaintiffs were entitled to an injunction to restrain the continuance of such pollution and to damages in respect of the pollution already suffered. In this subject-matter and these issues (says counsel for the defendants) the remaining members of A.C.A. as such have in law no interest whatever, and it is not

suggested that any of them has any such interest otherwise than as a member A
of A.C.A.

I appreciate the force of counsel's argument and, speaking for myself, I find it impossible to hold that we would be justified in regarding ourselves as no longer bound by *Alabaster v. Harness* (6) and *Oram v. Hutt* (7) on the strength of the changes in public policy or in social or economic conditions which are said to have taken place since those cases were approved in 1918 by a majority B
of the House of Lords in *Neville v. London "Express" Newspaper, Ltd.* (8). They were in fact followed as recently as June, 1954, by LYNKEY, J., in *Baker v. Jones* (14). But it is an abuse of authorities to extract from judgments general statements of the law made in relation to the facts and circumstances of particular cases, and treat them as concluding cases in which the facts and circumstances are entirely different, and which raise questions to which their authors were C
not directing their minds at all. In *Alabaster v. Harness* (6) and *Oram v. Hutt* (7) the actions which had been maintained were actions for libel or slander, that is to say, actions in respect of wrongs essentially personal to the plaintiffs, and it is in this context that the observations in the judgments in these cases as to the common interest required in order to justify maintenance being an interest D
recognised by the law in the subject-matter of the action or some issue between the parties to the action must be considered. In *Neville v. London "Express" Newspaper, Ltd.* (8), the maintained action was of a different kind, but one in which the absence of any common interest between the maintainers and the parties maintained was, if anything, plainer than it was in *Alabaster v. Harness* (6) and *Oram v. Hutt* (7).

I ask myself whether, if the cases had been in this order of date, that is to say, E
first, *Alabaster v. Harness* (6), second, *Oram v. Hutt* (7), third, *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) and, fourth, *Plating Co. v. Farquharson* (9), and had all been heard by a similarly constituted Court of Appeal, the court would have said in *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) or in *Plating Co. v. Farquharson* (9): "We are bound by our own decisions in *Alabaster v. Harness* (6) and in *Oram v. Hutt* (7) F
to hold that what was here done was illegal maintenance". I would answer this question with a decided negative. In *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) I think the court would have said: "That which is here alleged to have been illegal maintenance was merely an incident in a legitimate business transaction. It is an entirely different case from *Oram v. Hutt* (7) and of a kind to which the observations of the court in that case were in no way directed". Similarly, in *Plating Co. v. Farquharson* (9), I think the court would have said: "The defendant here being engaged in a particular trade was attempting to secure support for his appeal in a matter of common concern to the trade from other persons engaged in it, or in other words was inviting persons engaged in that trade to join him in protecting their common trade interests by supporting his appeal. With cases of this kind our decision in *Oram v. Hutt* (7) has nothing to do". H

Be that as it may, we are bound by *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) and *Plating Co. v. Farquharson* (9) just as much as we are bound by *Alabaster v. Harness* (6) and *Oram v. Hutt* (7). I
It seems to me that *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) at all events shows that it is not illegal maintenance for a person to support the defence of an action in respect of a claim against which he has, as part of a legitimate business transaction, agreed to indemnify the defendant, and I cannot reconcile this with a strict application of the principle that maintenance can only be justified on the ground of common interest where the maintainer has some interest recognised by the law in the subject-matter of, or some issue in, the action. In such a case, the maintainer no doubt has a financial interest in the result of the action, but only because he has chosen

A to give the indemnity. The mere fact that he has given the indemnity surely cannot suffice to give him a common interest within the meaning of the principle. Otherwise, every maintainer who effected the maintenance of an action by giving an indemnity against damages and costs to the defendant, or against costs to the plaintiff, could plead by way of justification the common interest thus acquired, which is clearly not so. In my view, therefore, the true justification in cases such as *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) must be that the maintainer, having given the indemnity in the course of a legitimate and genuine business transaction, has a legitimate and genuine business interest in the result of the action which suffices to justify him in maintaining the defendant (as in *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) itself) or, as it might equally well be, the plaintiff. This leads me to conclude that a person who has a legitimate and genuine business interest in the result of an action must be taken for the purposes of the rule against maintenance to have an interest recognised by the law in the subject-matter of the action.

D It seems to me further to follow from *Plating Co. v. Farquharson* (9), to which I should add LORD SUMNER's segregation in *Oram v. Hutt* (7) ([1914] 1 Ch. at p. 106) of insurance and mutual protection societies as in a different category from the case then under consideration in the words "there is no question here of the business of insurance or of mutual protection societies", that persons engaged in a particular trade, or, by parity of reasoning, persons engaged in a particular profession or individually possessed of proprietary interests of a particular kind, may lawfully form themselves into an association with a view to protecting at the expense of all, and if necessary by litigation at the common expense, the interests of each in the common field.

F Whether I am right or not in attributing this effect to *Plating Co. v. Farquharson* (9) and LORD SUMNER's observation in *Oram v. Hutt* (7), supra, I would for my part decline to hold an association of that description guilty of maintenance in supporting one of its members in the prosecution or defence of an action of the relevant kind in the absence of clear authority constraining me to do so, and no authority which I can regard as so constraining me has been cited. Accordingly, I would hold that an association of a number of persons individually interested as riparian owners or holders of fishing rights in the preservation from pollution of the waters of various rivers in different parts of the country could, without being guilty of the crime or tort of maintenance, support with any funds at their disposal actions brought by individual members to restrain the pollution of the rivers to which the interests of those members related. In this simple hypothetical case, each member of the association would have legal rights in relation to some particular river which he would be entitled to protect by bringing an action against any person wrongfully polluting it, and would have a legitimate and genuine business interest in contributing to the financial support of an action brought by any other member to protect that other member's legal rights, whether in relation to the same or some other river, in the shape of his expectation as a member of the association that, in the event of his own legal rights being infringed, he in his turn would receive from his fellow members similar support in the prosecution of any action he might find it necessary to bring, for the purpose of protecting those rights.

I Counsel for the defendants says that, even if there would be no illegal maintenance in such a case, the present case is of a different character, because membership of A.C.A. is not limited to persons having legal interests in the waters of rivers, such as riparian proprietors or holders of fishing rights, and he points to various passages in the literature and appeals issued by the A.C.A., showing that they seek support from any and every member of the public, whether they have any such interests or not and, indeed, whether they are themselves anglers or not. It seems that, by way of support for this argument, two employees of the

defendants, who had no interests in rivers or in angling applied (as I think somewhat disingenuously) for membership of the A.C.A. and were admitted to membership without inquiry as to their having any relevant interests.

I am prepared to assume that it is not the case that every member of A.C.A. has legal interests such as those of a riparian owner or holder of fishing rights so as to be entitled himself to bring an action in respect of the pollution of some particular river or rivers. But I am not satisfied that legal interests of that sort are the only interests of members, on the strength of which the character of a mutual protection society can be claimed for A.C.A. by way of defence to the charge of illegal maintenance. I think it is reasonable to include, as a proper participant in an organisation for mutual protection against the pollution of rivers, any member who has in relation to some river such an interest as would justify him individually in lending financial support to the plaintiff in an action brought to restrain the pollution of that river.

Interests in this category, which, together with the legal rights above referred to, I term "relevant interests", might be held to include, for example, the interests of a man accustomed to fish in a particular river by the revocable permission of the riparian owner. Such a man might, I think, be held to have an interest recognised by the law, albeit a precarious one, in the subject-matter of an action brought by the riparian owner to restrain pollution of the river whereby the fishing was spoilt. Again, a man might be accustomed to fish in a particular river under licences, personal to him, periodically obtained for a consideration from the riparian owner. He too might, I think, well be held to have such an interest so long as any licence for the time being held by him was in force. The proprietor of a hotel near a good fishing river, depending for his custom on people coming to fish in the river, might be ruined if the fishing was spoilt by pollution. He, I should think, might well be held to have a legitimate and genuine business interest which would justify him in giving financial support to an action brought by the riparian owner to stop the pollution of the river. Indeed, it would, to my mind, be ridiculous if the law held him guilty of a crime for supporting an action to stop a state of affairs which was depriving him of his livelihood. Again, a vendor of fishing tackle might be held to be in a position comparable to that of the hotel proprietor. Other examples (not necessarily related to fishing) of *damnum sine injuria* arising from the pollution of a river, and making it a matter of real concern to the persons damaged, that the pollution should be stopped, might no doubt be given. In general, I should say that all persons in that position ought, as a matter of justice and common sense, to be held entitled to contribute to their own protection by giving financial support to any action brought to stop the pollution by any person possessed of an interest in the river enabling him to bring such an action.

Thus, in the view I take, the range of relevant interests is potentially of great width, and I am not disposed to limit it by reference to the strict and narrow definition of "common interest" laid down in *Alabaster v. Harness* (6) and *Oram v. Hutt* (7) with reference to the actions for libel and slander there in question. The pollution of a man's character or reputation by libel or slander is a matter personal to him, and he alone is concerned in the prosecution of any action brought in respect of it, even though the same words might be made the subject of an action by some other person. The pollution of a river is a physical fact which in itself may be productive of manifold mischief in varying degrees to many different people, and I do not think the court should be astute to reject the mischief suffered or reasonably apprehended by any given individual as insufficient to justify him in contributing to the costs of an action to restrain pollution, or to hold him guilty of a crime in so contributing.

The evidence before us on this aspect of the case does no more than show that there may be some members of A.C.A. who have no relevant interests at all. If proof had been forthcoming that there was in fact a given number of members

A of A.C.A. who had no relevant interests at all, even in the wide sense which I am disposed to give to that expression, there might be a nice question as to what degree of dilution of the membership of an association such as A.C.A. by members having no relevant interests would suffice to convert financial assistance given by the association to individual members in litigation, to protect their legal rights in the water of rivers, from financial assistance justified on the principle of mutual protection into illegal maintenance. I use the word "degree" advisedly, for I think the question can only be one of degree. A further question of equal nicety might arise as to whether, if some degree of dilution is present, the effect of it is that the association's financial support of a given action by one of its members is illegal maintenance on the part of those members who have no relevant interests and justifiable maintenance on the part of those members who have relevant interests. If that is the effect of any dilution shown to exist, it could hardly be held that the association as a body was guilty of illegal maintenance; and, for my part, I would not be prepared to hold that those members who did have relevant interests were guilty of that crime. But if in such case illegal maintenance is to be imputed only to those members who had no relevant interests, then it would be necessary to pursue the investigation a step further and see what proportion, if any, of the funds applied in aiding the prosecution of the action was attributable to the contributions or donations of those members, for only that proportion of the funds could be said to have been illegally applied. Such inquiries would present insuperable difficulties in relation to a body of the size of A.C.A., the membership of which must be constantly changing and the members of which may well include many who at some times have relevant interests and at others have none. I cannot think that guilt or innocence of the crime of maintenance should be made to depend on any such impracticable counting of heads, investigation of individual interests and dissection of funds.

I think the real question is whether A.C.A. can fairly be described as being in substance a body of persons individually possessed of legal interests as riparian owners or holders of fishing rights, or having other relevant interests in the sense above indicated, so that when A.C.A., whether directly or through the medium of the trustee company, supports an action brought by one of its members in defence of his legal rights, it can fairly and as a matter of substance be held to be doing so in defence of the collective interests of its members on the principle of mutual protection. If that question can be answered affirmatively, then I think the charge of illegal maintenance should be held to be repelled, albeit that the membership of A.C.A. may include, and the funds at its disposal may be to some extent derived from, members who have no relevant interests, but who object on principle to the pollution of rivers. It should be noted that mere contribution of funds to A.C.A. is not illegal maintenance, and that the support of litigation is by no means the only purpose of A.C.A. The receipt of contributions or donations from non-members cannot, so far as I can see, affect the question one way or the other. If the purposes of A.C.A. are lawful purposes, I do not see how they can be made unlawful because non-members who approve of its purposes choose to contribute to its funds. I should perhaps add that I do not think it material that aid for any action brought by a member is given at the discretion of the committee of A.C.A. and is not claimable by the member as of right.

I On the evidence before us, it is quite impossible to say how A.C.A. might stand in relation to the test above formulated, which would be a matter of fact and degree to be determined by the jury in the theoretically possible but virtually unprecedented event of a criminal prosecution for illegal maintenance, but I can by no means presume against A.C.A., in what is, theoretically at all events, a criminal matter, that it would fail to satisfy that test.

For these reasons, I am of opinion that the defendants, on whom the onus lies, have failed to show that A.C.A., and the trustee company as the instrument of

A.C.A., have not a sufficient interest in the present action to justify them in giving financial support to the plaintiff in the prosecution of it, without thereby committing the crime of illegal maintenance. This makes it unnecessary for me to consider whether, if A.C.A. and the trustee company were shown to have no such interest, they could nevertheless bring themselves within the specific exception applicable to the maintenance of suits out of charity, but, speaking for myself, I find great difficulty in bringing the case within that exception, and am disposed to accept the argument of counsel for the defendants, as above summarised, on this aspect of the matter.

Even if, contrary to my opinion, the defendants should be taken to have succeeded in making out a case of illegal maintenance against A.C.A., and the trustee company as its instrument, I am by no means satisfied that it would be proper to order a stay of proceedings on that account. We have been referred to many cases in which actions have been held to have been illegally maintained, but to no case in which an order has been made for a stay of proceedings in a maintained action on the ground that it was being illegally maintained.

The question whether it might not be proper to order a stay on this ground was touched on, but left entirely open, by ATKIN, L.J., in *Wild v. Simpson* (15) ([1919] 2 K.B. at p. 564), where he said:

"To set the procedure of the court in motion for a particular object may be unlawful; but the proceedings themselves remain valid. They vitally concern two parties at least not privy to the illegality—namely, the opposing litigant and the court itself. I should not expect therefore to find the proceedings, though unlawfully maintained, to be declared void; though I reserve my opinion as to whether the court, on being satisfied that pending proceedings are being unlawfully maintained, has not power to stay them as being vexatious and oppressive and an abuse of the process of the court, and to continue such stay until the court is satisfied that the proceedings are purged of the taint of illegality."

It is well settled that the illegal maintenance of the plaintiff in an action is no defence to the action (see *Skelton v. Baxter* (16), [1916] 1 K.B. at p. 326). I find difficulty in reconciling this with the theory that it affords proper ground for a stay of proceedings. It is not, to my mind, a satisfactory answer to this difficulty to say that the stay would be of a temporary character only, operating until such time as the proceedings are purged of the taint of illegality. Once there has been illegal maintenance, the crime by which the proceedings are said to be tainted has been irretrievably committed, and I do not see how the taint could be purged otherwise than by discontinuing these proceedings and starting a fresh action. That would in effect make maintenance a defence to the action, which it clearly is not. If the court should not allow a plaintiff to proceed with the prosecution of his action while he is being illegally maintained, it would seem that, by parity of reasoning, the court should not allow a defendant to proceed with his defence while he is being illegally maintained. In the latter case, a stay of proceedings would obviously be inappropriate, and indeed would benefit the party alleged to be abusing the process of the court; and to strike out the defence would be equivalent to making the illegal maintenance of the defendant a ground for holding the plaintiff entitled to judgment. Moreover, it seems to me undesirable that the question whether an action is being illegally maintained should be adjudicated on an application to stay proceedings in that action, for this procedure involves, in effect, a trial of the question whether the alleged maintainer is guilty of what is still, theoretically at all events, a crime, in the absence of the person accused.

I think *Elborough v. Ayres* (17) if anything, tends to support the view that a stay should not be granted. In that case an application was made in the Chancery Court for an injunction to restrain one Ayres and his solicitors from proceeding with the taxation of costs in an action at law, on the ground that the action was

A illegally maintained, and SIR WILLIAM JAMES, V.C., said (L.R. 10 Eq. at p. 373):

"It is admitted, in fact, that as the action was Mr. Ayres' action, he would be entitled to the damages; and the fact that he was assisted illegally, if he was assisted illegally, it is admitted, would not be any plea or answer to the action at law. I apprehend that it clearly would have been no ground for interference by this court to prevent the action from going on."

B For the reasons I have endeavoured to state, I would dismiss this appeal.

C HODSON, L.J. (read by VAISEY, J.): This is an appeal from the refusal of DANCKWERTS, J., to stay all proceedings in an action on the ground that the action is illegally maintained and oppressive and vexatious and an abuse of the process of the court. The application is made by the defendants, the Consett Iron Co., Ltd., against whom an action has been brought by the plaintiffs, claiming an injunction and damages for pollution of the River Derwent. The plaintiffs are a Mrs. Martell, a riparian owner of land downstream from the defendants' works, and six other plaintiffs, the trustees of the Derwent Angling Association, an unincorporated association with some 150 members, who are fishing tenants of the first plaintiff.

D The unlawful maintenance alleged is: (i) that an unincorporated association called the Anglers' Co-operative Association, of which the Derwent Angling Association is a club member, instigated the latter to procure a riparian owner to join with it in bringing an action against the defendants, she having no wish to do so; (ii) that a company called the Anglers' Co-operative Association Trustee Co., Ltd. prior to the proceedings, gave to the plaintiffs an indemnity against all costs they might incur or fail to recover from the defendants. It is to be observed that neither the Anglers' Co-operative Association nor the Anglers' Co-operative Association Trustee Co., Ltd., are parties either to the action or to the application before the court and, further, that it is well settled that an unlawful maintenance agreement is no defence to an action: *Hilton v. Woods* (18).

F The defendants are seeking to stay the action until the plaintiffs have purged themselves of the taint of illegality, so that at least temporarily they will be in as strong a position as if they had been able to set up the agreement as a defence to the action. There is no precedent for such an application having been successfully made, but the defendants rely on the following passage from the judgment of ATKIN, L.J., in *Wild v. Simpson* (15) ([1919] 2 K.B. at p. 564):

G "To set the procedure of the court in motion for a particular object may be unlawful; but the proceedings themselves remain valid. They vitally concern two parties at least not privy to the illegality—namely, the opposing litigant and the court itself. I should not expect therefore to find the proceedings, though unlawfully maintained, to be declared void; though I reserve my opinion as to whether the court, on being satisfied that pending proceedings are being unlawfully maintained, has not power to stay them as being vexatious and oppressive and an abuse of the process of the court, and to continue such stay until the court is satisfied that the proceedings are purged of the taint of illegality."

H I It was submitted that maintenance was a common law misdemeanour, and a criminal offence by statute, and was also a tort at common law and for this reason the action ought to be stayed. Finally, however, it was conceded that the tortious aspect of maintenance was irrelevant on this application, since, in view of the decision of the majority of the House of Lords in *Neville v. London "Express" Newspaper, Ltd.* (8), an action for maintenance at common law will not lie without proof of damage for the mere invasion of a right but is an action in respect of an offence which causes damage to the plaintiff. Hence, although, by a majority differently constituted in the same case, the House held that the success of the maintained action was not of itself a bar to civil proceedings, it was

admitted that, until the maintained action had been disposed of, the tortious act could not be proved. A

It remains, therefore, to consider the question from the criminal aspect. Generally speaking, if it is clear that an action is tainted with criminal illegality, the court will seek to protect itself from the abuse of its process. It becomes necessary to ascertain, if possible, of what the crime consists and what are the defences open to the persons accused thereof. B

In this connection, some reference to the history of the crime is needed. To use the graphic language of LORD LOUGHBOROUGH, L.C., in *Wallis v. Duke of Portland* (2) (3 Ves. at p. 502), maintenance is founded on the principle that

“parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense.” C

The law was no doubt in medieval times rigid in the prohibition of maintenance of all kinds, and, when the country was in an unsettled and lawless state, the barons did not scruple to use their resources for their general advantage. Hence a series of statutes beginning with 3 Edw. 1 c. 25 and c. 28 and culminating in the statute 32 Hen. 8 c. 9, were passed, but it was not until the strong government of the Tudors came into being, reinforced by the Star Chamber, that maintenance was suppressed. (See PROFESSOR HOLDSWORTH'S HISTORY OF ENGLISH LAW, vol. 8, at p. 398, and, for a list of the relevant statutes, see *Neville v. London "Express" Newspaper, Ltd.* (8) per LORD PHILLIMORE, [1919] A.C. at pp. 426 and 427). In later days maintenance survived in a somewhat different form, and maintainers no longer guaranteed to procure success in litigation, but provided the money to that end. In connection with the provision of money, the rigour of the rule has been modified by exceptions, so that, where the exceptions apply, there is no unlawful maintenance. D

These exceptions are conveniently set out in the judgment of LORD COLERIDGE, C.J., in the well-known case of *Bradlaugh v. Newdegate* (1) (11 Q.B.D. at p. 11): E

“As a general rule there is no doubt that such common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. BROOKE, FITZHERBERT, ROLLE, HAWKINS, VINER, COMYNS, to cite no more, all concur in this. BULLER, J., in his celebrated judgment in *Master v. Miller* (5), strongly insists upon it. But then the instances they give show the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, e.g., as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them.” F

In *Alabaster v. Harness* (6) this court was not disposed to extend the list of exceptions (see per LORD ESHER, M.R. ([1895] 1 Q.B. at p. 343)). G

The House of Lords in *Neville v. London "Express" Newspaper, Ltd.* (8), approved the decision in *Alabaster v. Harness* (6) as to the extent of the exceptions (see per LORD FINLAY, L.C., [1919] A.C. at p. 385). It is to be noted, however, that no question was raised in the House as to the extent of the H I

A exceptions, since these were not material to the decision of the case. Counsel for the defendants has argued, nevertheless, that the list of exceptions is closed and that if this case does not fall within the recognised exceptions, the action is being unlawfully maintained. This argument is a formidable one, and counsel for the plaintiffs recognised that the language used by the members of the Court of Appeal in *Alabaster v. Harness* (6) would not readily cover a common interest such as he seeks to establish between his clients and those who, it is alleged, are unlawfully maintaining their action. Moreover, the same court, in *Oram v. Hutt* (7), adopted the same standpoint as their predecessors in the earlier case, and these cases are binding on the court today. The observations of the court were, however, directed to maintenance of the particular cases which they had to consider, namely, libel actions which may be said to have a peculiar quality in that the personal reputation of an individual is not readily susceptible to the conception of the common interest shared therein with other persons.

There are, however, other decisions of the Court of Appeal, one earlier than *Alabaster v. Harness* (6), viz., *Plating Co. v. Farquharson* (9), and one later, viz., *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11), in which the common interest held to be sufficient to rebut an allegation of unlawful maintenance was in each case a common commercial interest such as scarcely to come within the strict limits of the language used in *Alabaster v. Harness* (6). I am myself of the opinion, for the reasons given by JENKINS, L.J., that, in dealing with the case of pollution of a river, a wider conception of common interest may be permitted than in the case, for example, of a libel action, so that A.C.A., in maintaining the plaintiffs' claim, may fairly be said to be doing so on the principle of mutual protection, which has been recognised to exist in a number of cases covering the activities, e.g., of trade unions.

In *Allen v. Francis* (19), LORD COZENS-HARDY, M.R., said ([1914] 3 K.B. at p. 1067):

"A workman desiring to make a claim against his employer may be helped by his trade union, or by his club, or approved society."

F The same learned judge referred to the passage I have just cited in *Bobbey v. Crosbie & Co.* (20). SWINFEN EADY, L.J., repeated and agreed with the actual words of the Master of the Rolls. This statement of the law has been acted on and accepted as correct before and since the decision in *Allen v. Francis* (19) was given, as is well-known to those who practice in these courts; yet the common interest which binds the members of a trade union together for the purpose of supporting an action against an employer by one of its members does not seem readily to be covered by the formula which counsel for the defendants seeks to apply to all cases, namely, that the maintainer must have an interest recognised by law in the subject-matter of the action. It is difficult to see what common interest one workman has in an action by another workman against his employer for personal injuries, except the interest arising from a desire to protect one another in case other accidents occur involving injury to other workmen due to the negligence of employers.

I Counsel for the defendants met this argument, as I understood him in the last resort, by saying that he did not admit the activities of trade unions in maintaining actions of the kind indicated were lawful and that there was no direct decision in point. This may be so, but there is some relevance in considering the dicta of SIR HERBERT COZENS-HARDY, M.R., and the earlier dictum of LORD ALVERSTONE, C.J., to which JENKINS, L.J., referred, and there is no record in a long history of litigation of any employer having even taken the point that all such trade union activity was unlawful. That the common interest which is spoken of is more elastic than the rigid formula would suggest is, I think, supported by the way the motive of charity is treated by LORD COLERIDGE, C.J., in *Bradlaugh v. Newdegate* (1), when he referred, as an example of common interest, to the interest which charity and compassion give a man on behalf of a poor man.

I should add that I do not think that this case can be regarded as covered by the exception in favour of charity, since I do not regard the protection of anglers in their recreations as a charitable object, even if the plaintiffs in the present action could properly be regarded as poor. Indeed, the main argument of the plaintiffs was directed to show that they had a common interest with the plaintiffs, based on the need of mutual protection rather than that A.C.A. was moved by a charitable motive to aid poor people.

For the purpose of considering the application for a stay, I will assume, without admitting, that the category of the exceptions is, as contended, closed, that it is too late for the court, when considering the law of maintenance, to extend the list and that this case does not fall within it. I have made the reservation that I do not admit that the category is closed, having in mind the judgment of SIR HERBERT COZENS-HARDY, M.R., in *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11). Having listened to a learned argument on the common law action for maintenance, he said ([1908] 1 K.B. at p. 1012):

"Beyond all doubt there was a time when what the defendants did would have been regarded as criminal. But there is little use in citing ancient text-books on this branch of the law. The law has been modified in accordance with modern ideas of propriety."

I content myself with adopting in 1954 what SIR HERBERT COZENS-HARDY said in 1908. It is by no means clear to me that the plaintiffs in this action could be prosecuted successfully for aiding and abetting the common law or statutory misdemeanour of maintenance, even on the footing that they do not come within the recognised exceptions to the rigid rule. There has been no modern instance of a prosecution cited to us. ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE gives a precedent for an indictment, but cites none but civil authorities in the text.

The limits of the tort have been defined by the House of Lords in *Neville v. London "Express" Newspaper, Ltd.* (8), where it was held that no action for tort would lie without proof of special damage. Although the House held that the success or failure of the maintained action was not the final criterion of the existence of special damage, it might be still open to a defendant to the criminal charge to argue that the limits of the crime are the same as those of the civil wrong. LORD FINLAY, L.C., having said ([1919] A.C. at p. 379):

"The action for maintenance is, in my opinion, one which can be sustained only if special damage has been occasioned to the plaintiff by the maintenance",

continued as follows: "The maintenance may be punishable as an offence . . ." Later he said (*ibid.*, at p. 380):

"The criminal law prohibits and may punish the act, but in the absence of damage the remedy is not by civil action."

VISCOUNT HALDANE and LORD ATKINSON agreed with LORD FINLAY, but LORD SHAW OF DUNFERMLINE, with whom LORD PHILLIMORE agreed, took the view that the test of maintenance is the test of the quality of the act itself as it bears on the attainment of justice in the particular case, and that the test either of tort or of offence is primarily whether it contains that quality which is essential both by the statute and the common law of England. In view of this conflict of opinion, I am not satisfied that it would not be open to a man prosecuted before the conclusion of the maintained action to plead that he had committed no crime unless and until it were proved that an injustice had been worked.

It is not necessary to express an opinion as to whether this plea would succeed, but, there being (unlike cases of libel, for example) no decision showing any distinction between the elements of the crime and of the tort, the court, I think, would be unwilling to grant a stay when the ground for so doing depended on the drawing of a distinction between the tort and the crime, for which there is no

- A specific authority apart from the guarded dicta of LORD FINLAY, inferentially supported by LORD HALDANE and LORD ATKINSON in *Neville's* case (8). Further, the granting of a stay to the defendants, when the ground for staying affords no defence to the action, would on the face of it be unjust. Finally, it would work an injustice between plaintiffs and defendants, seeing that defences as well as claims can be maintained. A defence cannot be stayed without depriving a plaintiff, at least temporarily, of his rights, so that a plaintiff, if the roles were reversed, would presumably be in a position to strike out a maintained defence, which would be tantamount to making a plea of maintenance in reply destructive of a valid defence. Even if it were established that the proceedings were so tainted with illegality that the court ought not to pronounce judgment in favour of the plaintiff, it would seem that a stay is an inappropriate course. If a crime has been committed, it is difficult to see how the plaintiffs could effectively purge themselves of the illegality, except by starting a fresh action free from the taint of the crime. In any event, the point can scarcely be taken by a defendant since, as I have stated earlier, it is not open to him to set up as a defence that the action that he seeks to resist is being maintained by a third party.

This, I think, accords with the view expressed by SIR WILLIAM JAMES, V.-C., in *Elborough v. Ayres* (17) (L.R. 10 Eq. at p. 373):

"It is admitted, in fact, that as the action was Mr. Ayres' action, he would be entitled to the damages; and the fact that he was assisted illegally, if he was assisted illegally, it is admitted, would not be any plea or answer to the action at law. I apprehend that it clearly would have been no ground for interference by this court to prevent the action from going on."

For these reasons, I am of opinion that the application for a stay should be dismissed.

VAISEY, J.: In RUSSELL ON CRIME (10th Edn.), vol. 1, there is a note on p. 374 explaining the origin of "maintenance" in the following words:

"The abuse of legal proceedings by oppressive combinations to carry them into effect is said to have speedily appeared upon the establishment of the laws in the time of Edward I. Instead of their former associations for robbery and violence, men entered into formal combinations to support each other in law suits; and it was found requisite to check this iniquity by Act of Parliament."

If such were the origin of the principle, I wish that we could have held that to maintain a party in litigation is only wrongful where there is something in the nature of a conspiracy between the maintained party and the maintainer to defeat, rather than to further, the ends of justice. But in face of the authorities, many of them recent, which have been cited to us, it would seem that maintenance is still in law both a tort and a crime in all cases, except where it can be brought into one of the recognised exceptions to the rule which prohibits it. It may well be that those exceptions are not entirely rigid, but are in some degree flexible, as suggested by SIR HERBERT COZENS-HARDY, M.R., in the passage already cited from his judgment in *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.* (11) ([1908] 1 K.B. at p. 1012). And as "poverty" is itself a relative conception and term, I should myself have been prepared to say that the plaintiffs in this case are in the position of the man to whom LORD COLERIDGE, C.J., refers in his judgment in *Bradlaugh v. Newdegate* (1) (11 Q.B.D. at p. 11) as

"a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them";

for the expense involved in bringing or defending such an action as this, involving

as it does much expert scientific and other evidence, is far beyond the means of any litigant who is neither a very rich man nor a wealthy corporation. A

I prefer, however, to base my judgment in favour of dismissing this appeal mainly on the simple ground that the alleged tortfeasor or criminal (that is to say, either A.C.A., an unincorporated body, or the A.C.A. Trustee Co., Ltd.) is not before the court, and has not been found or proved to be guilty of the alleged tort or crime in these or any other proceedings. To condemn it in its absence, and unheard, and giving it no opportunity of establishing its innocence, would, in my view, be plainly contrary to the most elementary and fundamental requirements of justice. Any man, and any body of men, when accused or suspected of a crime, will be presumed to be innocent of it until his or their guilt is proved, and this applies equally to a corporation such as the A.C.A. Trustee Co., Ltd. It makes no difference, in my judgment, if the allegation is only of an attempt or intention to do a wrongful act or commit a crime, and I think that it is just as necessary for the actual attempt or intention to be proved as it would be in the case of the act or crime itself. The defendants' application to stay the action seems to me to be misconceived; and, for the reasons which I have tried to express, as well as for those given by my Lords (in which I would respectfully concur), I am for dismissing this appeal. B C D

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Allen & Overy* (for the defendants); *Gerrish & Co.* (for the plaintiffs).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re CASTON CUSHIONING, LTD. E

[CHANCERY DIVISION (Roxburgh, J.), February 7, 1955.]

Company—Winding-up—Liquidator nominated by resolution of members—Creditors' meeting—Majority in value but not in number nominate another liquidator—Second nomination ineffective—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 294—Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 134. F

Company—Winding-up—Meeting of creditors—Majority in value but not in number.

At a meeting of C., Ltd. a resolution was passed that the company be wound-up voluntarily and that B. be appointed liquidator. The company was insolvent. At a subsequent meeting of creditors of the company a resolution appointing L. liquidator of the company was proposed. Six creditors were present at the meeting of creditors, representing debts aggregating £7,627 odd, and of these creditors two, representing debts aggregating £4,795 odd, voted in favour of the resolution and three, representing debts aggregating £2,336 odd, voted against the resolution. The chairman of the meeting, who was the sixth creditor, declared the resolution to be lost, and confirmed the appointment of B. as liquidator. One of the two creditors who voted in favour of the appointment of L. as liquidator having petitioned that the company be wound-up by the court, G

Held: (i) B. was validly nominated as liquidator by the company but L. had not been validly so nominated by the creditors, because the creditors' resolution to nominate him had not been supported by a majority in number of the creditors present and voting at the meeting, although it had been supported by a majority in value of those creditors. H

Re Bloxwich Iron & Steel Co. ([1894] W.N. 111) considered. I

(ii) the petitioning creditor was entitled to an order that the company be wound-up by the court, and the liquidator, having been duly appointed and having appeared to protect himself and not to oppose the petition, was entitled to his costs.

- A** [**Editorial Note.** Section 294 of the Companies Act, 1948, which applies where the voluntary winding-up is a creditors' voluntary winding-up, confers on the company and the creditors power to "nominate" a liquidator at their meetings, the nominee of the creditors superseding the nominee of the company if he is a different person. The term "nominate" is not used in the comparable s. 285 of that Act which confers power to appoint a liquidator in a members' voluntary winding-up. The intention is clearly that the ultimate appointment of a liquidator in a creditors' voluntary winding-up shall accord with the wishes of the creditors; and ROXBURGH, J., indicates that legislation is needed to make clear that the will of the majority in value of the creditors should prevail. In the present case the making of a compulsory winding-up order would have had the consequence that the Official Receiver would become liquidator of the company (see s. 239 (d) of the Act of 1948). The application to the court in the present case may be compared with that in *Re Karamelli & Barnett, Ltd.* ([1917] 1 Ch. 203).
- B** voluntary winding-up. The intention is clearly that the ultimate appointment of a liquidator in a creditors' voluntary winding-up shall accord with the wishes of the creditors; and ROXBURGH, J., indicates that legislation is needed to make clear that the will of the majority in value of the creditors should prevail. In the present case the making of a compulsory winding-up order would have had the consequence that the Official Receiver would become liquidator of the company (see s. 239 (d) of the Act of 1948). The application to the court in the present case may be compared with that in *Re Karamelli & Barnett, Ltd.* ([1917] 1 Ch. 203).
- C** As to the Appointment of a Liquidator in a Creditors' Voluntary Winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 739, para. 1486; and for cases on the subject, see 10 DIGEST 994, 6891-6894.
- D** As to Resolutions at Meetings of Creditors, see 6 HALSBURY'S LAWS (3rd Edn.) 614, para. 1208; and as to the Right of Creditors to Petition for a Compulsory Order after Voluntary Winding-up begun, see 6 HALSBURY'S LAWS (3rd Edn.) 539, para. 1039.]

Case referred to:

- E** (1) *Re Bloxwich Iron & Steel Co.*, [1894] W.N. 111; 38 Sol. Jo. 546; 1 Mans. 350; 10 Digest 873, 5923.

Petition for Winding-up.

This was a petition by a creditor for a debt of £4,577 10s. 10d. for an order that Caston Cushioning, Ltd. be wound-up under the provisions of the Companies Act, 1948.

- F** On Aug. 16, 1954, a resolution for voluntary liquidation was passed by the company and the company nominated Mr. Baker, a chartered accountant, as liquidator. On the same date, Mr. Caston, a director of the company, took the chair at a meeting of the creditors of the company. Six creditors, including the chairman, were present at the meeting. At that meeting the petitioning creditor proposed Mr. Lambeth, chartered accountant, as liquidator and the proposal was duly seconded and put to the meeting. On the vote the petitioner and another creditor, together representing proved debts to the value of £4,795 odd, voted for the appointment of Mr. Lambeth, and three creditors, together representing proved debts to the value of £2,336 odd, voted against the resolution. The total of proved debts was £7,627 odd. The company was insolvent. The chairman declared the resolution to be lost and, there being no other nomination of a liquidator, that the appointment of Mr. Baker was confirmed. The petitioning creditor presented this petition praying that the company be wound-up under the provisions of the Companies Act, 1948, or that such other order might be made in the premises as should seem just.
- G**
- H**

I. Edwards-Jones for the petitioning creditor.

R. B. S. Instone for the liquidator.

- I** The company did not appear.

ROXBURGH, J., stated the facts and continued: The position, therefore, was that the majority in number was against Mr. Lambeth, but the majority in value was in his favour.

This point has been open since 1894, when *Re Bloxwich Iron & Steel Co.* (1) was decided, and appears never to have been deemed of sufficient importance to be solved in the various Companies Acts passed since then. Section 294 of the Companies Act, 1948, reads:

"The creditors and the company at their respective meetings mentioned in the last foregoing section may nominate a person to be liquidator for the purpose of winding-up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator . . ."

It is plain that Mr. Baker was appointed liquidator unless the creditors nominated Mr. Lambeth. But did the creditors nominate Mr. Lambeth? Rule 134 of the Companies (Winding-up) Rules, 1949, provides:

"At a meeting of creditors a resolution shall be deemed to be passed when a majority in number and value of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution . . ."

If this was a meeting to which r. 134 applies, it is plain that the resolution was not passed, because it was not passed by a majority in number and value; it was passed by a majority in value which was a minority in number.

It seems to me that there is no real ambiguity about that rule, and if the rule applied, the resolution was not duly passed. That is consistent with the decision in *Re Bloxwich Iron & Steel Co.* (1), where the court on an application gave effect to the wishes of the majority in value. It was nowhere stated in the judgment, though it was suggested in argument, that a resolution supported by a majority in value but a minority in number had been duly passed.

I am not absolutely certain that r. 134 does apply in the present case. I am inclined to think that it does, but, whether I am right or wrong about that, I should certainly not be prepared to lay down for the first time a proposition of law which would have the result that the question whether or not a resolution was passed at a meeting of creditors depended on whether it did or did not fall within r. 134. That would introduce a wholly illegitimate trap for persons who have to try to make sense of this legislation including, in this particular connection, secretaries of companies and other people who are not expected to read deeply in the law reports. Therefore, though I should have thought that there was a crying need for some amendment of this legislation which would make it clear that, in the event of the majority in value being a minority in number, their will should none the less prevail, unless and until some amendment of the law is made, I should not be prepared to hold that a different principle applied according to whether the meeting was or was not one which fell within r. 134.

In my judgment, Mr. Baker was duly appointed liquidator. There is no question about his removal, because the petition is not opposed, and, therefore, he will automatically be removed by the making of a compulsory order. What is important, however, is not only the question of his costs today, with which I am immediately concerned, but another matter which must depend on the same principles, namely, the costs and expenses which he has incurred up to the present in acting as liquidator. This is an important question and, as I have said, it is extraordinary that there should be no clearer statutory definition of how creditors pass a resolution at a meeting. The difficulty is not limited to this class of case: it applies, I think, to every meeting of creditors where those voting in favour of a resolution are the majority in value but a minority in number, an occurrence which cannot be uncommon.

The petitioning creditor is plainly entitled to his order in default of any opposition, because the liquidator has appeared, not to oppose on behalf of the company, but to look after himself, as he was well entitled to in the circumstances which I have indicated. The petitioning creditor's costs in the ordinary course will be ordered to be paid out of the assets. So far as the liquidator is concerned, the position is this. He was appointed liquidator. In the petition there is a vague allegation, which, I am told, was not intended to be a reflection on him, but I

A think that anyone reading the petition would assume that it was so intended. As the allegation was not intended to make any reflection on him, I do not think that it ought to remain in the petition. It is quite unnecessary, in order to found a cause of action, to have it there, and I think that it should be struck out of the petition.

B It seems to me that as the liquidator was duly appointed, and as he has come here to defend a charge against himself, he has taken a very reasonable course, and he is entitled to his costs out of the assets in due course of liquidation.

Petition allowed.

Solicitors: *Kingsley Napley & Co.* (for the petitioning creditor); *Middleton, Lewis & Co.* (for the liquidator).

C [Reported by R. D. H. OSBORNE, Esq., *Barrister-at-Law.*]

D

E BURGESS v. MANAGEMENT COMMITTEE OF THE FLORENCE
NIGHTINGALE HOSPITAL FOR GENTLEWOMEN
AND ANOTHER.

[QUEEN'S BENCH DIVISION (Devlin, J.), October 29, 1954, February 7, 8, 9, 1955.]

F *Fatal Accident—Damages—Assessment—Husband and wife professional dancing partners—Joint earnings shared—Death of wife due to negligence—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2.*

G The plaintiff and his wife were professional dancers who, by the beginning of 1953, were nearing the peak of their professional status. In January, 1953, the wife was admitted to hospital for an operation. She died there owing to the negligence of the second defendant. The wife had been paying towards the joint living expenses of herself and the plaintiff out of her share of the joint income. She had also been paying towards the expenses of the infant child of her previous marriage and towards the expenses of her widowed mother. In an action by the plaintiff under the Fatal Accidents Act, 1846, in which the second defendant admitted liability, the plaintiff as personal representative of his wife claimed damages under various heads, viz., for the loss of his wife as a wife, for the loss of his wife as a dancing partner, on behalf of the child of his wife's previous marriage for the loss to the child, and on behalf of his wife's mother, for her loss.

H **Held:** (i) damages for injury to a husband resulting from the death of a wife were only recoverable under the Fatal Accidents Act, 1846, s. 2, if they were attributable to the relationship of husband and wife, and as no benefit arose from the dancing partnership of the plaintiff and his wife which could properly be attributed to their relationship as husband and wife, no damages were recoverable for the value of the wife to the plaintiff as his dancing partner.

I *Sykes v. North Eastern Ry. Co.* (1875) (44 L.J.C.P. 191) followed.

(ii) mutual dependence of husband and wife for living expenses where both the husband and the wife earned could be the subject of a claim under the Fatal Accidents Act, 1846, s. 2, and, as the plaintiff and his wife by sharing their expenses had benefited each other, there was a benefit to the

plaintiff that arose from the relationship of husband and wife for loss of which a claim was maintainable under the Fatal Accidents Act, 1846, and no higher burden of proof was required to maintain the assertion that the wife contributed towards the joint expenses than would be required to maintain an assertion that the husband so contributed; accordingly, the plaintiff was entitled to recover damages on this ground for the loss of the wife's earning power and of her contribution to the joint living expenses.

[For the Fatal Accidents Act, 1846, s. 2, see 17 HALSBURY'S STATUTES (2nd Edn.) 5.]

Cases referred to:

- (1) *Best v. Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394 ; [1952] A.C. 716; 3rd Digest Supp.
- (2) *Franklin v. South Eastern Ry. Co.*, (1858), 3 H. & N. 211; 31 L.T.O.S. 154; 157 E.R. 448; 36 Digest (Repl.) 213, 1128.
- (3) *Condon v. Great Southern & Western Ry. Co.*, (1865), 16 I.C.L.R. 415; 36 Digest (Repl.) 213, 2026.
- (4) *Sykes v. North Eastern Ry. Co.*, (1875), 44 L.J.C.P. 191; 32 L.T. 199; 39 J.P. 280; 36 Digest (Repl.) 212, 1117.
- (5) *Hull v. Great Northern Ry. Co. of Ireland*, (1890), 26 L.R.Ir. 289; 36 Digest (Repl.) 212, 2005.
- (6) *Feay v. Barnwell*, [1938] 1 All E. R. 31; 36 Digest (Repl.) 230, 1219.

Action.

The plaintiff, Robert William Burgess, started dancing as an amateur in 1942. Also in that year he met Mrs. Baker who became his dancing partner for amateur purposes. After his demobilisation in 1946 they started dancing together in a team known as Burgess and Baker. In July, 1948, they started to dance professionally and began going in for competitions and giving demonstrations, and they also started a school of dancing. In 1951 Mrs. Baker was divorced by her husband and in September, 1952, she married the plaintiff. By the beginning of 1953, they were nearing the peak of their professional status. In January, 1953, the plaintiff's wife entered the Florence Nightingale Hospital for Gentlemen at 19 Lisson Grove, London, N.W.1, managed and controlled by the first defendants. She was attended by the second defendant, Dr. Emily Catherine Lewis. To perform the operation, the second defendant gave an injection to the plaintiff's wife, as a result of which she died, the solution in the injection having contained a lethal proportion of adrenalin. The plaintiff claimed against both defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, as the widower and legal personal representative of his wife for his own benefit, for that of Brenda Baker, an infant daughter of his wife by her previous marriage, and for that of Elizabeth Drinkwater, the widowed mother of the plaintiff's wife. The second defendant admitted negligence and, at the beginning of the hearing, the case against the first defendants was discontinued.

On the question of the quantum of damages the findings of the court were as follows. The gross income of the plaintiff, who was thirty-eight years old, from dancing tuition fees, demonstrations and competitions and from a school which he and his wife had started, was between £1,000 and £1,250 annually at the time of his wife's death, with the prospect of the earnings from demonstrations and competitions declining but of the income from the school increasing from about £400 to about £500 annually. As result of the death of the plaintiff's wife, who was thirty-six years old, the plaintiff had no dancing partner and, being unable to find another suitable partner, his income from the demonstrations and competitions would cease, though the income from tuition fees would continue. The income prospectively remaining to the plaintiff was about £600 per annum.

- A On this basis HIS LORDSHIP estimated the value to the plaintiff of the deceased as a dancing partner to be £2,500. The plaintiff and his wife kept no servant. They lived in a flat and she performed the household duties. After her death the plaintiff had to employ a woman at 25s. weekly and to have meals out. His wife had had the income which she had earned. HIS LORDSHIP assessed the loss to the husband of the deceased as a wife at £1,000. The wife had contributed
- B towards the household expenses. The rent was £9 13s. monthly and there were expenses for gas and electricity. HIS LORDSHIP assessed the damages in respect of the loss of the wife's contribution at £1,000.

- The wife had contributed towards the school fees of the child of her previous marriage and had spent money on her clothes. Since the wife's death the school fees had been reduced by half and the plaintiff had paid them. HIS LORDSHIP
- C assessed at £350 the damages for what the child lost by the wife's death, both in respect of the school fees and of what she might have done for the child.

The wife had paid at least £1 weekly to her widowed mother who was sixty-six years of age. HIS LORDSHIP assessed the loss to her at £300.

A. A. H. Marlowe, Q.C., and A. J. Phelan for the plaintiff.

- D *A. P. Marshall, Q.C., and M. R. Hoare for the defendant.*

- DEVLIN, J.: In this case liability is admitted, but the assessment of damages raises two unusual questions under the Fatal Accidents Act, 1846. The principal claimant is the husband, and he claims in respect of the loss of his wife. The husband and wife were professional dancing partners, and I think
- E it is clear beyond any doubt that their joint ability to earn an income greatly exceeded the ability of either of them individually. Neither of them individually could have expected to earn as much as they both did together, dancing as a couple and as a team in competitions and in giving demonstrations, and so on. Accordingly, the main head of the husband's claim is in respect of the damage to his own position which has been caused to him by the loss of his wife and dancing
- F partner. The second point that arises is this: The husband and the wife shared their joint earnings. The wife was, therefore, beneficially entitled to a separate income. They not only shared their earnings, but they also shared their living expenses, and the question is to what extent, in those circumstances, can the husband be said to be dependent on the wife, so that the loss of the wife loses for him a benefit which can be translated into money and for which he can be
- G given compensation under the Fatal Accidents Act, 1846.

The other points in the case I think are only points of fact, and I think it is convenient, therefore, that I should deal first of all with the facts, that I should assess the value of each of the items that are contained in the claim, and that I should then go on to consider which of those items are, in my judgment, legally recoverable.

- H [HIS LORDSHIP having reviewed the evidence in relation to damages and having assessed the damages as stated above, viz., (i) for the loss of the plaintiff of his wife as a dancing partner £2,500, (ii) for the loss to the plaintiff of his wife as a wife £1,000, (iii) for the loss to the plaintiff of his wife's contribution towards the joint household expenses £1,000, (iv) for the loss to the child of the previous marriage £350, and (v) for the loss to the wife's mother £300, continued:]
- I The first and most important claim is the claim for the loss of the wife as a dancing partner. Now that, of course, must depend, in the last analysis, on the terms of the Fatal Accidents Act, 1846, under which the claim is made, and the question is whether it is a claim that is allowable under that Act or not. The claim is not put in any other way; it is not put as a claim which arises in common law. But I think, before one turns to the Act, it is convenient to consider the reason why it does not arise under the common law, because then one will see what necessary limitations must be read into the rather wide and general

provisions of the Fatal Accidents Act, 1846. It is clear that the plaintiff, the husband, has, in fact, sustained an injury; he has, in fact, sustained a loss. Why, then, is it not recoverable in law? The answer is, I think, because the law must necessarily limit the scope within which it can allow recovery. Whenever a man dies, if he is a man of an active type, it has repercussions, great or small, on all those with whom he has previously been concerned. It may redound to their financial advantage, or it may redound to their financial disadvantage. If a man who is employed as a departmental manager, let us say, at £3,000 a year, is suddenly killed, someone may step into his shoes and get a larger income, and derive a benefit from his death, while someone else, perhaps a secretary whom he particularly liked, might be thrown out of employment and might have difficulty in getting other employment at the same salary, and might thus lose a sum of money. All those losses, though they do not seem quite so direct as the loss of the plaintiff in this case, are, in fact, still within the same category. They are a little more remote because of the close connection between the plaintiff and his wife as dancing partners, but they are within the same category, and the law does not allow it, because if it did there would be no end to the compensation which would have to be paid as a result of some perhaps quite small accident and which could not have been foreseen by the wrongdoer.

That principle has been recently very clearly stated in the House of Lords, and I think that it is worth quoting two passages from the speeches in *Best v. Samuel Fox & Co., Ltd.* (1). I read first of all from the speech of LORD GODDARD, where his Lordship said ([1952] 2 All E.R. at p. 398):

"It may often happen that an injury to one person may affect another. A servant whose master is killed or permanently injured may lose his employment, it may be of long standing, and the misfortune may come when he is of an age when it would be very difficult for him to obtain other work, but no one would suggest that he thereby acquires a right of action against the wrongdoer. Damages for personal injury can seldom be a perfect compensation, but where injury has been caused to a husband or father it has never been the case that his wife or children, whose style of living or education may have radically to be curtailed, have on that account a right of action other than that which, in the case of death, the Fatal Accidents Act, 1846, has given."

Then LORD MORTON OF HENRYTON said (*ibid.*, at p. 400):

"My Lords, with one exception to which I shall shortly return, it has never been the law of England that an invitor, who has negligently but unintentionally injured an invitee, is liable to compensate other persons who have suffered, in one way or another, as a result of the injury to the invitee. If the injured man was engaged in a business, and the injury is a serious one, the business may have to close down and the employees be dismissed. A daughter of the injured man may have to give up work which she enjoys and stay at home to nurse a father who has been transformed into an irritable invalid as a result of the injury. Such examples could easily be multiplied. Yet the invitor is under no liability to compensate such persons, for he owes them no duty and may not even know of their existence."

That is the general principle of common law, and it is in the light of that principle that one must interpret the words of the Fatal Accidents Act, 1846, which are extremely short and wide. The material words are in s. 2, and are simply these:

"... Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused . . . and

A in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . . ”

If one were merely to apply those wide words this case, I think, would fall within them, because it is an injury which resulted from death, but those wide

B words have been restricted by a series of decisions which really make a complete exegesis of the way in which the section should be applied, and the respect in which counsel for the defendant suggests and submits that they must be cut down to fit the facts of this case is that the loss must be a loss which arises from the relationship which is specified in the section itself.

C Let me take for example the case of a man in the prime of life, who takes into partnership a young man, and within two or three years the senior partner is killed. The junior partner's prospects may be grievously injured; he may not have had time to establish himself in the good graces of the clients of the firm, and the result may be that a lot of work goes elsewhere. At common law there would be no claim by the junior partner. Can it make any difference that the senior partner is a father who has taken a son into the family business? Plainly, in

D the mind of the law, no; and, therefore, counsel for the defendant submits, that relationship, in such a case as that, is purely incidental, and he submits that that is also the position in this case. The loss claimed is claimed in that case qua junior partner, not qua son, and to allow the loss under the Fatal Accidents Act, 1846, merely because of the incidental factor that the senior and the junior partner happen to be father and son would be wrong. Therefore, one

E must cut down the wide words of the Act by reading into them an implication that the loss must result from one or other of the relationships which are specified in the section.

Then counsel for the defendant relies, not only on general considerations, but also on one particular authority, which I think takes him a good deal, if not the whole, of the way. Counsel for the plaintiff, on the other hand, relies on other

F authorities, which I shall have to consider briefly, as showing that the case relied on by counsel for the defendant does not establish all that he wants. I think that it is clear that the authorities do establish that, if the benefit arises out of the relationship, it need not be a monetary benefit but it can be services rendered which can then be translated into money. I think that it is clear also from the

G authorities, that, if a relation, out of filial duty, or any other motive that arises from relationship, renders services to the plaintiff, either free services or services at less than the market rate, the loss of those services is something which can be translated into cash and is recoverable under the Act. That is what counsel for the plaintiff suggests is the true position in these cases. He also submits that, on the authorities, it is not necessary that the benefits should arise out of the

H relationship. He says that it is immaterial if there happens to be a contract of partnership or other contract, either express or implied, and that the benefits are, therefore, within the terms of the Act.

The first authority which I have to consider is *Franklin v. South Eastern Ry. Co.* (2). I do not think that I need say any more about that case than this, that it was a case where a father earned 3s. 6d. a week by carrying up coals to the

I wards of a hospital where he was employed. He was not, in fact, himself capable of carrying up the coals, and his son carried up the coals for him, so that he earned the 3s. 6d. a week. The son was killed. There you have the sort of case in which one relation is assisting another in the performance of his work, as, counsel for the plaintiff says, the wife was assisting the plaintiff here; but it is plain that what was there being given to the father was 3s. 6d. per week. If the son had taken the 3s. 6d. per week and handed it over to the father for his upkeep, that contribution would unquestionably have been within the Act, and so it is said

that the services rendered are equally within the Act. The son was, by reason of the relationship, rendering services free to his father.

In *Condon v. Great Southern & Western Ry. Co.* (3), an Irish case on which counsel for the plaintiff also relies, it was explained in just the same way. There the son was killed, and the mother made a claim, and one of the things that she said in her evidence was (16 I.C.L.R. at p. 416):

"Michael would be of use to me to assist me to carry on any business. He would be now nearly as useful as his father",

and the learned judge who directed the jury said that they might consider whether, if he were able to earn, he would have helped his mother by those earnings, or, as he said (*ibid.*):

". . . if the boy had lived he would have been of some appreciable and substantial benefit to his mother, by sharing his labour, and thereby enabling her to earn the more for herself and her other children . . ."

That direction, and the principle of that case, I take to mean just the same thing, that, if the son had continued to live (because of course, under the Act one may consider the prospect of future benefits), he would, in fact, have worked for his mother in a way which would have enabled his mother to earn more, meaning thereby that he would have worked at less than the usual wages, and by working at less than the usual wages he would have given his mother the benefit of his labour, which would have been reflected in her earnings, just as in the earlier case that I cited the benefit of the son's labour was reflected in the 3s. 6d. a week paid to the father. That was a case, therefore, of services rendered free, or at less than the market rate, by reason of the relationship of mother and son.

The next case is the case on which counsel for the defendant relies, and it is *Sykes v. North Eastern Ry. Co.* (4). There the son assisted his father and the son was killed. According to the father's evidence he employed his son and paid his son 33s. a week as wages. Then he said (44 L.J.C.P. at p. 192):

"My son used to assist me; his assistance was included in the 33s. I allowed him to draw so much to pay his wages, and we used to consult when he came home. I make plans; I found his advice and assistance of great value; owing to my son's death I shall never be able to take the contracts that I did during his lifetime, because I cannot light upon anyone having the same knowledge that he had."

That claim was disallowed, and BRETT, J., said (*ibid.*):

"The plaintiff gave no evidence of a pecuniary benefit accruing to him from relationship; the son worked for his father, who appears to have paid him a full amount of wages."

Then GROVE, J., said (*ibid.*):

"The plaintiff was bound to prove a benefit accruing to him from his relationship with the deceased; but he merely showed that he derived an advantage from a contract with his son. *Franklin v. South Eastern Ry. Co.* (2) is plainly distinguishable; the facts were very different. In that case the son worked for nothing; here the father paid wages, the son was servant when he assisted the plaintiff. There was no evidence that the son was paid less than the usual wages for a skilled workman. The plaintiff appears to have paid him the wages which a skilled workman ought to receive. The pecuniary advantage to the plaintiff did not depend upon the relationship; the deceased at any time might have left the employ of the plaintiff, who possibly might have succeeded in hiring a better workman than his son."

A That is setting out the principle for which counsel for the defendant contends, the son getting the full amount of the wages, and the loss of benefit arising merely from the loss of a valuable employee, and not from the loss of a son.

I think I need refer only to two more cases, one of which was cited to me by counsel for the plaintiff as qualifying *Sykes v. North Eastern Ry. Co.* (4), and that is *Hull v. Great Northern Ry. Co. of Ireland* (5). There PALLES, C.B., at the beginning of his judgment, said this (26 L.R.Ir. at p. 293):

C "It is unnecessary to determine whether there is evidence that the loss, if any, of the plaintiff, accrued by reason of the relation of mother and daughter which subsisted between her and the deceased. Even were the services of the deceased rendered in pursuance of a contract, the reasoning of the judges in *Sykes v. North Eastern Ry. Co.* (4), seems to leave it open for consideration whether the discontinuance, through death, of the services which although contracted for, are of greater value than the price stipulated for them, may not (if the jury believe that the relationship between the parties was the motive of the contract) amount to a pecuniary loss, within Lord Campbell's Act."

D I do not think that that qualifies the principle in *Sykes v. North Eastern Ry. Co.* (4), except in one particular which is not relevant here. The chief baron is there, I think, expressly recognising the principle in *Sykes v. North Eastern Ry. Co.* (4), that the relationship between the parties must be, as he says in one place, the motive of the contract, or, as he says in another place, the loss must accrue by reason of the relation of mother and daughter. All that he is pointing out is

E this, that that relationship may take effect in two ways; it may induce the relation to give her services free, or it may induce the relation to give her services at less than the market rate, and, if she gives them at less than the market rate, it is a benefit just as it is if she gave them free, and it is pointed out that in *Sykes v. North Eastern Ry. Co.* (4) the position was the contrary of that.

F The last case that I need refer to is a decision of SINGLETON, J., in *Feay v. Barnwell* (6), which is relied on by counsel for the defendant. There, the learned judge allowed as one of the items of loss, the loss to the husband of 10s. a week pension which he got, but in respect of his wife; that is to say, his pension was 10s. per week larger than would have been his pension as a single man, because he was a married man, and when his wife died his pension was reduced by 10s. a week. That again was assistance which came from the wife to the husband in

G the form of income, but again, it is assistance which quite plainly derived from the relationship, for the reason why he got the 10s. was because he was a married man and had a wife, and the 10s., therefore, arose from the relationship between himself and his wife.

H All those authorities help to confirm the principle which is stated in *Sykes v. North Eastern Ry. Co.* (4), and I think that, even without the assistance of those authorities, I should have arrived at the same question of principle, and that is that the benefit, to qualify under the Act, must be a benefit which arises from the relationship between the parties. Therefore, the question that I have to determine in this case is whether the benefit so arose. It is important to note that here the wife's services were fully paid for, that is to say, she took her full half share of the

I joint earnings. It is not suggested that that was an arrangement that was particularly beneficial to the plaintiff; it is not suggested that it was an arrangement which depended in any way on the relationship of husband and wife, or that a lady dancing partner would have asked more but for the fact that she was the wife of the other partner. It was, in effect, the market rate, so far as there is any evidence; it is what one would expect would happen, and, therefore, she was not rendering any services to the plaintiff which he got either free or at anything less than the market rate. Then the question is: did the fact that they were earning that joint

income arise from their relationship ? It was not unconnected with their relationship, and I think that their relationship was, if one may so put it, a very convenient and usual incident of the partnership. It is convenient, of course, if a man and woman are constantly going about together and staying at hotels, and it greatly eases the position, if they can stay as man and wife, and it adds also, as counsel for the plaintiff stressed, that element of permanence to what might otherwise be a pure business partnership. But those, in my judgment, are only incidental matters, and they do not go to the root of the relationship at all. They do not amount, in the end, to anything much more than a partnership between a father and son being regarded as more permanent and enduring than a partnership between two people without relationship. A partnership between father and son may make the partnership smoother and easier to work out, but, in essence, the partnership which exists is a business partnership, and so, I think, was the partnership in this case. That, I think, is stressed by the fact that the husband and wife's relationship was superimposed on the partnership; they had been together as professional partners, sharing their income, for years before they were married, and there are in existence in the dancing world dancing partners who are not married, and although, no doubt, the usual thing is to find them married, that is not essential.

I have, therefore, come to the conclusion that there were here no services that were rendered by the wife to the plaintiff, and there was no benefit arising in the dancing partnership that can properly be attributed to the relationship of husband and wife; and if this claim were to be allowed, then any partner whose prospects were similarly affected by the death of the other, whatever their relationship was, ought logically to be compensated, too.

I turn now to the other head of the claim which counsel for the defendant disputes, and that is the loss by the plaintiff of his wife's contribution to their joint living expenses. Counsel says that he does not dispute it as a matter of principle; he accepts it as a matter of principle, but he says that it must be strictly proved, and that there is no evidence in this case that the wife did, in fact, contribute out of her share of the income. I gathered that he would put his case as high as this, that there must be something to show that when the plaintiff, as it is conceded, took the money out of the drawer to pay, shall I say, the monthly instalments of rent, he was taking it from his wife's share in the drawer as well as his own, and that, in the absence of that "something", the plaintiff cannot recover. Counsel conceded that, if the wife had kept her own share of the money, and had it paid over to her in notes, and then handed notes over to the plaintiff for the purposes of the establishment, then it would have been something which was assessable. Therefore, counsel puts his objection as one on the facts, saying that the burden of proof has not been discharged. I think, however, that, in reality, his objection is really one of principle, and I think it is really shown by the comment of counsel for the plaintiff, that, if the position had been reversed, and it had been the wife who was here suing by reason of the death of the husband, no one would even have thought of contending for a moment that at least a half was not paid by the husband. The possibility of counsel for the defendant's contention really only arises because this is a case of the wife and not the case of the husband, and it is, therefore, based on the principle, I think, that some higher degree of burden of proof must be expected for the assertion that a wife contributes towards the joint expenses than would be expected in the case of a husband. I do not think that, under present conditions, any such higher burden of proof ought to be imposed, or that there is any presumption one way or the other. No doubt, fifty or a hundred years ago, the presumption was that the husband paid all the joint living expenses, and anything that the wife earned was a sort of pin-money, which she could keep for herself; but I do not think that that fits the facts of modern married life, and I do not think that it fits the case of the very sensible and ordinary way in which

A the married couple in this case were, in fact, carrying on their married life. They were both earning equally, and they both contributed equally, and I think the wife was just as much contributing to the joint living expenses by the way in which they were discharged, as she would have been if she had kept the money herself and then handed it over to the plaintiff.

B No case has been cited to me where what one might call the mutual dependence of that sort has been made the subject of a claim under the Fatal Accidents Act, 1846, but I see no difficulty about it in principle. It seems to me that when a husband and wife, either with separate incomes or with a joint income to which they are both beneficially entitled, are living together and sharing their expenses, and in consequence of that fact their joint living expenses are less than twice the expenses of each one living separately, then each, by the fact of the sharing, is

C conferring a benefit on the other, and I think that mutual benefits clearly arise from the relationship by virtue of which they are living together, namely, the relationship of husband and wife, and, accordingly, that comes within the Fatal Accidents Act, 1846.

There is a small claim for funeral expenses within the Fatal Accidents Act, 1846, which is not disputed, and which I allow. There is also a claim under the Law

D Reform (Miscellaneous Provisions) Act, 1934, and, for the purpose of that Act, I make the assessment for the loss of what was manifestly an exceptionally full, happy and beneficial life, of £500. As, however, I am told that the plaintiff and the daughter are the sole beneficiaries in the estate, and their shares in that sum, whatever it may be, will probably be less than the amount that I have awarded under the Fatal Accidents Act, 1846, it might be convenient if I merely gave

E judgment under the Fatal Accidents Act, 1846.

Judgment for the plaintiff.

Solicitors: *Alwyn Williams & Co.* (for the plaintiff); *Le Brasseur & Oakley* (for the defendant).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

COOPER v. CRITCHLEY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), January 26, 27, 28, 1955.]

Sale of Land—Contract—Memorandum—Joint ownership of freehold premises—Sale by one co-owner to the other—"Interest in land"—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 40 (1).

Land—Joint tenancy on trust for sale—Beneficial interests in proceeds of sale as tenants in common—Whether interest in land.

The plaintiff and the defendant were joint tenants in fee simple of land which they held on trust for sale and on trust to hold the net proceeds of sale and the net rents and profits until sale for themselves as tenants in common in equal shares. They granted a lease of the land to a company in which each of them held one-half of the total issued share capital. The plaintiff and the defendant entered into negotiations for the sale to the defendant of the plaintiff's interest in the property. The defendant ultimately declined to complete the proposed purchase. The plaintiff started proceedings for specific performance of a contract for the said sale alleged to have been constituted partly orally and partly by correspondence, and, among other defences, the defendant pleaded the Law of Property Act, 1925, s. 40.

Held: no binding contract had been agreed, but if a contract had been concluded for the sale by the plaintiff of his interests to his co-owner, the defendant, it would have been a contract for the sale of an "interest in land" within s. 40 (1) of the Law of Property Act, 1925, and, as there was no sufficient memorandum in writing of the alleged contract, that section also constituted a good defence.

Re Price ([1928] Ch. 579), *Edwards v. Hall* ([1949] 1 All E.R. 352), *Re Fox* ([1913] 2 Ch. 75) and *Re Witham* ([1922] 2 Ch. 413) considered.

Per JENKINS, L.J.: I should be inclined to accept the general proposition that a share in the proceeds to arise from a sale of land is an interest in land within the meaning of the Law of Property Act, 1925, s. 40 (1) (see p. 524, letter H).

Appeal dismissed.

[**Editorial Note.** The equitable doctrine of conversion results in land to which it applies being treated as personalty for the purposes of disposition and devolution. It does not follow, however, that, if a trust for sale has attached to land and has effected a conversion so that the beneficial interests in the proceeds of sale can be transmitted as personalty, those beneficial interests cease to be interests in "land" within the meaning of that term in some enactment. Whether they are or are not is a question of construction of the enactment. A converse example of the same principle arose under settled land legislation, by which capital money is converted (in effect) by statute into land for the purpose of disposition, transmission and devolution; the conversion did not, however, change the nature of the property so as to render it land for the purposes of another statute directed to a different purpose, namely, that of taxation (see *Middleton (Earl) v. Cottesloe*, [1949] 1 All E.R. 841).]

As to the Doctrine of Conversion, see 13 HALSBURY'S LAWS (2nd Edn.) 131 et seq.; and for cases on the subject, see 20 DIGEST 335, 772 et seq.

As to what is an Interest in Land, see 27 HALSBURY'S LAWS (2nd Edn.) 602-604, paras. 1069, 1070, and 29 HALSBURY'S LAWS (2nd Edn.) 240, para. 323; and for cases on the subject, see 40 DIGEST 18-21, 55-73.

For the Law of Property Act, 1925, s. 40 and s. 205 (1) (ix) and (x), see 20 HALSBURY'S STATUTES (2nd Edn.) 500 and 834, 835.]

Cases referred to:

- (1) *Re Price*, [1928] Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.
- (2) *Edwards v. Hall*, [1949] 1 All E.R. 352; 2nd Digest Supp.

- A (3) *Re Fox*, [1913] 2 Ch. 75; 82 L.J.Ch. 393; 108 L.T. 948; 32 Digest 429, 1035.
- (4) *Re Hazeldine's Trusts*, [1908] 1 Ch. 34; 77 L.J.Ch. 97; 97 L.T. 818; 32 Digest 484, 1468.
- (5) *Kirkland v. Peatfield*, [1903] 1 K.B. 756; 72 L.J.K.B. 355; 88 L.T. 472; 32 Digest 409, 878.
- B (6) *Re Witham*, [1922] 2 Ch. 413; 92 L.J.Ch. 22; 128 L.T. 272; 32 Digest 473, 1367.
- (7) *Miller v. Collins*, [1896] 1 Ch. 573; 65 L.J.Ch. 353; 74 L.T. 122.
- (8) *Re Jauncey*, [1926] Ch. 471; 95 L.J.Ch. 377; 134 L.T. 728; 32 Digest 407, 860.

Appeal.

- C Appeal by the plaintiff from an order of VAISEY, J., dated Nov. 22, 1954, dismissing the plaintiff's action for specific performance of a contract alleged to have been made on or about Dec. 30, 1953, whereby the plaintiff agreed to sell and the defendant agreed to purchase the plaintiff's interest in (a) the freehold premises known as 35, Market Street, Watford, in the county of Hertford, and (b) the company called Sterlina Furnishers, Ltd.; or, alternatively, for
- D damages for breach of contract. The defendant pleaded by his defence (i) that the parties were never ad idem; (ii) that it was intended that the agreement relating to the sale of the freehold property should be embodied in a formal contract and that until such contract had been executed no rights or liabilities should arise between them; (iii) that the contract, if any, was unenforceable by virtue of the Law of Property Act, 1925, s. 40 (1). VAISEY, J., held that there
- E was no concluded bargain, and that the parties had contemplated putting the terms into a formal agreement. HIS LORDSHIP, therefore, found it unnecessary to deal with the defence depending on s. 40 (1) of the Act of 1925. The judgment of the Court of Appeal is reported only so far as it relates to the Law of Property Act, 1925, s. 40 (1).

- F *H. E. Francis* for the plaintiff.
W. D. Collard for the defendant.

SIR RAYMOND EVERSHED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

- JENKINS, L.J.:** In this case the plaintiff, Leslie Charles Cooper, and the
- G defendant, Baden Arthur Critchley, are each entitled to one-half of the issued share capital of a company called Sterlina Furnishers, Ltd. That company had an authorised capital of £5,000, divided into shares of £1 each, and the parties each hold 250 of the issued shares, the total issued share capital being only £500. The parties are also entitled under what, in the old days, would have been a
- H tenancy in common to premises known as 35, Market Street, Watford. Those premises are under lease to the company, and the company carries on business on them, the business consisting of selling and dealing in carpets, rugs, floor coverings and such things, partly for cash and partly on hire-purchase terms. In or about December, 1953, there were differences between the parties with regard to the conduct of the business, and, in the result, they decided that they had better sever their association. With that object in view, the plaintiff
- I wrote to the defendant on Dec. 17, 1953, a letter containing proposals for the sale of his interest in the property and his interest in the company, i.e., his holding of shares in the company. The terms offered were not wholly acceptable to the defendant, and he made a counter-offer and negotiations ensued. Ultimately the defendant intimated, by his solicitors, to the plaintiff's solicitors that he had decided not to go on with his proposed purchase of the plaintiff's interest.

The plaintiff maintains that what I have referred to as "negotiations" in fact resulted in a binding contract. The defendant, on the other hand, as his breaking off of the negotiations implies, takes the view that there was no binding

contract; there were merely negotiations which were terminated before any A
binding contract was reached. In those circumstances, the plaintiff commenced
the present action in the Chancery Division, claiming specific performance of the
contract on which he relied.

The defences raised to the claim for specific performance were that the parties
were not ad idem, which includes the contention that there was never any B
concluded contract; that any bargain which was struck was a bargain subject
to contract and no formal contract was ever executed; and, lastly, that in any
case there was no sufficient memorandum of the contract, if there had been a
contract, under the provisions of the Law of Property Act, 1925, s. 40.

I will deal first with the question whether there was any concluded contract
between the parties. That question was dealt with first by the learned judge.
and he came to a conclusion on it adverse to the plaintiff and it was thus un- C
necessary for him to deal with the question of s. 40 of the Act of 1925. His
decision was, in effect, not only that there was no concluded bargain, but also
that the parties had contemplated putting the terms into a final formal agreement
before they were to be bound.

[HIS LORDSHIP reviewed the correspondence and evidence, and continued:]
I find myself unable to differ from the conclusion reached by the learned judge D
to the effect that there was here no binding contract. That makes it strictly
unnecessary for me to consider the second question, i.e., whether, if there was a
binding contract which would, in other respects, have been enforceable, the
defendant has a good defence under the Law of Property Act, 1925, s. 40, on
the ground that there is no sufficient note or memorandum in writing of this
contract to satisfy the section, as, in my opinion, there clearly is not. Section E
40 (1) is as follows:

“No action may be brought upon any contract for the sale or other
disposition of land or any interest in land, unless the agreement upon which
such action is brought, or some memorandum or note thereof, is in writing,
and signed by the party to be charged or by some other person thereunto
by him lawfully authorised.” F

It will be observed that the section refers to “any contract for the sale or other
disposition of land or any interest in land”. The subject-matter of the sale in
this case, so far as the premises 35, Market Street, Watford, are concerned, is the
plaintiff's interest in the premises, if I may use that expression without prejudice.
The nature of his interest is that the plaintiff and defendant are beneficial co- G
owners. Under the law as it stood before the Law of Property Act, 1925, they
would have been simply tenants in common, each with an undivided share of the
property. For conveyancing reasons, the law was, as everybody knows, altered
by the Act of 1925, and the effect of the alteration by s. 34 (2) was that interests
of this kind could only be given effect to behind a trust for sale. Thus the position
here as regards 35, Market Street, Watford, is that it is vested in the plaintiff H
and the defendant as joint tenants in fee simple on trust to sell with power to
postpone and to stand possessed of the proceeds of sale and the net rents and
profits until sale in trust for themselves in equal shares.

That being the conveyancing position, it is urged by counsel for the plaintiff
that it can no longer be said that what used to be an undivided share in land
and now is a corresponding share in the proceeds of sale of the land, is “land
or any interest in land” within the meaning of s. 40, and he referred us to I
Re Price (1), where it was held that the interest of the owner of a former undivided
share in land in the proceeds of sale of the land to arise under the statutory trust
for sale imposed by the provisions of the Law of Property Act, 1925, in regard
to undivided shares was an interest in personality. The passage to which we
were referred is in the judgment of CLAUSON, J. He said ([1928] Ch. at p. 589):

“The result of this survey of the new Acts seems to show that on Jan. 1,
1926, Thomas John Price ceased to have any estate in the fourteen acres

- A or any part of it and became entitled to an equitable interest in the proceeds of sale of the fourteen acres—namely, such interest as might be requisite for giving effect to his rights as a person interested in the land. In my opinion, such an interest is an interest in personal estate. By the statutory imposition of a trust for sale the land has, so far as beneficiaries are concerned, been converted into money, and Thomas John Price has an interest in the money.”
- B

Counsel for the plaintiff also referred us to *Edwards v. Hall* (2). The headnote of that case shows at once that it was of a very different kind from this one. The headnote is ([1949] 1 All E.R. 352):

- C “After Sept. 3, 1939, one of several tenants in common of a farm acquired the interest of the others and became sole freeholder of the property. Subsequently she gave the tenant of the farm notice to quit. Held: the conveyance by the tenants in common of their interest in the land to the other tenant in common was a sale of an interest in land which was personalty and not a sale of an agricultural holding within the meaning of the Defence (General) Regulations, 1939 . . .”;
- D

and that had certain consequences as to the requirements of a valid notice to quit. I do not think that case is of any great assistance here.

- I agree that, for certain purposes of disposition and devolution, the proceeds of sale to arise under a trust for sale of land are by virtue of the equitable doctrine of conversion to be considered as personalty, but the question in this case is whether, for the purposes of this particular section, s. 40 of the Law of Property Act, 1925, an interest in the proceeds which arise under a trust for sale of land is an interest in land within the meaning of that section. Counsel for the defendant referred us to certain authorities, which seem to me to be more nearly in point, in which similar interests were held to be interests in land, for the purposes of other enactments. The first of those cases was *Re Fox* (3), and it was there held by WARRINGTON, J., following *Re Hazeldine's Trusts* (4) and *Kirkland v. Peatfield* (5), that a mortgagor's interest in the proceeds of sale of the land held on a trust for sale was an interest in “land” as defined by the Real Property Limitation Act, 1833, s. 1, and therefore, after the lapse of twelve years and in the absence of any payment or acknowledgment, the title of the mortgage was extinguished under s. 34 of the Act of 1833 and s. 8 of the Real Property Limitation Act, 1874. The question was put by WARRINGTON, J. ([1913] 2 Ch. at p. 78): “Is this mortgage a mortgage of land or ‘any share, estate, or interest’ in land within the meaning of the Real Property Limitation Act, 1833?” His Lordship goes on (*ibid.*):
- F
- G

- “The question mainly depends on the true construction of the interpretation clause contained in s. 1 of the Act of 1833, which says that the word ‘land’ shall extend to, amongst other things, ‘any share, estate or interest’ in land, ‘whether the same shall be a freehold or chattel interest’. Is the interest which a person takes in the proceeds of sale of land an interest in land? In my opinion it is.”
- H

Then he quotes the two authorities which I have mentioned.

- I The next case was *Re Witham* (6), which raised a similar question. The headnote is ([1922] 2 Ch. 413):

“A testator gave the whole of his residuary estate in trust for his wife for life, with remainder to his children in equal shares, and he died in 1894, leaving a widow and seven children. In 1903 one of the testator's sons mortgaged his one-seventh share in his father's estate, which at that date consisted of personalty and realty. The testator's widow died in 1918, and after her death most of the realty was realised. No interest was ever

paid, and no acknowledgment of the mortgage debt was given since 1903. **A**
 Held, that the mortgage debt, as against the proceeds of sale of the real estate, was barred by s. 8 of the Real Property Limitation Act, 1874."

That was a decision of SARGANT, J., who followed the decision of the Court of Appeal in *Re Hazeldine's Trusts* (4), which, as he said, WARRINGTON J., had followed in *Re Fox* (3). In *Miller v. Collins* (7), it was held that an interest of a married woman "in a sum of money, properly invested by her trustees upon a mortgage of land, is an interest in land within s. 77 of the Fines and Recoveries Act [1833]". There was a somewhat similar decision under the Real Property Limitation Act, 1833, in *Re Jauncey* (8). **B**

There is thus authority—not, it is true, relating to the Law of Property Act, 1925—for the proposition that in Acts of Parliament the expression "interest in land" may include an interest in the proceeds of sale of land; and I would be disposed, with little hesitation, to give the words a similar meaning in s. 40 of the Law of Property Act, 1925, were it not for the definition of land contained in s. 205 (1) (ix) of that Act, which says: "'Land' includes land of any tenure"—then there is a long enumeration of particulars ending with "an easement, right, privilege, or benefit in, over, or derived from land; but not an undivided share in land". One may also refer to para. (x), which says: **C**

"'Legal estates' mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorised to subsist or to be created as legal estates; 'equitable interests' mean all the other interests and charges in or over land or in the proceeds of sale thereof; an equitable interest 'capable of subsisting as a legal estate' means such as could validly subsist or be created as a legal estate under this Act." **D**

The definition of land in s. 205 (1) (ix) of this Act does, in so many words, exclude an undivided share in land; but that does not, to my mind, conclude the matter. The interest here in question is not an undivided share in land: it is a right to a share of the proceeds to arise from a sale of land, and para. (ix) does not say that such a right is not an interest in land, while para. (x) classes together as "equitable interests" interests in land or the proceeds of sale thereof. Moreover the definitions in s. 205 of the Act of 1925 are assigned subject to the qualification "unless the context otherwise requires". Section 40 of the Act of 1925, as is well-known, replaced part of the Statute of Frauds, 1677, s. 4, and there is, to my mind, little doubt that, before the Law of Property Act, 1925, an interest in the proceeds to arise from a sale of land would notwithstanding the equitable doctrine of conversion have ranked as an interest in land for the purposes of s. 4 of the Act of 1677. I am reluctant to construe s. 40 (1) of the Act of 1925 as altering the law in this respect. **E**

Accordingly, I would be disposed to hold that a share in the proceeds to arise from a sale of land is an interest in land within the meaning of s. 40 (1). But if I am wrong in my inclination to accept the proposition in these general terms, I think that, at all events, in a case such as this, where the transaction to which the contract relates is a sale by one to the other of two legal joint tenants of land, each of whom is beneficially entitled to one-half of the proceeds to arise from its sale, and who moreover are joint lessors under a lease to which the property is subject; and where by virtue of the transaction the purchaser will acquire, subject to and with the benefit of the lease, the whole estate, legal and beneficial, in the entirety of the land; the contract cannot well be regarded as anything else than a contract for the sale of an interest in land and, were it necessary for us to do so, I would so hold. **F**

For the reasons which I have stated on the question of contract or no contract, I am of opinion that the learned judge's decision in this case should not be disturbed, and I would dismiss this appeal. **G**

A **SIR RAYMOND EVERSLED, M.R.:** I am of the same opinion. I agree with JENKINS, L.J., that, in any event, the plaintiff would have failed on the point arising under s. 40 of the Law of Property Act, 1925. I agree with the reasoning of JENKINS, L.J., and add nothing except that if there was in this case a contract for the sale or other disposition of an interest in land, then there was no memorandum or note of that contract signed by the defendant.

B **HODSON, L.J.:** I also agree.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Wallington, Fabian & White*, Watford (for the plaintiff); *Mills, Lockyer & Co.* (for the defendant).

C [Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

D

E

INLAND REVENUE COMMISSIONERS v. BADDELEY AND OTHERS. SAME v. SAME.

F [HOUSE OF LORDS (Viscount Simonds, Lord Porter, Lord Reid, Lord Tucker and Lord Somervell of Harrow), December 13, 14, 15, 16, 1954, February 17, 1955.]

G *Charity—Benefit to community—Religious, moral, social, and physical well-being—Sufficient section of public—Uncertainty—Members or likely to become members of Methodist Church in two boroughs—Persons benefiting depending on opinion of mission leaders—Poverty—Insufficiency of means—Advancement of education—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 54 (1).*

Stamp Duty—Charity—Moral, social and physical well-being—Whether object charitable—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 54 (1).

H Land on which stood a mission church, lecture room and store, was conveyed to trustees on trust to permit the land to be appropriated and used by the leaders of a mission "for the promotion of the religious social and physical well-being of persons resident in the county boroughs of West Ham and Leyton . . . by the provision of facilities for religious services and instruction and for the social and physical training and recreation of such aforementioned persons who for the time being are in the opinion of [the] leaders [for the time being of the Stratford Newtown Methodist Mission] members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by these presents and . . . by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons".

I By a second deed, other land, which was laid out as a playing field, and on which a pavilion and groundsman's bungalow had been erected, was conveyed to the same trustees on similar trusts except that "moral well-being"

was substituted for "religious well-being" throughout and the residents benefiting were required, in the opinion of the mission leaders, to be, or to be likely to become, members of the Methodist Church,

Held: (i) the trusts were not for the relief of poverty, for "relief" connoted such need as for a home or for the means to provide some necessity or quasi-necessity.

(ii) (LORD REID dissenting) promotion of the "religious social and physical well-being" or the "moral social and physical well-being" of the persons to whom the deeds referred were objects of an ambit too wide to include only purposes which in law were charitable and, accordingly, the trusts constituted by the deeds were not charitable trusts.

Williams' Trustees v. Inland Revenue Comrs. ([1947] 1 All E.R. 513) followed.

Per VISCOUNT SIMONDS: (i) regarded as a whole the sum of the activities permissible under the deed [i.e., the deed of conveyance of the Mission Church, etc.] can only be regarded as educational in the loose sense in which all experience may be said to be educative and, if the activities are examined one by one, it is impossible to regard many of them as in even the loosest sense educational (see p. 529, letter G, post).

(ii) a trust cannot qualify as a charity within the fourth class in *Income Tax Special Purposes Comrs. v. Pemsel* ([1891] A.C. 531) (i.e., as being of general public utility) if the beneficiaries are a class of persons not only confined to a particular area, but selected from within it by reference to a particular creed (see p. 534, letter A, post).

Per LORD SOMERVELL OF HARROW: there might well be a valid trust for the promotion of religion benefiting a very small class. It would not follow at all that a recreation ground for the exclusive use of the same class would be a valid charity (see p. 549, letter A, post).

Decision of the COURT OF APPEAL, sub nom. *Baddeley v. Inland Revenue Comrs.* ([1953] 2 All E.R. 233) reversed.

[As to Relief of Poverty as a Charitable Purpose, see 4 HALSBURY'S LAWS (3rd Edn.) 214, 215, para. 492; and for cases on the subject, see 8 DIGEST (Repl.) 316, 13 et seq.]

As to Objects of Public Utility being Charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 229, para. 509; and *ibid.*, 234, para. 515 text and note (*u*); and for cases on the subject, see 8 DIGEST (Repl.) 350, 302 et seq.

As to Education as a Charitable Purpose, see 4 HALSBURY'S LAWS (3rd Edn.) 218 et seq., paras. 496 et seq.; and for cases on the subject, see 8 DIGEST (Repl.) 326, 91 et seq.

For the Finance Act, 1947, s. 54 (1), see 21 HALSBURY'S STATUTES (2nd Edn.) 1345.]

Cases referred to:

(1) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 27 Tax Cas. 409; 2nd Digest Supp.

(2) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 313, 1.

(3) *Re De Carteret*, [1933] Ch. 103; 102 L.J.Ch. 52; 148 L.T. 188; Digest Supp.

(4) *Farley v. Westminster Bank, Ltd., Re Ashton's Estate*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; Digest Supp.

- A (5) *Dunne v. Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest (Repl.) 392, 858.
- (6) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 8 Digest (Repl.) 397, 889.
- (7) *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.*, [1946] N.I. 178; 27 Tax Cas. 431; 2nd Digest Supp.
- B (8) *Morice v. Durham (Bp.)*, (1805). 10 Ves. 522; 32 E.R. 947; 8 Digest (Repl.) 390, 836.
- (9) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.
- (10) *Re Strakosch*, [1949] 2 All E.R. 6; [1949] Ch. 529; [1949] L.J.R. 1477; 2nd Digest Supp.
- C (11) *Goodman v. Saltash Corpn.*, (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 8 Digest (Repl.) 440, 1306.
- (12) *Verge v. Somerville*, [1924] A.C. 496; 93 L.J.P.C. 173; 131 L.T. 107; Digest Supp.
- D (13) *Re Hadden*, [1932] 1 Ch. 133; 146 L.T. 190; 101 L.J.Ch. 53; Digest Supp.
- (14) *Re Foakes*, (1933), unreported.
- (15) *Re Chesters*, (1934), unreported.
- (16) *Re Nottage*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 8 Digest (Repl.) 358, 370.
- E (17) *National Anti-Vivisection Society v. Inland Revenue Comrs.*, [1947] 2 All E.R. 217; [1948] A.C. 31; [1947] L.J.R. 1112; 177 L.T. 226; 28 Tax Cas. 311; 2nd Digest Supp.
- (18) *James v. Allen*, (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, 839.
- (19) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.
- F (20) *Re Webber*, [1954] 3 All E.R. 712.
- (21) *Inland Revenue Comrs. v. City of Glasgow Police Athletic Assocn.*, [1953] 1 All E.R. 747; [1953] A.C. 381; 117 J.P. 201; 34 Tax Cas. 76; 3rd Digest Supp.
- (22) *Re Mariette*, [1915] 2 Ch. 284; 84 L.J.Ch. 825; 113 L.T. 920; 8 Digest (Repl.) 327, 98.
- G (23) *Cocks v. Manners*, (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 8 Digest (Repl.) 325, 86.
- (24) *Re MacDuff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest (Repl.) 395, 879.
- (25) *Re Hobourn Aero Components, Ltd.'s Air-Raid Distress Fund*, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 2nd Digest Supp.
- H (26) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest (Repl.) 320, 52.

Appeals.

- I Appeals by the Crown from orders of the Court of Appeal dated May 18, 1953, and reported sub nom. *Baddeley v. Inland Revenue Comrs.*, [1953] 2 All E.R. 233, reversing orders of HARMAN, J., dated Dec. 18, 1952, and reported [1953] 1 All E.R. 63. HARMAN, J., held that the trusts of two instruments dated Aug. 21, 1951, were not exclusively charitable and dismissed appeals by trustees by Cases Stated under the Stamp Act, 1891, s. 13, from decisions of the Inland Revenue Commissioners.

The facts appear in the opinions of VISCOUNT SIMONDS and LORD REID.

Geoffrey Cross, Q.C., J. H. Stamp and E. B. Stamp for the appellants, the A
Crown.

S. Pascoe Hayward, Q.C., and W. F. Waite for the respondents, the trustees.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and Denys B. Buckley as amici curiae.

The House took time for consideration.

Feb. 17. The following opinions were read.

VISCOUNT SIMONDS : My Lords, these consolidated appeals raise once more a question, which has so often caused doubt and difficulty in the courts of this country, whether certain trusts are charitable in the sense which the law accords to that word. It need cause no surprise, though it may cause regret, that this should be so. For while no comprehensive definition of legal charity has been given either by the legislature or in judicial utterance, there is no limit to the number and diversity of the ways in which man will seek to benefit his fellow-men. To determine whether the privileges, now considerable, which are accorded to charity in its legal sense, are to be granted or refused in a particular case, is often a matter of great nicety and I think that this House can perform no more useful function in this branch of the law than to discourage a further excess of refinement where already so many fine distinctions have been made. In the present appeals, the controversy is about the amount of stamp duty payable in respect of two deeds of conveyance, by which trusts were declared of certain property thereby respectively conveyed. If the trusts so declared were charitable the duty is smaller than if they were not charitable. The sums actually at stake are trifling, but the issue is an important one. It was decided in favour of the appellants, the Commissioners of Inland Revenue, by *HARMAN, J.*, but against them by the Court of Appeal. Hence the present appeal.

I find it convenient, my Lords, to examine the two deeds separately, and take first a deed of conveyance to the respondents as trustees of certain land at Stratford in the county of Essex of an area of about 680 square yards with a mission church, lecture room and store erected on some part thereof. So far as relevant (omitting certain words which, admittedly, were inserted in error) the trusts of this property were as follows:

"The trustees shall permit the said property to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission under the name of the Newtown Trust (hereinafter called 'the foundation') for the promotion of the religious social and physical well-being of persons resident in the county boroughs of West Ham and Leyton in the county of Essex by the provision of facilities for religious services and instruction and for the social and physical training and recreation of such aforementioned persons who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by these presents and by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons. Provided always that the trustees shall not at any time hereafter and so long as the trusts hereby declared shall not have totally failed use or permit the said property to be used either for physical training or physical recreation or any kind of game on Sundays Christmas Days or Good Fridays or for the sale or consumption of intoxicating drink."

This main trust is followed by certain ancillary provisions which cannot, I think, affect the question whether it is a charitable trust. It is at once apparent that the document is not skilfully drawn. It is presumably *all* the persons resident

A in the specified boroughs whose religious, social and physical well-being is to be promoted, but this is to be achieved by providing certain facilities for religious services and instruction and for the social and physical training and recreation of "such aforementioned persons", i.e., such residents, as are

B "for the time being in the opinion of the leaders members or likely to become members of the Methodist Church and of insufficient means to enjoy the advantages by these presents."

This awkward phraseology leaves me in doubt whether the beneficiaries under this trust are to be all the residents in a certain area or only such of the residents as satisfy two conditions, first that they are Methodists or, in the opinion of the leaders, potential Methodists, and, secondly, that they are of limited means. C It might even be that, on a true interpretation of the deed, some benefits are open to all the residents, others to a more limited class. Fortunately, I do not find it necessary to determine this question, for I think that, whatever view may be taken of it, this case is governed by the recent decision of this House in *Williams' Trustees v. Inland Revenue Comrs.* (1).

D Before, however, I examine that case and certain other cases which must, I think, guide your Lordships' decision, I must first dispose of two contentions which were urged, the one by the respondents and the other by the Attorney-General, against the appeals.

By the respondents, it was contended that the trusts of the deed could be supported as valid charitable trusts on the ground that they came within the first head of LORD MACNAGHTEN'S classification in *Income Tax Special Purposes Comrs. v. Pemsel* (2), viz., that they were for the relief of poverty. This contention was, in my opinion, rightly rejected both by HARMAN, J., and the Court of Appeal. I do not question that there may be a good charity for the relief of persons who are not in grinding need or utter destitution: see *Re De Carteret* (3). But I agree with HARMAN, J., and am content to adopt his words, that relief E connotes need of some sort, either need for a home or for the means to provide for some necessity or quasi-necessity, and not merely an amusement, however healthy. F

The Attorney-General, appearing as amicus curiae, urged that the validity of the trust could be sustained on the ground that, regarded as a whole, it was an educational charity. This contention had not previously been put forward and your Lordships have not the advantage of knowing the views on it of the learned judge and the Court of Appeal. The short answer appears to me to be that, regarded as a whole, the sum of the activities permissible under the deed can only be regarded as educational in the sort of loose sense in which all experience may be said to be educative, and that, if such activities are examined one by one, it would be impossible to regard many of them as in even the loosest G sense educational. H

If, then, this trust is charitable, it can only be because it falls within the fourth class in LORD MACNAGHTEN'S classification; that is, it must be a trust of general public utility and must be within the spirit and intendment of the preamble to the statute 43 Eliz. 1 c. 4. And this is what the Court of Appeal has held it to be. My Lords, with great respect to the singularly acute and refined argument of I JENKINS, L.J., who delivered the leading judgment in the Court of Appeal, I must doubt whether anything is gained by discussing whether the trust should be regarded as prescribing three separate and distinct objects, viz., (a) the promotion of religious well-being, (b) the promotion of social well-being, and (c) the promotion of physical well-being, or as having as its goal a state of complete well-being with three several aspects, religious, social and physical. Let it be assumed that, in the words of the learned lord justice, the object of the trust is the religious, social and physical improvement of the persons resident in the two boroughs;

and let it be further assumed that this is the end desired for each of such persons, making such reservation as may be necessary for the fact that facilities for social and physical training are to be reserved for a limited class of those persons. Yet, in the end, the question is for what purposes may the trust property be used without trespassing beyond the language of the deed? I find that it may be used for promoting and encouraging all forms of such activities, i.e., the provision of facilities for (inter alia) social and physical training and recreation,

“as are calculated to contribute to the health and well-being of such persons.”

My Lords, I do not think it would be possible to use language more comprehensive and more vague. I must dissent from the suggestion that a narrow meaning must be ascribed to the word “social”. On the contrary, I find in its use confirmation of the impression that the whole provision makes on me, that its purpose is to establish what is well enough called a community centre in which social intercourse and discreet festivity may go hand in hand with religious observance and instruction. No one will gainsay that this is a worthy object of benevolence, but it is another question whether it is a legal charity, and it appears to me that authority which is binding on your Lordships puts it beyond doubt that it is not. Here we are not concerned to consider whether a particular use to which the trust property may be put is a charitable use: that is a question on which different minds might well come to different conclusions. On the contrary, we must ask whether the whole range of prescribed facilities or activities (call them what you will) is such as to permit uses which are not charitable. If it is, it is not such a trust as the court can execute and it must fail.

My Lords, I repeat that, in this admittedly difficult branch of the law, nothing is to be gained by adding refinement to refinement, and I am satisfied that, in the light of several decisions of this House, in which comparable general words have been held not to create a valid charitable trust, your Lordships would not be justified in taking a different view in the present case. From many cases I will take a few, selecting only those in which the generality of the words has been held to exclude an exclusively charitable connotation. In *Farley v. Westminster Bank, Ltd., Re Ashton's Estate* (4), the gift was to the respective vicars and churchwardens of two named churches “for parish work”. Vague words indeed, but, if I had to write them out somewhat less vaguely, I could not easily find more appropriate words than those with which the trust of this deed begins and ends, adding, perhaps, something about the relief of the poor which, at any rate, would not detract from their charitable content. Yet this trust failed, because work (or activity) which conduces to the welfare of the parishioners (or which promotes their religious, social and physical well-being) is not confined to purposes legally charitable. So in an earlier case, *Dunne v. Byrne* (5), a gift to the Roman Catholic Archbishop of Brisbane to be used in the manner “most conducive to the good of religion in this diocese” as he might decide, was held to be invalid, because, though it had a prima facie religious content, yet the generality of the language admitted an application which the law would not consider charitable. The words of LORD MACNAGHTEN in delivering the judgment of the Board may be recalled ([1912] A.C. at p. 411):

“The language of the bequest (to use LORD LANGDALE's words) would be ‘open to such latitude of construction as to raise no trust which a court of equity could carry into execution’.”

These words are directly applicable to the present case, and, being applied, are fatal to the contention of the respondents. I do not refer to *Houston v. Burns* (6), or other cases in which the same principle has been applied and come to the recent case of *Williams' Trustees v. Inland Revenue Comrs.* (1), which I have already mentioned. There the House had to consider a deed by which a

- A trust was established for the benefit of Welsh people in London. Its object was declared to be to establish and maintain an institute and meeting place in London for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people, and of fostering the study of the Welsh language and so on. The means by which this was to be achieved were, without prejudice to the generality of the object, set out with some particularity. The noble and learned Lords who heard the case (including my noble and learned friend, LORD PORTER) were unanimous in thinking that this was not a valid charitable trust. It is true that in the present case religious instruction is, but in Williams' trust was not, prescribed, but this distinction is irrelevant as it is conceded that the trust is not exclusively for religious purposes. But apart from this distinction, what valid ground is there for distinguishing the two cases? I ignore at this stage any difference in the class of beneficiaries: that raises another and more difficult question. I look only at the nature of the benefits which are within the scope of the two trusts, having regard in each case to the language of the exordium, and in this aspect I am unable to find any material distinction. I hope that I do no injustice to the judgments of the Court of Appeal in the present case if I say that they appear to give a special meaning to the word "social" where it occurs in the present deed and, having done so, to give too much significance to that meaning. It is to be observed that "social" is a word that occurs in the Williams' trust deed also. It is probably true that, as JENKINS, L.J., says, much turns on the construction of the several deeds and it is, perhaps, because I have taken a different view of the meaning of a particular word that I have come to a different conclusion on the whole case. I am glad to think that, in doing so, I find myself in complete agreement with the Court of Appeal of Northern Ireland who, in *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (7), had to construe a deed which is essentially comparable with that which your Lordships are considering and held that the trust thereby established was not a valid charitable trust.

Other aspects of the trust established by the first deed were discussed and it is right that I should make some observations on them, but before doing so I will turn to the second deed, by which an area of land at Ilford in the county of Essex laid out as a playing field, on parts of which a pavilion and groundsman's bungalow had been erected, was conveyed to trustees on trusts which were substantially the same as those of the first deed except that (a) "moral" was substituted for "religious" in the opening words of the trust, (b) no reference was made to the provision of facilities for religious services and instruction, and (c) the benefits were unambiguously conferred exclusively on residents who satisfied the conditions of membership or potential membership of the Methodist Church and insufficiency of means to which I have already referred. The second deed also contained certain ancillary provisions to which I need not refer and, further, a declaration of trust of £10,000 which had been paid to them and of any other money or property which might be paid or transferred to them which the trustees were directed to use or apply in such manner

- I "as the trustees shall think most beneficial for promoting the objects of the charity hereby constituted."

Once more I submit to your Lordships that this trust must fail by reason of its vagueness and generality. The moral, social and physical well-being of the community, or any part of it, is a laudable object of benevolence and philanthropy, but its ambit is far too wide to include only purposes which the law regards as charitable. I need not repeat what I have said in regard to the promotion of religious, social and physical well-being, except to emphasise that to hold the

one a valid and the other an invalid trust would be to introduce the sort of refinement which I deplore. A

In regard to this second trust, I will only add that it does not follow that, because a trust in the vague and general terms of the second deed cannot be supported, therefore a gift by devise or conveyance of land for a recreation ground must also fail. This was the particular concern of the learned Attorney-General, and I think it right to say that, in my opinion, a gift of land for use as a recreation ground by the community at large or by the inhabitants of a particular geographical area may well be supported as a valid charity. But I would reserve my opinion in a case in which the beneficiaries are a class determined, for instance, by adherence to a particular religion, or by employment in a particular industry, or by particular employers. B

This brings me to another aspect of the case, which was argued at great length and, to me at least, presents the most difficult of the many difficult problems in this branch of the law. Suppose that, contrary to the view that I have expressed, the trust would be a valid charitable trust if the beneficiaries were the community at large or a section of the community defined by some geographical limits, is it the less a valid trust if it is confined to members or potential members of a particular church within a limited geographical area? The starting point of the argument must be, that this charity (if it be a charity) falls within the fourth class in LORD MACNAGHTEN'S classification. It must, therefore, be a trust which is, to use the words of Mr. Romilly in *Morice v. Bishop of Durham* (8), of "general public utility", and the question is what these words mean. It is, indeed, an essential feature of all "charity" in the legal sense that there must be in it some element of public benefit, whether the purpose is educational, religious or eleemosynary: see the recent case of *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (9); and, as I have said elsewhere, it is possible, particularly in view of the so-called "poor relations cases", the scope of which may one day have to be considered, that a different degree of public benefit is requisite according to the class in which the charity is said to fall. But it is said that, if a charity falls within the fourth class, it must be for the benefit of the whole community, or at least of all the inhabitants of a sufficient area. And it has been urged with much force that, if, as LORD GREENE, M.R., said in *Re Strakosch* (10), this fourth class is represented in the preamble to the statute of Elizabeth by the repair of bridges, etc., and possibly by the maintenance of houses of correction, the class of beneficiaries, or potential beneficiaries, cannot be further narrowed down. Some confusion has arisen from the fact that a trust of general public utility, however general and however public, cannot be of equal utility to all and may be of immediate utility to few. A sea-wall, the prototype of this class in the preamble, is of remote, if any, utility to those who live in the heart of the Midlands. But there is no doubt that a trust for the maintenance of sea-walls generally, or along a particular stretch of coast, is a good charitable trust. Nor, as it appears to me, is the validity of a trust affected by the fact that, by its very nature, only a limited number of people are likely to avail themselves, or are, perhaps, even capable of availing themselves, of its benefits. It is easy, for instance, to imagine a charity which has for its object some form of child welfare, of which the immediate beneficiaries could only be persons of tender age. Yet this would satisfy any test of general public utility. It may be said that it would satisfy the test because the indirect benefit of such a charity would extend far beyond its direct beneficiaries, and that aspect of the matter has probably not been out of sight. Indirect benefit is certainly an aspect which must have influenced the decision of the "cruelty to animal" cases. But I doubt whether this sort of rationalisation helps to explain a branch of the law which has developed empirically and by analogy on analogy. C D E F G H I

It is, however, in my opinion, particularly important in cases falling within the fourth category to keep firmly in mind the necessity of the element of general

- A public utility and I would not relax this rule. For here is a slippery slope. In the case under appeal, the intended beneficiaries are a class within a class. They are those of the inhabitants of a particular area who are members of a particular church. The area is comparatively large and populous and the members may be numerous. But, if this trust is charitable for them, does it cease to be charitable as the area narrows down and the numbers diminish? Suppose the area is confined to a single street and the beneficiaries to those whose creed commands few adherents. Or suppose the class is one that is determined not by religious belief but by membership of a particular profession or by pursuit of a particular trade. These were considerations which influenced the House in the recent case of *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (9). That was a case of an educational trust, but I think that they have even greater weight in the case of trusts which, by their nominal classification, depend for their validity on general public utility.

It is pertinent, then, to ask how far your Lordships might regard yourselves bound by authority to hold the trusts now under review valid charitable trusts, if the only question in issue was the sufficiency of the public element. I do not repeat what I said in *Williams' Trustees v. Inland Revenue Comrs.* (1) about *Goodman v. Saltash Corpn.* (11), and the cases that closely followed it. Further consideration of them does not change the view that I then expressed which, in effect, indorsed the opinion of the learned editor of the last edition of *TUDOR ON CHARITIES*. More relevant is *Verge v. Somerville* (12). In that case, in which the issue was as to the validity of a gift

- E “unto the trustees . . . of the ‘Repatriation Fund’ or other similar fund for the benefit of New South Wales returned soldiers”,

LORD WRENBURY, delivering the judgment of the Judicial Committee, said that, to be a charity, a trust must be ([1924] A.C. at p. 499)

- F “for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the object of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.”

- G Here, my Lords, are two expressions “an appreciably important class of the community” and “any particular class of such inhabitants”, to which, in any case, it is not easy to give a precise quantitative or qualitative meaning. But I think that, in the consideration of them, the difficulty has sometimes been increased by failing to observe the distinction, at which I hinted earlier in this opinion, between a form of relief extended to the whole community yet, by its very nature, advantageous only to the few, and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it. Of the former type, repatriated New South Wales soldiers would serve as a clear example. To me, it would not seem arguable that they did not form an adequate class of the community for the purpose of the particular charity that was being established. It was with this type of case that LORD WRENBURY was dealing, and his words are apt to deal with it. Somewhat different considerations arise if the form, which the purporting charity takes, is something of general utility which is, nevertheless, made available not to the whole public but only to a selected body of the public—an important class of the public it may be. For example, a bridge which is available for all the public may undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons, however numerous and important: it is then clearly not a charity. It is not of general public utility, for it does not serve the public purpose which its nature qualifies it to serve.

Bearing this distinction in mind, though I am well aware that, in its application, it may often be very difficult to draw the line between public and private

purposes, I should, in the present case, conclude that a trust cannot qualify as a charity within the fourth class in *Pemsel's* case (2) if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed. The learned Master of the Rolls in his judgment cites a rhetorical question asked by Mr. Stamp in argument ([1953] 2 All E.R. at p. 239),

"Who has ever heard of a bridge to be crossed only by impecunious Methodists?"

The *reductio ad absurdum* is sometimes a cogent form of argument, and this illustration serves to show the danger of conceding the quality of charity to a purpose which is not a public purpose. What is true of a bridge for Methodists is equally true of any other public purpose falling within the fourth class and of the adherents of any other creed.

The passage that I have cited from *Verge v. Somerville* (12) refers also (not, I think, for the first time) to "private individuals" or a "fluctuating body of private individuals" in contradistinction to a class of the community or of the inhabitants of a locality. This is a difficult conception to grasp. The distinction between a class of the community and the private individuals from time to time composing it is elusive. But, if it has any bearing on the present case, I would suppose that the beneficiaries, a body of persons arbitrarily chosen and impermanent, fall more easily into the latter than the former category. I conclude that, on this ground also, I should decide this case against the respondents, even if I were otherwise in their favour, and will only add that, in coming to this conclusion, I find myself in agreement with *BABINGTON, L.J.*, in the *London-derry* case (7), to which I have already referred.

I move that the appeals be allowed accordingly. The costs of all parties will be paid by the appellants, in accordance with the undertaking previously given.

LORD PORTER: My Lords, I concur with the opinion of the noble Lord on the Woolsack, in holding that the trusts declared in the two matters now under appeal are not charitable.

Like **LORD TUCKER**, however, I desire to express no opinion whether the beneficiaries constitute a sufficient class for the purposes of class four of *Pemsel's* case (2).

LORD REID: My Lords, the first question to be determined is the proper interpretation of the trust purposes set out in the conveyances of the mission hall and lecture room and of the playing field. I shall take first the conveyance of the playing field. The phraseology is, in this deed, more concise and somewhat easier to follow. The essential part of it, for the present purpose, is as follows:

"The trustees shall permit the said property to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission under the name of the Newtown Trust . . . for the promotion of the moral social and physical well-being of persons resident in the county boroughs of West Ham and Leyton in the county of Essex who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by these presents by the provision of facilities for moral social and physical training and recreation and by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons."

This begins by setting out the object to be attained,

"the moral social and physical well-being of persons resident in the county boroughs of West Ham and Leyton."

A There follows a limitation to a section of those persons. I must return to this, but, as this limitation throws no light on the nature of the trust purposes, I need not deal with it now. Then there follows the method, and the only permissible method, by which the object is to be attained: first

B “by the provision of facilities for moral social and physical training and recreation ”

and then

“by promoting and encouraging all forms of such activities [which must mean the activities of moral, social and physical training and recreation] as are calculated to contribute to the health and well-being ”

C of the beneficiaries. I think that “facilities” here means equipment and instruction or supervision suitable for the activities mentioned and it is, I think, plain that the playing field can only be used for activities which are promoted or encouraged by the leaders. The real question is: What are the nature and scope of the activities which the leaders are required or permitted to promote or encourage, and whether the conduct of any of those activities would go beyond what can properly be regarded as the fulfilment of a charitable purpose? The proviso, which I have not quoted, throws little independent light on this question and it must, in my opinion, be determined by construing the words which I have quoted in light of the whole circumstances disclosed in the deed.

E The leaders are, in my view, required to bear in mind that the donor’s objective is threefold—to promote the moral and social and physical well-being of the beneficiaries: they must not pursue one of these purposes in isolation. Of course, some activities will contribute more to one and some more to another of these purposes, but they must not promote or encourage any activity which may be detrimental to any of these three purposes—indeed, they must prevent any such activity. They are expressly required only to promote or encourage activities which are calculated to contribute to health and well-being. It is not enough F that a particular activity should not be harmful to health or well-being, it must only be promoted or encouraged if it is such as to contribute to health and well-being, and, of course, it would only be possible to conduct activities of a kind which the nature of the premises—a playing field—permits.

G My Lords, it is said that the words which I have quoted afford so vague a description of the permitted activities that a court could not determine what is authorised and what is not, or, alternatively, that these words are so wide as to authorise activities which could not come within anything that the law regards as charitable, so I must now consider what the law does regard as charitable. We were referred by the Attorney-General to a number of Acts of Parliament H extending over nearly a century in which Parliament has regarded the provision of facilities for recreation for adults as a charitable purpose. The first was the Recreation Grounds Act, 1859, under which land conveyed for the “regulated recreation ” of adults or for playgrounds for children was, I think, clearly regarded as land conveyed for a charitable purpose. It would appear that Parliament I assumed that this was the law, but if Parliament was wrong in so assuming then it would be necessary, in order to give effect to the Act, that there should be implied an enactment that land conveyed in terms of the Act should be treated as land held for charitable purposes.

The most important Act is the Mortmain and Charitable Uses Act, 1888. This Act, in my judgment, enacts that the dedication of any park, garden or other land to “the recreation of the public ” is a charitable purpose and is within the meaning, purview and interpretation of the preamble to the Act 43 Eliz. 1 c. 4. The drafting of the Act of 1888 is somewhat unusual and it requires careful examination. Section 13 repeals the whole of the Act of Elizabeth, including the preamble, and then enacts

"(2) Whereas by the preamble to the Act 43 Eliz. c. 4 (being one of the enactments hereby repealed), it is recited as follows [then the preamble is set out in full] and whereas in divers enactments and documents reference is made to charities within the meaning, purview, and interpretation of the said Act: References to such charities shall be construed as references to charities within the meaning, purview, and interpretation of the said preamble."

Part II of the Act is headed "Charitable uses", and begins by enacting, in s. 4, that, subject to the savings and exceptions contained in the Act, every assurance of land to or for the benefit of any charitable uses shall be made in accordance with the requirements of the Act and unless so made shall be void. Then, in Part III headed "Exemptions", s. 6 enacts that Parts I and II of the Act shall not apply (subject to a limitation which is not material) to an assurance of land for the purposes only of (inter alia) a public park, and, by the definition in s. 6 (4), "public park" includes any park, garden or other land dedicated or to be dedicated to the recreation of the public. It is possible that, before 1888, a conveyance of a park to trustees for the express purpose that it should be held and maintained in perpetuity for the recreation of the public might not have been held to be a conveyance for a charitable purpose. The gift would benefit rich and poor alike and that whether or not they are subject to any disability, and recreation must here include the use of the land by members of the public for mere relaxation and pleasure. But the whole of the provisions of the Act must be read together and, unless the ordinary principles of statutory construction are to be disregarded, the words taken from the preamble of the statute of Elizabeth and enacted in s. 13 as the measure of charitable purpose must be construed in light of the earlier provisions of the Act which make the express purpose of holding "any park garden or other land" for the recreation of the public a charitable purpose. I would agree that any "other land" must be ejusdem generis with parks and gardens. Recreation is a very wide term, but only certain types of recreation can be pursued or enjoyed in a park or garden. It may be that, as regards other types of land or buildings where a greater variety of types of recreation could be pursued, merely requiring that they should be held for the recreation of the public would not be a charitable purpose. But, in my judgment, the Act of 1888 clearly establishes that a gift for the purpose of public recreation of subjects on which the only possible types of recreation are those which could be enjoyed in the open air in a park or garden is a gift for a charitable purpose. And, if that be so, I cannot see how it could be denied that a gift of money to be used to promote or facilitate the enjoyment of public recreation on such land is also a gift for a charitable purpose. I, therefore, agree with the decision in *Re Hadden* (13). It was followed in two unreported cases to which we were referred: in *Re Foakes* (14), in 1933, LUXMOORE, J., held that a bequest of certain fields and a barn (together with a sum for their upkeep) for use as a recreation ground was a valid charitable gift, and in *Re Chesters* (15), in 1934, BENNETT, J., held that a bequest of money to provide public recreation or playgrounds for the children was a valid charitable gift.

Re Nottage (16), is clearly distinguishable: money was bequeathed to provide annually a cup for yacht racing, so the only possible beneficiaries were yacht owners, who would be somewhat strange objects of charity. But what the appellants found on is the reasoning in the Court of Appeal to the effect that encouragement of a mere sport or game is not charitable, though the sport or game may be beneficial to the public. No doubt that is true in the main, but it cannot apply to the provision or support of playing fields: yacht racing is far removed from the kind of recreation which Parliament has declared to be charitable. And a charitable purpose, such as education, may well be achieved in part at least by promoting sport or games. The emphasis is on mere sport or games, and I cannot suppose that any of the learned judges had in mind the

- A Acts of Parliament dealing with recreation, or would have denied that the encouragement of games as a means to achieve a charitable purpose for those who took part in them was quite a different matter.

As regards recreation, the only other Act to which I need refer is the Open Spaces Act, 1906. Section 3 provides for land held by trustees on trust for the purposes of public recreation being transferred to a local authority and for the

- B conditions of the trust being varied with the approval of the Charity Commissioners. And s. 5 (1) provides that, in certain circumstances, the owner of an open space may convey his estate or interest in it to a local authority "in trust for the enjoyment of the public" and such a conveyance must be for a charitable purpose if it is to be valid.

- C I am, therefore, of opinion that the purpose set out in the present deed for the provision of facilities for recreation and for its promotion and encouragement is a valid charitable purpose unless the class of beneficiaries is too narrow—a matter to which I shall return. I can find no distinction between a playing field and a park or garden for it is, I think, common knowledge that certain games are habitually played in public parks, and the dedication to the recreation of the public authorised by the Act of 1888 must, in my view, have permitted the
- D playing of games such as are played on a playing field.

But I think that the matter can be dealt with on broader lines. I would refer to the passage from *TYSEN ON CHARITABLE BEQUESTS*, at p. 5, quoted with approval by my noble and learned friend LORD SIMONDS in *National Anti-Vivisection Society v. Inland Revenue Comrs.* (17) ([1947] 2 All E.R. at p. 233):

- E "One by one the question of the validity of such trusts was brought before the Court of Chancery . . . It considered only this: Having regard to all legislative enactments and general legal principles, is it or is it not for the public benefit that property should be devoted for ever to fulfilling the purpose named? If the court considered that it was not for the public benefit, it held the trust altogether void."

- F It appears to me that the court, in determining what is for the public benefit, must be guided by the views of Parliament as embodied in Acts of Parliament, and, unless any general legal principle prevents it, courts should recognise as charitable purposes not only the precise purposes mentioned in the statutes, but others so closely resembling them that they cannot reasonably be distinguished. If that be right, then recreation on a playing field is, to my mind, not distinguishable from recreation in a public park. And if the promotion of recreation on a playing field is a charitable purpose, a fortiori I would think the promotion of moral, social and physical training there to be a charitable purpose.
- G

- H But, as this latter purpose is said to be too vague, I must examine it in more detail. The phrase social and physical training was not the invention of the donor in this case. It occurred in s. 86 of the Education Act, 1921, which provided that

"For the purpose of supplementing and reinforcing the instruction and social and physical training provided by the public system of education . . ."

- I an education authority may make arrangements to supply or maintain or aid the supply or maintenance of, inter alia,

"(c) other facilities for social and physical training in the day or evening."

This was extended by s. 6 of the Physical Training and Recreation Act, 1937, so as to permit this to be done for persons of whatever age, whether attending any educational institution or not. And, in the Education Act, 1944, it is provided, by s. 53, that it shall be the duty of every local education authority to secure that the facilities for primary, secondary and further education

provided for their area include adequate facilities for recreation and social and physical training, and "further education" includes (s. 41 (b))

"leisure-time occupation, in such organised cultural training and recreative activities as are suited to their requirements, for any persons over compulsory school age who are able and willing to profit by the facilities provided for that purpose."

My Lords, with these examples of its use before him, the donor in the present case might well suppose that the phrase social and physical training has an ascertainable meaning, and, if it has, the addition of the word "moral" could not vitiate the gift. I do not say that, because a phrase is habitually used in Acts of Parliament, it necessarily follows that it must have a precise meaning, but I would not readily hold that it is beyond the capacity of a court to determine the meaning of such a phrase with sufficient precision to enable it to determine whether any particular case falls within or outside its scope.

It is, of course, necessary that the trust purposes should be sufficiently precise to enable a court to determine, if a question should arise, whether a particular activity is authorised by them or not, and

"If the property as SIR WILLIAM GRANT, M.R., said in *James v. Allen* (18) (3 Mer. at p. 19) 'might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute' "

(per LORD MACNAGHTEN in *Dunne v. Byrne* (5), [1912] A.C. at p. 411). But the best way to show that the purposes are too vague is to find a hypothetical case where it could not be determined with reasonable certainty whether the case is within the purposes or not, and the best way to show that the purposes are too wide to be charitable is to find a hypothetical case which would be within the purposes but beyond the scope of charity. Nevertheless, counsel for the appellants refrained, no doubt for good reason, from submitting any such case; none was suggested in argument, and I can find none myself. It may be that the phrase "social training" apart from any context would be too vague, but in this context I see no great difficulty. The word "social", taken alone, has acquired a variety of meanings, but, to my mind, social training, in this context, plainly means training calculated to make a person more fit to associate with his fellows in society or the community in a God-fearing civilised and law abiding way, and that, surely, is one of the chief aims of all education. In *Re Compton* (19), the money bequeathed was

"to be used to fit the children to be servants of God serving the nation."

The bequest failed because the beneficiaries were only a fluctuating body of private individuals, but there was no suggestion that these words were too vague if the class of beneficiaries had been sufficient. LORD GREENE, M.R., said ([1945] 1 All E.R. at p. 200):

"The words are most apt to describe the ideals of such an education as that for which Dr. Arnold stood and which at any rate since his time have always been regarded as the dominant purpose of a public school education."

In my opinion, the words in the present case are no more vague than, and not essentially different from, those to which LORD GREENE referred. It is true that in that case the words referred to pupils, and in the present case they refer to persons of any age who can take advantage of a playing field. But education does not stop at any age. Recreation by itself may not be an educational purpose, but moral, social and physical training is. At least, I cannot think of any activity which would come within those words but would not be educational in character,

- A and I adopt the words of LORD GREENE, M.R., in *Re Strakosch* (10) ([1949] 2 All E.R. at p. 9):

“ If the object and the means indicated are clearly charitable, then the court is not astute to look for possible, but subsidiary, non-charitable means which might be within the words used.”

- B I note that in a recent case, *Re Webber* (20), VAISEY, J., had no doubt that furthering the Boy Scouts Movement was an educational and, therefore, charitable purpose.

In some contexts, social training might mean training in those arts and graces which are sometimes supposed to facilitate admittance to certain more exclusive circles of society, but that is not the meaning here. On a playing field a person

- C can learn the value of endurance and perseverance, of assiduous practice, of unselfish association in a team, and of winning with modesty and losing with a good grace, and, to my mind, that is the kind of moral and social training which the donor's words mean in this deed and in the Acts from which they were taken. I did not understand it to be argued that physical training was too vague a phrase, and if Parliament has enacted that providing for recreation in a public park is charitable it would, indeed, be remarkable that the law should hold that provision for outdoor training is not a charitable purpose. With all respect to your Lordships who think otherwise, I cannot feel any substantial doubt that the purposes of this deed are charitable and are sufficiently clearly stated to be enforceable.

- D But I find the case of the mission hall more difficult. The trust purposes here are almost identical with those for the playing field, the only material difference being the substitution of the word “ religious ” for “ moral ”, and the insertion of an additional purpose for the provision of facilities for religious services and instruction which is clearly charitable. But my doubt arises with regard to recreation. The possible forms of recreation in a hall are very different from those on a playing field and it does not appear that Parliament has ever declared indoor recreation to be a charitable purpose. It is well settled that the provision of entertainment or amusement is not, by itself, a charitable purpose: but if the dominant purpose of the trust is charitable in character the fact that recreation is provided as an adjunct to that purpose does not destroy the charitable character of the trust. That appears to me to have been recognised in *Inland Revenue Comrs. v. City of Glasgow Police Athletic Asscn.* (21), and I may also cite *Re Mariette* (22), where providing five courts for a school was held to be charitable.

- G In the present case, I have already pointed out that the leaders must endeavour to promote the religious and social and physical well-being of the beneficiaries and only permit such activities as are calculated to contribute to their health and well-being, and the only reference to recreation is in the passage

- H “ by the provision of facilities for religious services and instruction and for the social and physical training and recreation of ”

the beneficiaries. It was argued that this case is indistinguishable from *Williams' Trustees v. Inland Revenue Comrs.* (1). In that case, the decision of the commissioners was that

- I “ while certain features of the institute conform to the idea of charity we have come to the conclusion that these features are not so dominating nor is the general character of the institute such as effectively to distinguish it from an ordinary social club.”

In his speech, with which the other noble and learned Lords concurred, my noble and learned friend, LORD SIMONDS, set out the activities of the institute which included maintaining a billiard room and tea and games rooms, badminton and table tennis clubs and promoting dances, whist and bridge drives, a weekly

social and dance and an annual dinner and garden party. On the other hand A
there were lectures and debates, literary and educational classes and a library,
and the office served as an information bureau for Welsh people. It is true that the
first object of the institute was to create a centre in London for promoting the
moral, social, spiritual and educational welfare of Welsh people and fostering
the study of the Welsh language and of Welsh history, literature, music and art, B
but there followed provision for using the institute for providing a meeting place
for Welsh people in London and their friends where they could obtain facilities
for social intercourse, study, reading, rest, recreation and refreshment, and for
meetings, concerts, lectures and other forms of instruction, discussion or
entertainment. My noble and learned friend said, after examining the authorities
([1947] 1 All E.R. at p. 520):

"It is clear, as I have already said, that they [the trustees] have not C
applied the income for charitable purposes only, and I do not doubt that
they have applied them strictly in accordance with their trust."

My Lords, not only do I fully accept that decision, but I do not see how, on
the facts, any other was possible. Recreation and entertainment were so D
prominent, both in the objects and in the activities of the institute, that I do not
see how they could have been regarded as mere adjuncts of other and charitable
purposes. But, surely, it must be a question of degree whether in any particular
case this is so or not, and I find difficulty in reading the trust purposes in this
case as permitting the mission hall to be used for anything at all resembling
a social club. The hall is to be used primarily for religious services and instruc- E
tion and social and physical training, which are, in my opinion, charitable
purposes. It is open, not only to Methodists, but to persons likely to become
members of the Methodist Church, and attendance is, of course, voluntary.
It may well be that some of the beneficiaries would not attend if the activities
were severely limited to those which are strictly religious and educational.
Any recreation must, under the deed, be such as is calculated to contribute to the
health and well-being of those who attend and must be sanctioned by the leaders, F
and, in my view, recreation is only to be promoted or permitted in conjunction
with, and as ancillary to, the other purposes and, therefore, it is not such as to
destroy the charitable nature of the trust. If I had thought that the hall could
be freely used for mere recreation, entertainment or amusement by persons who
take no part in the other activities, I would have reached a different conclusion.

On this part of the case the appellants relied also on several other authorities, G
and I must now deal with them. In *Dunne v. Byrne* (5), a bequest to the Roman
Catholic Archbishop of Brisbane to be used as he might judge most conducive
to the good of religion was held not charitable. I think that this decision was
inevitable because the whole of the money might well have been used for a non-
charitable purpose:

"In *Cocks v. Manners* (23) there is the well-known instance of the H
dedication of a fund to a purpose which a devout Roman Catholic would
no doubt consider 'conducive to the good of religion' but which is certainly
not charitable"

(per LORD MACNAGHTEN, [1912] A.C. at p. 410).

But if I have rightly construed the deed of gift of the hall, this property could I
not be used for any non-charitable purpose because any purpose or use not
strictly charitable in itself is purely ancillary to purposes which are charitable.
In *Farley v. Westminster Bank, Ltd.* (4), the bequest was to the vicar and church-
wardens "for parish work". If these words had not been added the bequest
would have been charitable because the law would have implied that the money
must be used in the performance of their spiritual duties for strictly religious
purposes. But it was held as a matter of construction that the words "for

A parish work" were enlarging words. LORD ATKIN ([1939] 3 All E.R. at p. 493) quoted with approval from the judgment of SIR WILFRID GREENE, M.R. ([1938] 1 All E.R. at p. 711) in the Court of Appeal:

B "It appears to me that, taking them as words of ordinary English, they cover any activity in the parish, any work in the parish which trustees of that character may be expected to perform, whether that work be strictly a religious purpose or strictly a charitable purpose, or whether it be a work considered to be conducive to the good of religion, or considered to be benevolent, or generally useful to the inhabitants of the parish or the congregation of the church."

C Once it had been decided that the words were enlarging words and had that meaning, it was clear that the whole of the money could have been devoted to non-charitable purposes, and, again, that appears to me to be quite different from the present case.

D Then the appellants relied on the well known series of cases where expressions such as charitable or philanthropic, charitable or public and charitable or benevolent have been considered. In *Re MacDuff* (24), the bequest was

"for some one or more purposes, charitable, philanthropic or".

The blank was held to be immaterial, but the word "philanthropic" was held to be wider than charitable and vague and the bequest was held invalid. LINDLEY, L.J., said ([1896] 2 Ch. at p. 463):

E "We must get at something sufficiently definite to guide the court as to the kind of trust which it has to execute, and that trust must be of the kind called technically a charitable trust."

And LOPES, L.J., said (*ibid.*, at p. 468):

F "Looking at those words, I ask myself whether or not this property might not consistently with the will, having regard to the word 'philanthropic', be applied to other than strictly charitable purposes, and I feel compelled to answer that question in the affirmative. It has been said that nothing can be suggested—no purpose and no object can be suggested which would come within the meaning of the word 'philanthropic' which is not also a charity. If that were so, I think the argument of the Attorney-General could be maintained; but that is not a view that I am able to adopt. I think I could suggest many objects which would come within the word 'philanthropic', and to which the trustees would be entitled to apply the money, which are not charitable. I will not again allude to recreation grounds and grounds devoted to sport which are not for the poorer classes, but are generally for rich and poor alike. I think that would be a case."

H And then he gives another illustration. The appellants found on this reference to recreation grounds and it is certainly a dictum of some weight. It appears (*ibid.*, at p. 460) that LOPES, L.J., in the course of the argument, asked: Would a gift for the establishment of cricket and recreation grounds be charitable? But the question does not seem to have been pursued, and the statutes to which I we have been referred were not brought to the notice of the court. I wholly accept the rest of the quotation, and particularly the method of approach which it sets out.

I Cases of bequests for charitable or public purposes are even further removed from the present case, because it is clear that public purposes include purposes which are not charitable. I need not cite authority for the proposition that, if the object is predominantly political, the gift is not charitable, and I think that it would be generally agreed that, in a democratic country, political purposes

are among the most important and, perhaps, the most important of all public purposes. A

I can at this point deal briefly with an argument for the respondents that, even if these trusts are not otherwise charitable, they are for the relief of poverty and are charitable for that reason. I agree that poverty does not mean destitution and that the relief of poverty can go a good deal further than supplying the bare necessities of life, but it cannot extend to supplying everything that one would like people to have for their own good. It is true that under these deeds the benefits are only to be available to B

“those of insufficient means otherwise to enjoy the advantages provided,”

but if the true meaning of the trust purposes is that something like social and athletic clubs can be set up to provide mere sport, games, entertainment and amenities for those who do not wish to take part in the other activities, then I think that providing those advantages for those who could not otherwise afford them goes some way beyond the relief of poverty. There are many people well above the poverty line who cannot afford to pay for such advantages. But, if I am right in my reading of the trust purposes and in my view of the law, then the element of poverty is not necessary to make them valid charitable purposes. C D

But holding that the trust purposes are charitable does not mean that the respondents necessarily succeed. Not only must the purposes be charitable, but the beneficiaries must be such a class as will bring in that public element which is essential. The beneficiaries here are the members of the Methodist Church who reside in two large county boroughs, and also residents there who, in the opinion of the leaders, are likely to become members of that church. I do not think that this latter extension of the class of beneficiaries improves the respondents' case. If members of the church are not a sufficient class the addition of an indeterminate number of individuals cannot remedy the defect. But on the other hand, this extension of the class cannot, in my view, create any difficulty. It does not create any uncertainty about who the beneficiaries are. The donor has made the leaders the judges of whether any particular person has the requisite qualification; no doubt the question which they have to determine depends largely on opinion, but the leaders are in a position to form an opinion on the question. The selection of candidates or applicants frequently depends largely on opinion, but that has never, so far as I am aware, been put forward as a reason against the validity of a charitable bequest for assistance to individuals, and I see no reason why it should be an obstacle here. And if the members of the Methodist Church constitute a sufficient class, it was not argued that the limitation to those members who reside in a particular large and populous area, or to those members of insufficient means to provide the benefits for themselves, would make the class insufficient. The argument was boldly advanced that, even if the purposes of these trusts were charitable so that they would be valid trusts if the benefits were open to all, the limitation to Methodists vitiates their charitable character. E F G H

This House recently had occasion to consider this matter in connection with an educational trust in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (9), and my noble and learned friend, LORD SIMONDS, then stated the law thus ([1951] 1 All E.R. at p. 33):

“It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that a trust is not charitable if it confers only private benefits . . . These words ‘section of the community’ have no special sanctity, but they conveniently indicate (i) that the possible (I emphasise the word ‘possible’) beneficiaries must not be numerically negligible, and (ii) that the quality which distinguishes them from other I

- A members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *Re Compton* (19), of a number of families, cannot be regarded as charitable. A group of persons may be numerous, but if the nexus between them is their personal relationship to a single *propositus* or to several
- B *propositi*, they are neither the community nor a section of the community for charitable purposes."

I shall also quote, for a reason which will appear later, from the judgment of the Privy Council delivered by LORD WRENBURY in *Verge v. Somerville* (12) ([1924] A.C. at p. 499):

- C "To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot."
- D

The contrast between a section of the community and a fluctuating body of private individuals has been used as the proper test in several cases without any suggestion that it is an inadequate test, and it appears to have its origin in the speech of EARL CAIRNS in *Goodman v. Saltash Corpn.* (11) (7 App. Cas. at p. 650).

- E If these are the criteria to be applied in this case, then it was not disputed that members of the Methodist Church are a section of the community and an appreciably important class of the community, and are a particular class of the inhabitants of West Ham and Leyton. I would not embark on any theological inquiry, but it appears to me to be beyond doubt that membership of any branch of the Christian Church is a quality which does not depend on the
- F members' relationship to any individual or *propositus*. There may be small sects which are not sufficiently numerous to form an appreciably important class of a community, but no one would suggest that that is true of the Methodist Church. Indeed, I understood counsel for the appellants to admit that the beneficiaries in this case would be a sufficient class to be proper objects for a charitable gift for educational or religious purposes, or for the relief of any kind
- G of disability or distress, and that it would not matter in such cases that the benefits were not confined to those who could be said to be in poverty. But the beneficiaries in this case are ordinary people not necessarily suffering from any disability and some, at least, of the purposes may be neither religious nor educational, and it was argued that, in such a case, a trust cannot be charitable in the eye of the law unless the benefits are open to the whole community, or
- H at least to all the inhabitants of an area. The argument was that, while there could be a valid charitable trust of the fourth class in favour of a section of the community consisting of the inhabitants of a particular area, it would not be valid if in favour of a section of the community defined in any other way. I can see no justification in reason for this distinction, but it has often been pointed out that the law of charity is full of anomalies and I must, therefore, examine
- I the argument.

The appellants found this argument on LORD MACNAGHTEN'S well-known classification in *Income Tax Special Purposes Comrs. v. Pemsel* (2) ([1891] A.C. at p. 583):

" 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

They say that "beneficial to the community" means beneficial to the whole community. But then they are immediately faced with this difficulty: they admit that a trust for the relief of sick or disabled Methodists could be a valid charitable trust although its benefits were open to all Methodists rich and poor alike but to no one else. But they get over the difficulty by saying that any such trust falls within LORD MACNAGHTEN's first class and that, when he said trusts for the relief of poverty, he meant to include trusts for the relief of disability or distress, whether financial or not. I find it difficult to believe that LORD MACNAGHTEN was ever guilty of such inaccurate use of language, and I feel sure that this was not his intention here because (*ibid.*, at p. 584) he refers to the first three classes in these words

"... the advancement of religion, or the advancement of education, or the relief of the poor."

The word poverty is sometimes loosely or metaphorically used to mean lack of something other than money but no one could say "relief of the poor" if he meant to include relief of disabled people irrespective of their means. But it is said that LORD MACNAGHTEN took his classification from the argument of Mr. Romilly in *Morice v. Bishop of Durham* (8) (which can be found quoted by LINDLEY, L.J., in *Re MacDuff* (24) [1896] 2 Ch. at p. 466):

"First, relief of the indigent; in various ways: money: provisions: education: medical assistance, etc.; secondly, the advancement of learning; thirdly, the advancement of religion; and, fourthly, which is the most difficult, the advancement of objects of general public utility."

And it is said that "general public utility" cannot include a case where the beneficiaries are only a class of the community. But the same difficulty arises here again: in which class are we to put a trust for the benefit of disabled Methodists? The appellants again say in the first class, but the word "indigent" appears to me to be as inappropriate as "poor" to include disabled people of ample means. It may be that Mr. Romilly did not have in mind cases of this kind. I have not made a search to see whether any had come before the court at that time. But LORD MACNAGHTEN did not merely copy the words of Mr. Romilly. He made at least one significant alteration, substituting "education" for "learning": for education is now regarded as wider in scope than learning in the sense in which I think Mr. Romilly used the word. And he omitted the word "general" in the description of the fourth class. I cannot believe that this was due to inadvertence. It seems to me much more likely that he was not satisfied that it should be included.

But a meticulous examination of words used by judges, however eminent, cannot be decisive if these words were used in cases where the present question was in no sense in issue, so I turn to consider the authorities. In *Verge v. Somerville* (12), the bequest was

"unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers."

There was no such fund in existence, but it was held that this was a valid charitable trust and that a scheme should be settled. The judgment of the Board was delivered by LORD WRENBURY. He made it plain that this case fell within the fourth of LORD MACNAGHTEN's divisions of charity, and he stated the test to be applied in the words which I have already quoted and I repeat the crucial words ([1924] A.C. at p. 499):

"The inhabitants of a parish or town, or any particular class of such inhabitants [the italics are mine] may, for instance, be the objects of such a gift."

He then posed the question whether, if this test is satisfied, poverty is a necessary element and continued (*ibid.*, at p. 500):

- A "In argument it was scarcely pressed that it is necessary, and after the decision in *Goodman v. Saltash Corpn.* (11) it was not possible to maintain the general proposition that it is. A trust or condition in favour of the free inhabitants of ancient tenements in the borough of Saltash, in accordance with a usage whereunder they had the privilege of dredging for oysters, was there held to be a valid charitable trust, and, obviously, some of the
- B inhabitants might not have been poor."

Then he said (*ibid.*, at p. 506):

- "It is a public trust and is to benefit a class of the community—namely, men from New South Wales who served in the war and were returned or to be returned to their native land . . . Their Lordships have no doubt that
- C this is a charitable purpose. If it were (which in their opinion it is not) necessary to find that need of assistance is to be a qualification for benefit . . . and if it were necessary to find a reference to poverty, their Lordships have no difficulty in finding it."

- Accordingly the ratio decidendi was that, without poverty being a qualification, there was a valid charitable trust within LORD MACNAGHTEN's fourth division in favour of a class of the community defined otherwise than by reference to all the inhabitants of any particular area. It is true that there was no discussion of the argument now submitted by the appellants, but that was because it had not then occurred to anyone to raise the question; and, if this case stood alone, it would not be fatal to the appellants' argument because your Lordships are not bound by decisions in the Privy Council.
- D

- E But your Lordships are bound by a previous decision in this House, and it appears to me to be unquestionable that, in *Goodman v. Saltash Corpn.* (11), this House decided that there was a valid charitable trust where there was no question of poverty or disability or of education or religion, and where the beneficiaries were not by any means all the inhabitants of any particular area.
- F LORD SELBORNE, L.C., said (7 App. Cas. at p. 646) that the usage was

" . . . confined to a particular class of persons, viz., the 'inhabitants of ancient messuages within the borough' (whose number would not be capable of indefinite increase) . . . "

- G LORD BLACKBURN based his dissent on the fact that he thought it quite clear that they were not the public at large (*ibid.*, at p. 654), and LORD FITZGERALD regarded them as a recognised class within the borough (*ibid.*, at p. 668). It is quite true that some parts of the ratio decidendi in *Goodman's* case (11) have been so modified by subsequent decisions of this House that it would appear that those noble and learned Lords who took part in these decisions did not accept as an inflexible rule that this House is bound by every part of every ratio decidendi in every previous case. But no one has ever suggested that the rule that we are bound by actual decisions of the House is other than absolute and inflexible, and, apart altogether from the ratio decidendi in *Goodman's* case (11), it appears to me that the actual decision in that case is inconsistent with the appellants' argument. Moreover, if there has been a modification of that ratio decidendi, it has only been with regard to the question whether the trust purposes must be not only public purposes but also of such a nature as to be charitable in character, and on other matters, including that now in question,
- H
- I the case appears to me to be fully authoritative.

I may add that I have found no support for the appellants' submission that LORD MACNAGHTEN's first class can include cases for relief of distress or disability where poverty is not a necessary qualification for receiving benefits. But, besides the authorities I have dealt with, there are a number of expressions or indications of opinion that such cases fall within the fourth class. For example, I think that it clearly appears in *Re Hobourn Aero Components, Ltd.'s Air-Raid*

Distress Fund (25), that LORD GREENE, M.R., thought ([1946] 1 All E.R. at p. 506) A that the relief of air raid distress would be a good charitable object within the fourth class, and in *Oppenheim's case* (9), LORD NORMAND ([1951] 1 All E.R. at p. 37) referred to this and other cases as being within that class. I shall not trouble your Lordships with further examples.

I must now examine *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (7). The appellants relied on it for two purposes: first, B as an authority on the question whether the trust purposes in this case are charitable in their nature, and, secondly, in support of the argument which I am now considering. On the former question, much depends on the construction of the particular deed, and on that matter I shall be as brief as I can, but the second is a pure question of law and, as this case contains, in the judgment of BABINGTON, L.J., the only authority which the appellants were able to cite in C support of their argument, I must deal with it in more detail. The trust purposes so far as relevant were

"to permit the same or any part thereof to be used as a hall for meetings or for social or recreational purposes in connection with the various Presbyterian Churches in the City of Londonderry and the surrounding D district or as a hostel or boarding house or as a library or for such other purpose or purposes as the board of governors . . . shall from time to time think fit it being the true intention and meaning of these presents that said premises should be used for the purposes of assisting and helping in the religious moral social and recreative life of those connected with the Presbyterian Church . . . in such manner as the said board of governors . . . shall from time to time think right." E

These purposes appear to me to be considerably wider than those set out in the conveyance of the hall in the present case. I have already said that I would not have held that trust in this case to be charitable if I had thought that the recreation permitted was not merely ancillary to the other purposes, and that the hall could be freely used for recreation and entertainment by those who took no F part in the other activities. I think that both the *Londonderry* case (7) and the present case are near the border-line. If I could construe the trust provisions in the way in which LORD MACDERMOTT (then MACDERMOTT, J.) construed them I would reach the result which he reached, but, on the whole, I prefer the construction put on these provisions in the Court of Appeal, and, on that construction, the premises could be used for non-charitable purposes in ways not purely G ancillary to the charitable purposes set out in the deed, and it appears that they were, in fact, so used. I do not find in this case any sufficient answer to the special consideration which I have stated with regard to the hall in the present case. And it appears to me to have no bearing on the present case with regard to the playing field.

On the second question, what is a sufficient class of the community, LORD H MACDERMOTT and LORD ANDREWS, C.J., rejected the argument for the present appellants for reasons with which I am in substantial agreement, but BABINGTON, L.J., took a different view. He said ([1946] N.I. at p. 196):

"The Presbyterian church is not a section of the public. Its members, or those of its members to be benefited under this trust, are no doubt members of the public but they are not a section of it any more than were the work, I people in *Re Drummond* (26), and the trust is therefore not a trust for general public purposes but for a fluctuating body of private individuals . . . Considerable confusion has, I think, arisen from a failure to distinguish between the public element in cases under the first three of Lord MACNAGHTEN's categories and the fourth. Under the first three the charitable intention must be established, i.e., for the relief of poverty, the advancement of religion, or the advancement of education. The objects must be of a public nature, as I

- A FITZGIBBON, L.J., says, but it is immaterial under these categories how the class is delineated provided it is adequate in numbers and importance. In cases falling within category number four, however, there can be no charity until it is shown that the gift is to or for the benefit of the public or a section of the public . . . If this trust had been for the advancement of religion the class would clearly be sufficient in numbers and importance to sustain it as
- B a good charitable trust though it only benefits a particular faith, the members of which do not constitute a section of the public."

My Lords, the reasoning in the passage which I have quoted appears to me to be in direct conflict with the decision of this House in *Oppenheim's* case (9), and it is right to say that that case had not been reported when BABINGTON, L.J., gave his judgment. In *Oppenheim's* case (9), the trust was for the advancement of education, but the decision of this House was that it is not enough that the class of beneficiaries is numerous, it must also be a section of the community, and the ratio decidendi applies equally to a trust for the advancement of religion. So if the reasoning of BABINGTON, L.J., is correct, and the members of a religious denomination do not constitute a section of the public (or the community),

D then a trust solely for the advancement of religion or of education would not be a charitable trust if limited to members of a particular church. Of course, the appellants do not contend that that is right: they could not but admit that members of a church are a section of the community for the purpose of such trusts. But they maintain that they cease to be a section of the community when it comes to trusts within the fourth class. BABINGTON, L.J., gives no support

E to that contention, but the appellants cannot succeed on this argument unless that contention is sound. Poverty may be in a special position, but otherwise I can see no justification in principle or authority for holding that, when dealing with one deed for one charitable purpose, the members of the Methodist or any other church are a section of the community, but when dealing with another deed for a different charitable purpose they are only a fluctuating body of private

F individuals. I, therefore, reject this argument and, on the whole matter, I am of opinion that these appeals ought to be dismissed.

LORD TUCKER: My Lords, JENKINS, L.J.'s analysis of the two conveyances in question led him to the conclusion that the object of the first trust was the promotion of the religious, social and physical well-being of persons resident in the county boroughs of West Ham and Leyton, and of the second trust the promotion of the moral, social and physical well-being of persons so resident who are considered by the leaders of the Stratford Newtown Methodist Mission to be likely to become members of the Methodist Church and to be of insufficient means otherwise to enjoy the advantages provided by the deed, and that the remaining provisions merely prescribe the means whereby these objects were to

G be attained. My Lords, I agree with this construction of the deeds, and I am also in agreement with all the members of the courts below in holding that these trusts cannot be regarded as trusts for the relief of poverty.

H

In considering whether they fall within the fourth class of *Pemsel's* case (2), as the Court of Appeal have held, or within class two—trusts for the advancement of education—as was submitted in the alternative for the first time before your

I Lordships, the words which, in my view, create the difficulty are "the promotion of social well-being". This is an extremely vague phrase which may have different meanings to different minds, and may include things considered by some, but not by others, to be advantageous. It would appear to cover many of the activities of the so-called "welfare state", and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable. I find it impossible to construe these trusts, as the Court of Appeal have done, in such a way as to restrict the operation

of this language to promoting or inculcating ([1953] 2 All E.R. at p. 250, letters A E to F):

“those standards of secular conduct or behaviour expected of a good neighbour and a good citizen.”

It would, I feel, be a considerable extension of any previous decision to allow language of this vague nature to qualify a trust for inclusion as charitable within the spirit and intendment of the preamble to the statute of Elizabeth.

The present case is not unlike that of *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (7). The language is not, of course, identical. In the Irish case, the relevant words were:

“Upon trust to permit the same or any part thereof to be used as a hall for meetings or for social or recreation purposes in connection with the various Presbyterian Churches in the city of Londonderry and the surrounding district or as a hostel or boarding house or as a library or for such other purpose or purposes as the board of governors . . . shall from time to time think fit, it being the true intention and meaning of these presents that said premises shall be used for the purposes of assisting and helping the religious, moral, social and recreative life of those connected with the Presbyterian Church in the City of Londonderry and surrounding district in such manner as the said board of governors . . . shall from time to time think right.”

LORD ANDREWS, C.J., in the course of his judgment in the Court of Appeal said ([1946] N.I. at p. 188):

“Judicial minds have operated not always consistently on facts admittedly different; and the result can only be described as in a measure chaotic. I shall simply content myself with saying that I find nothing in the statutes referred to which would assist me in holding that the trusts in the present case for religious, moral, social and recreative purposes, excluded as I have held them to be from LORD MACNAGHTEN’S third class, fall within the fourth class as a valid charitable trust. The test is not whether the objects or purposes aimed at are beneficial to or receive the general acceptance of the community. It is simply whether they conform or not to the requirements and essentials of a legal charity.”

My Lords, I would respectfully adopt this language and apply it to the present case.

For this reason, which is, I think, also in conformity with the decision of this House in *Williams’ Trustees v. Inland Revenue Comrs.* (1), I would allow these appeals without expressing any view on the question whether the beneficiaries form a sufficient class for the purposes of class four of *Pemsel’s* case (2).

LORD SOMERVELL OF HARROW: My Lords, I am unable to accept the construction put on these deeds by the Court of Appeal. Before addressing myself to the words I will make one or two general observations. I agree with the Court of Appeal in rejecting the argument that, as a matter of law, a trust to qualify under LORD MACNAGHTEN’S fourth class must be analogous to the repair of “bridges portes havens causwaies seabankes and highewaies” being the examples given in the preamble outside the three main categories of poverty, religion and education. The words used by the Court of Appeal in *Re Strakosch* (10) do not afford any basis for this argument, as JENKINS, L.J., demonstrated. The reference was to show that the repair of a bridge is charitable notwithstanding its use by rich as well as poor. The submission is inconsistent, in my opinion, with some of the cases decided under the fourth head. I think, however, that a trust, to be valid under this head, would normally be for the public or all members of the public who needed the help or facilities which the trust was to provide. The present trust is not for the public.

A I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must, as a matter of law, be sufficient to support a trust in any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are, in my opinion, interdependent. There might well be a valid trust for the promotion of religion benefiting a very small class. It would not follow at all that a recreation ground for the exclusive use of the same class would be a valid charity, though it is clear from the Mortmain and Charitable Uses Act, 1888, that a recreation ground for the public is a charitable purpose.

This trust not being for the public, the necessary element of public benefit, if present, must be found in the purposes. I will deal with the first deed, the wording of which is more favourable to the respondents' argument in that it contains an express reference to religious services and instruction. It is not, however, suggested that the trust as a whole can be treated as one for the promotion of religion, the other purposes being merely ancillary. I agree with the courts below that the "means" clause has no application to the facilities for religious services and instruction. The clause is important, in that it implies that the advantages, social, physical and recreational, are a question of means. The more pecunious members can get them elsewhere. The leaders would, no doubt, organise the social and recreational activities, but, if it was intended that their spiritual and moral influence should play an important part, the advantages would not have been referred to as a question of means. The word "well-being", though qualified by "religious" as well as "social and physical", means primarily, in my opinion, a happy or contented state. Social well-being would be promoted when people were happy together—an important factor in institutional life. Physical well-being is promoted by exercise or recreation, and the health and contentment which normally follow. Social training is an ambiguous expression and may well be too vague. Its meaning to me is training in social behaviour, in manners. I think, therefore, these words entitle the respondents to run a social centre in the ordinary sense for the Methodists and prospective Methodists as set out in the deed. On this view the trust, limited as it is, is plainly not a charity, and the Court of Appeal would, as I read their judgments, have so held. Had I been able to agree with the more charitable construction placed on the deeds by the Court of Appeal, I should have felt great difficulty in reconciling their conclusion with the decision of this House in *Williams' Trustees v. Inland Revenue Comrs.* (1). I am aware of the differences that could be emphasised, but, on the whole, I think the deed in *Williams' case* (1) was nearer the border-line than the present deeds.

The Attorney-General as amicus curiae made certain submissions as to recreation grounds for the public and village halls. Nothing that I have said is to be taken as throwing any doubt or light on these matters. Where a ground or hall is for the public, different considerations clearly arise. I would allow the appeals.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Kenneth Brown, Baker, Baker* (for the respondents); *Treasury Solicitor* (for amici curiae).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

HOPGOOD v. BROWN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), February 1, 2, 3, 1955.]

Sale of Land—Conveyance—Description of parcels—Building plots—Boundary between two plots not stated—Subsequent conveyances with similar parcels—Boundary deemed straight—Building operations on one plot before ultimate conveyances of other plot—Building encroached—Effect of ultimate conveyance of plot encroached on.

Estoppel—Estoppel in pais—Boundary—Building plots—Understanding between owners of two adjoining plots that wall of garage on southern plot should be their boundary—Garage built by owner of one plot for owner of other plot—Encroachment—Claim by subsequent purchaser for trespass.

Licence—Mutual licences—Drainage to and from adjoining properties—Whether licence revocable by one owner while retaining benefit of the licence of the other owner.

On June 22, 1932, two adjoining plots of land on a building estate were conveyed to the same purchaser by separate conveyances. The conveyances were, mutatis mutandis, in similar terms, and, in each case, the measurements of three sides of the plot were given, but the measurement of the boundary between the two plots was not given. The description of the property conveyed ended in each case with the words "and for the purpose of facilitating identification only is delineated and shown by the pink colour on the plan drawn on these presents". There was nothing on the land to mark the boundary between the two plots, but on the plans, which were small, the line between the plots was to all appearance straight. The plots were conveyed subsequently by separate conveyances to a purchaser who, by separate conveyances dated June 18, 1949, conveyed the south plot to the defendant and the north plot to a company. In or about 1951 the company built for the defendant on his plot a bungalow and garage, the company agreeing with the defendant the plans and position of the buildings and intending the north wall of the garage to be part of the boundary between the two plots. A low wall was built to connect the front corner of the garage to a brick post which divided the two properties on the road side and a wire fence was erected from the rear corner of the garage to the rear boundaries of the plots. The visible boundary between the two plots thus created was not a single straight line, but two straight lines at an obtuse angle. The garage projected slightly over the boundary which would have separated the two plots if it had been a straight line. At about the same time, pursuant to an agreement between the company and the defendant, the company installed a manhole on its own plot and a pipe was connected to the manhole to carry off the rainwater from buildings on the defendant's land. The outflow pipe from the manhole was brought back through the defendant's land and connected with the main sewer in the road. On Apr. 29, 1952, the company sold the north plot to L. and on Nov. 18, 1952, L. sold it to the plaintiff. In all conveyances the descriptions of the north and south plots were in all material respects the same as in the conveyances of the same properties in 1932. The plaintiff, intending to build on the north plot, discovered that part of the defendant's garage and the brick wall were on the north plot and learned of the existence therein of the manhole and of the drain leading to it from the south plot. For the purpose of building, the manhole was moved to a more suitable point on the north plot and the drains leading from and to the defendant's land were re-connected to the manhole. The plaintiff sued the defendant for trespass in respect of the garage and of the manhole and drain from the defendant's land.

Held: (i) (by JENKINS and MORRIS, L.JJ.; SIR RAYMOND EVERSHED, M.R., not concurring) the conveyances of the plots not having shown the

A measurements of the boundary between the plots, the boundary must be taken to be a straight line, and, the parcels in all the conveyances of the north plot being substantially similar, the conveyance to the plaintiff, on its true construction, conveyed the land of the north plot up to the same straight line, and accordingly the defendant's garage encroached on the plaintiff's land; but (by the COURT) on the facts the company had been estopped from
 B asserting against the defendant that the boundary between the north and south plots was other than that shown on the land by the garage wall and the fence, and the plaintiff, as successor in title of the company, was in no better position and therefore was not entitled to any relief in respect of the encroachment.

C Dicta of MANSFIELD, C.J., in *Taylor v. Needham* (1810) (2 Taunt. at p. 282) applied.

(ii) the arrangement in regard to the manhole and drains was in the nature of grants of mutual dependent licences and the plaintiff could not revoke the licence on his part to the defendant to discharge water into the manhole while retaining the benefit of the defendant's licence to him to discharge water from the manhole through a drain which ran in and under the defendant's land.
 D

Appeal dismissed; cross-appeal allowed.

[As to the Description of Boundaries in Assurances, see 3 HALSBURY'S LAWS (3rd Edn.) 355, 356, paras. 674, 675, and 29 HALSBURY'S LAWS (2nd Edn.) 406, para. 569; and for cases on the subject, see 40 DIGEST 275-277, 2397-2412.

E As to Estoppel by Conduct, see 13 HALSBURY'S LAWS (2nd Edn.) 486, para. 555; and for cases on the subject, see 21 DIGEST 328-347, 1221-1324.

As to Revocation of Licences, see 20 HALSBURY'S LAWS (2nd Edn.) 10-12, para. 6; and for cases on the subject, see 30 DIGEST (Repl.) 539, 1725 et seq.]

Cases referred to:

- (1) *Wallington v. Townsend*, [1939] 2 All E.R. 225; [1939] Ch. 588; 108 L.J.Ch. 305; 160 L.T. 537; Digest Supp.
- F (2) *Willmott v. Barber*, (1880), 15 Ch.D. 96; 49 L.J.Ch. 792; 43 L.T. 95; on appeal C.A., (1881), 17 Ch.D. 772; 31 Digest (Repl.) 432, 5579.
- (3) *Taylor v. Needham*, (1810), 2 Taunt. 278; 127 E.R. 1084; 21 Digest 276, 930.
- (4) *Re Porter (William) & Co., Ltd.*, [1937] 2 All E.R. 361; Digest Supp.
- G (5) *Cairncross v. Lorimer*, (1860), 3 L.T. 130; 3 Macq. 827; 8 Digest (Repl.) 473, 1765.

Appeals.

Appeal by the plaintiff and cross-appeal by the defendant from an order of His Honour JUDGE HOWARD at Ilford County Court, dated Nov. 10, 1954.

H The plaintiff was the owner in fee simple of a plot of land known as 22 Hamlet Road, Collier Row, Romford, Essex, which he purchased in 1952. The defendant owned the adjoining property, known as 20 Hamlet Road, which he purchased in 1949. The boundary between the two properties at their junction with the roadway was indicated by a brick pillar. By his particulars of claim, the plaintiff alleged that the defendant had trespassed on the plaintiff's land in an area adjacent to their boundaries by building a garage thereon and also by constructing a manhole and drain thereon and thereunder. He claimed (i) a declaration that the boundary ran in a straight line to the rear of his land at right angles to the road; (ii) an injunction restraining the defendant from continuing the trespass; (iii) an order restraining the defendant from trespassing on the plaintiff's strip of land by erecting or allowing any building to remain thereon, and (iv) damages limited to £19. The defendant by his defence pleaded that the boundary between the two properties ran from the brick pillar and followed, first, the line of a brick wall running from the pillar to the corner of the defendant's garage, then the line of the garage wall, and then a line from the rear corner of the garage to the point which
 I

divided the rear boundaries of the two properties. In regard to the drain and manhole the defendant pleaded that they had been built with the consent of the then owner of the plaintiff's property, and that, when the plaintiff purchased the property and began to build his bungalow, it was agreed between the plaintiff's builder and the defendant that the plaintiff's builder should take up the drain and fill in the manhole and divert the drain of the defendant's bungalow into a new drain and manhole to be constructed on the plaintiff's land, and that the same was, accordingly, done. The defendant counterclaimed for a declaration that the boundary between the plaintiff's land and the defendant's land was as set out in the defence. At the hearing the plaintiff abandoned the claim for an injunction, and the defendant was allowed to rely on the doctrine of estoppel, since a predecessor in title of the plaintiff had not only acquiesced in the building of the garage but had erected the building under a contract with the defendant. The county court judge held that, on the true construction of the conveyance to the plaintiff, the plaintiff owned the strip of land on which the low wall and part of the garage was built, but that, in the circumstances, the plaintiff was estopped from alleging that the visible boundary line was not the true boundary. The learned judge further held that the defendant committed a trespass by allowing rain water from his property to pass through drains which were partly laid under the plaintiff's land. He dismissed the counterclaim and awarded the plaintiff 1s., damages, and made no order as to costs. The plaintiff appealed and the defendant cross-appealed.

H. Lester for the plaintiff.

A. E. Holdsworth for the defendant.

SIR RAYMOND EVERSHED, M.R.: At the beginning of his judgment in *Wallington v. Townsend* (1), a case which, on its facts, is sufficiently near to the present to be useful in some respects and to which, therefore, I shall return later, **MORTON, J.**, observed ([1939] 2 All E.R. at p. 228):

"The case is a good illustration of the fact that actions in which the subject-matter is comparatively trifling often give rise to the most difficult questions of fact and of law."

In the present case, after two days in the court below and the best part of two days in this court, we are now called on to deliver judgment in respect of a matter which, to an outsider, might appear to be of a somewhat trifling character.

The case is concerned with two small plots of land, part of what has at all material times been called the Havering Park estate, in Hamlet Road, Romford, Essex. These two plots, as the plans indicate, were part of an area which had been divided into a number of small plots for building purposes, a fact which (as will later appear) is, of itself, of some not negligible significance. The two plots are adjacent, the one lying, roughly, to the north of the other, and they have, therefore, throughout the litigation been conveniently referred to as the north plot and the south plot; and I shall adhere to that convenient nomenclature.

The story begins on June 22, 1932, when one Allen Ansell conveyed both plots to one Cyril Regent Turner. On the face of the deed of conveyance of the south plot there is a small plan bearing out what I have said, namely, that the plot sold was one of a number of like plots which had been marked out on some plan of the Havering Park estate designed for building purposes. The parcels in that deed were:

"all that piece of land situate in the parish of Romford in the . . . county of Essex part of the land known as the Havering Park estate conveyed to the vendor by a conveyance [which is then described] which said piece of land has the several dimensions following namely a frontage to the . . . proposed Hamlet Road of forty feet or thereabouts a length along its south-west side of 170 feet or thereabouts and a width at its rear or south-east side of thirty-one feet or thereabouts is adjoined on its north-east side by other land conveyed or about to be conveyed by the vendor to the

A purchaser [and] comprises the whole of the plot numbered 56 and the south-westerly portion of the plot numbered 55 in the vendor's development of that portion of the said Havering Park estate and for the purpose of facilitating identification only is delineated and shown by the pink colour on the plan drawn on these presents."

B By Sch. 2 to the deed, certain covenants which the purchaser entered into, referring to such matters as building line and fences, etc., are also made part of the deed.

The description which I have read gave three of the four essential measurements in a plot of land of this character. It gave no measurement for what it would have called the north-easterly side of the area, namely, the boundary between the south plot and the north plot, which was also sold to Mr. Turner on the same date. The conveyance of the north plot contained a description of that plot in all respects, mutatis mutandis, corresponding to the description of the south plot, save that it was the southern or south-westerly boundary which was not measured, namely, this same boundary separating the two plots, and that the northern boundary was slightly longer, namely, 173 feet, and the eastern boundary slightly shorter, namely, thirty feet, than the corresponding measurements of the southern and eastern boundaries of the south plot. It is, I think, obvious from the plans that the plots are of regular dimensions—that would inevitably be the case in building lots of this kind. It is not possible to imagine that the boundaries were intended to be otherwise than along straight lines from the frontage to the rear. The plans, however, are small, there is no description of the area, and I draw attention again to the formula used in the deeds, namely, "for the purpose of facilitating identification only" the plot is delineated on the plan. It appears that at that time both these plots were wholly vacant and un-built on. I say "It appears", because it is not entirely clear whether in 1932 there was anything on any part of the land to indicate the line of any of its boundaries, but it is clear that nothing had been placed along the southern boundary of the north plot, or the northern boundary of the south plot (which is the same thing), to indicate on the surface of the earth where that boundary ran; nor, of course, was there any need for it at that time, or for some little time afterwards, since both plots were in the same hands. In due course* Mr. Turner sold the plots to a Mr. Walker, and it may be assumed that the descriptions in those conveyances corresponded exactly with the descriptions in the conveyances of 1932.

G On July 18, 1949, for the first relevant time, the ownership of the two plots, north and south, was divided; for on that date, by two conveyances, Mr. Walker sold the north plot to a company known as Walter and Maurice Brown (Builders), Ltd., and the south plot to the defendant, Mr. M. W. Brown. The defendant had an interest in the building company, but it was not a controlling interest. He was a director, but the greater part of the shares and the control of the company was H in Mr. Walter Brown, the defendant's father.

In 1951 the first events occurred from which all that has happened in this litigation has flowed. The defendant desired to build a bungalow and a garage on his plot, and for that purpose plans were prepared by him or on his behalf. With those plans he approached the company, in which he was interested but which he did not control, and invited the company, first, to agree with him the position I which, as a result of the building, the boundary between his plot and the company's plot would inevitably take and, second, to build for him the bungalow and garage according to the plan. The most satisfactory way for me to deal with this important matter of fact is now to read two paragraphs from the long and careful judgment of the county court judge. He said:

"[The defendant] stated in evidence that he had no intention of encroaching on the company's boundary and that there was no intention on the

* On June 2, 1938.

company's part of permitting him to do so. He was supported on both points by his father who . . . was in a position to control the company. There was no cross-examination to suggest that this encroachment was a matter of design. Both witnesses struck me as completely honest and reliable. Neither they nor anybody else had, apparently, ever taken measurements to show exactly where the dividing line between the two properties ought to run. I have come to the conclusion of fact that both [the defendant] and the company acted with complete bona fides and intended the flank wall of the garage to run along and for its full length of fifteen feet to be the boundary line of their respective properties."

It was suggested that there was no evidence to support the conclusion of fact which I have just read, but I am quite clear that there was ample evidence to support it. In cross-examination the defendant said:

"No question of the company giving me any extra land. If in fact it was built on adjoining land, this was a mistake. The brick wall was put up intending it for the boundary between my property and the company's. It was so understood by me in my capacity as owner of the south property and as director of the company owning the north property."

On that last sentence, counsel for the plaintiff took the point that, in the circumstances, the company was really never bound by any of the consequences which might otherwise have flowed from what took place between the defendant and the company. Counsel submitted that, following the strict language of the defendant's answer (which, no doubt, was given in answer to a question framed appropriately in cross-examination) the defendant had merely agreed with himself as director, and that the company as such should not be taken as having accepted the arrangements which the defendant was seeking to make. I am, however, quite satisfied that that is not so. From the evidence given by the defendant's father it is quite plain that the father was fully aware of what the defendant was proposing to do, and that the father, who controlled the company, fully authorised the company's participation in what followed and assented to it, and, therefore, assumed for the company all the consequences that would naturally and properly flow.

From the passages which I have read it will have been made plain that the garage, part of the building which was proposed and which was, in fact, erected and the north wall of which was to form the boundary, encroached somewhat on the north plot. If, from a post which was actually on the site marking the extreme north-west corner, adjacent to Hamlet Road, of the south plot, a straight line, substantially parallel with the northern boundary of the north plot, were drawn to the back line, then the garage, in one part of it, went across that line into the north plot to the extent of some two or three feet. It is that which has given rise to the present action. Assuming that the boundary were to go along the north side of the garage, then it would proceed from Hamlet Road and form, not a single straight line, but two lines at an extremely obtuse angle, and, to the extent of the part of the land which would lie between the obtuse angle and the straight line, it is claimed that the plaintiff is entitled to relief. From the back of the garage, that is to say from the east side of the garage, there was a post-and-wire fence to the back of the plot, and, as the learned judge found, it was the mutual intention of the company and the defendant that thenceforth the garage wall and the fence should constitute the actual boundary between their plots. At the same time as this building operation occurred, another operation of a somewhat different character took place. In order to save the expense of having two pipes or drains from the two plots of land, or from any houses built on them, to the road, the idea was conceived of putting a manhole on the north plot, bringing to the manhole, by means of an underground drain, the water which would collect on or flow from the newly erected premises of the defendant, and then the water would flow from the manhole to the road

A by a route which re-crossed the boundary and went under the defendant's land. The scheme was that, in due course of time, the manhole should also collect water from the north land, so that there would be one outflow from the manhole to the main drain in the road serving both properties. It was a sensible and economical arrangement.

B So matters stood when, on Apr. 29, 1952, the company proceeded to dispose of its still vacant plot to Mr. Lister. The evidence given by the defendant (and the judge expressed the view that he was a witness of care and reliability) was that Mr. Lister inspected the property before purchasing it. In his judgment the judge said:

C "I should be perfectly prepared to hold as a question of fact—if, indeed, it were relevant—that the company never intended in the minds of their officers to convey anything more than what they had enjoyed. Indeed, as I have already said, they had always considered what I have called the actual boundary as representing the true boundary. Mr. Lister was not called, but the defendant gave evidence, which I accept, that he [Mr. Lister] visited the site before he purchased: and that he saw or could see just where the actual boundary lay."

D Unfortunately, it appears that no thought was given at that stage to verifying the position of the boundary, and, whatever may have been intended, the conveyance to Mr. Lister was expressed in the following form, so far as relevant. After reciting that the north plot was still vacant land, the parcels were described as

E "All that piece of land situate in the parish of Romford in the county of Essex part of the land known as the Havering Park estate and abutting upon the south-east side of a road known as Hamlet Road which said piece of land has the several dimensions following, namely . . ."

F There then followed an exact repetition of the dimensions mentioned in the conveyance of the north plot in 1932 and there followed a similar reference to the numbers on the Park estate plan, and the description concluded again, echoing the language of the earlier deed, "and for the purposes of facilitating identification only is delineated and shown by the colour pink on the plan drawn on" the conveyance of 1932 by Mr. Ansell to Mr. Turner. It is, of course, elementary that the mutual intentions of the parties to a deed cannot override or distort its language, although they may give rise to the right of one or other of the parties to have that language rectified. I will not, however, for the moment pause to express any view of the meaning of that conveyance. It is obvious that, if, according to its true effect and construction, all that that conveyance was apt to convey to Mr. Lister was the land in fact lying to the north of the garage wall and the post-and-wire fence, then that was all that Mr. Lister had when he, in due turn, came to sell shortly thereafter in the same year to the plaintiff. It appears that Mr. Lister bought as what is sometimes called a speculation, for the purpose of re-selling to the plaintiff or to some other purchaser. On Nov. 18, 1952, the plaintiff bought from Mr. Lister the same plot that Mr. Lister had bought. The language of the conveyance to the plaintiff was, so far as is relevant, identical with that which I have already read from the conveyance by the company to Mr. Lister. The plaintiff also bought, for a cash consideration, a plan of a bungalow and proceeded in due course to build his bungalow.

I Unhappily for the plaintiff, he was never advised as to the precise dimensions which the surface of the ground appeared to show as comprised within his plot and the dimensions which, according to the various plans, ought to have been shown; but when he proceeded with his bungalow (and he seems to have proceeded to a very advanced stage before he realised what the effect was) he discovered that the small projection made by the defendant's garage operated

so that the passage between the southern part of the plaintiff's bungalow and the boundary was insufficient to enable the plaintiff to get a motor car through it and garage the car at the back of the plot. That, no doubt, would be a substantial disappointment to the plaintiff, to say the least. As a result, he then discovered the divergence from the area as shown on the plan of 1932, on the footing that the southern boundary of his plot was a straight line substantially parallel with the northern boundary. That it is not quite parallel is obvious from the fact that the eastern boundary is shorter than the road frontage, but the regularity of the design, as I have already indicated, is apparent, and the position of the defendant's garage was inconsistent with the natural inferences from the plan. A B

In the end, after the defendant had made a laudable, and by no means ungenerous, attempt to assist the plaintiff, the present action was begun. It was stated to be an action for trespass, but, as counsel for the defendant pointed out, it should, perhaps, be described more correctly as an action for ejectment. In the prayer of the claim, the plaintiff sought not only a declaration that, to the extent which I have indicated, the south plot and the buildings on it had encroached on the north plot, but also an injunction which would, in effect, cause the encroachments to be removed and the defendant to depart from that part of the plaintiff's territory which the defendant had wrongfully occupied. During the course of the trial, however, counsel for the plaintiff made it clear that he no longer sought an injunction. He confined himself to seeking a declaration as to the position of the boundary and a sum of damages, being damages suffered up to date, estimated in the claim at the figure of £19. Those circumstances are not irrelevant when I come to consider the subject of the cross-appeal. There was also a claim in connection with the manhole. According to the particulars of claim, the plaintiff also claimed that the defendant had trespassed on the plaintiff's land by putting thereon a manhole and drains. As will later appear, that is not, in truth, his claim at all. The claim—and on this the plaintiff succeeded—was that the defendant had wrongfully allowed water from his land to pass to the plaintiff's manhole by an underground drain on the plaintiff's land. That, indeed, is a trifling matter of itself, as the judge held, and, no doubt, would never have been the subject of litigation had it not been that, as inevitably happens with all human beings when they quarrel, every possible item of dispute is brought into play. C D E F

On those claims the learned judge held, first, that the conveyances of the north plot (and particularly the conveyance from the company to Mr. Lister), on their true construction, conveyed the whole of that plot which had been the subject of the conveyance of 1932; that is to say, that the conveyances were apt to convey and did convey that area which I have described as lying between the obtuse angle and the straight line. The learned judge, however, held that, in the circumstances which I have described, when the defendant built his bungalow and garage the company and its successors in title, including the plaintiff, were estopped from so asserting and from asserting that the boundary was at any other position than that shown on the ground by the garage wall and the fence. That part, the main part, of the plaintiff's claim, therefore failed; but, as regards the manhole, the judge came to the conclusion that the right which the defendant had at one time enjoyed to discharge his water by the underground channel into the plaintiff's manhole was the subject of a revocable licence, and that the revocable licence had been revoked in fact. Although the judge declined to give any other remedy, he awarded the plaintiff, in respect of that matter of complaint, the contemptuous sum of one shilling for damages. The result of the two days' trial was, therefore, an order, commendably brief in form, which said that the plaintiff should recover from the defendant one shilling in damages, but made no other order as to costs or otherwise. From that judgment the plaintiff has appealed and the defendant has cross-appealed. G H I

A On the main question, the broad conclusion at which the judge arrived, namely, that the plaintiff failed, would appear to me to have all the commendation which common sense and the realities of the case can give it; and a conclusion that, at this time and after all that has occurred, the boundary is to be treated for all practical purposes as being along the line shown on the plan, with the result that, apart from the concession made by counsel for the plaintiff, as a
B matter of strict right the plaintiff could require the removal of part of the garage and of the fence, would appear hardly comprehensible to anybody but a lawyer. As MORTON, J., however, observed in *Wallington v. Townsend* (1) ([1939] 2 All E.R. at p. 228), these apparently simple, even trifling, matters have an unhappy knack of giving rise to most difficult questions. The first question—and it has
C formed a part of the cross-appeal—is whether the judge was right to hold, as he did, that on the true construction of the deeds there was conveyed to Mr. Lister and by Mr. Lister to the plaintiff the whole area defined and also delineated on the conveyance of 1932 of the north plot. In his judgment, the learned judge said:

D “It seems to me that it would be a wrong method of construction to give to the parcels of the conveyance of Apr. 29, 1952 [the conveyance from the company to Mr. Lister] a different meaning from that of the parcels of the earlier conveyance of June 22, 1932, and that the property conveyed by the former must have had the same boundaries as the property conveyed by the latter.”

E I have, for my part, been much impressed by the forceful character of the argument in the other direction. A conveyance purports, on the face of it, to be a conveyance of a piece of land, of something real, of part of the surface of the earth and that which underlies it. It is, therefore, as I understand it, legitimate
F to look at the physical facts, not for the purpose of distorting the language of the deed, but for the better identification of that which the language describes. Here there is described a plot of land fronting on a road called Hamlet Road in Romford. If at the relevant date in 1952 an inspection had been made of the locus in quo, it is plain that, on the face of it, the southern boundary of the plot then intended to be the subject of the deed was marked on the surface of the earth by that which had been put on it. We are concerned, however, not with the intention of the parties, but with the words of the deed, and I must, therefore, see what the deed of Apr. 29, 1952, said:

G “All that piece of land situate in the parish of Romford in the county of Essex part of the land known as the Havering Park estate and abutting upon the south-east side of a road known as Hamlet Road which said piece of land has the several dimensions following, namely, a frontage to the said Hamlet Road of forty feet or thereabouts a length along its north-east side of 173 feet or thereabouts and a width at its rear or south-east side of thirty feet or thereabouts and comprises the north-easterly portion of Plot No. 55
H and the south-westerly portion of Plot No. 54 on the said Havering Park estate . . .”

I If the description had stopped there (subject to the possible effect, about which we have heard no argument, of the reference to plots on the Havering Park estate), I confess that, for my part, I should have thought it would be plain that the property intended to be described was to be identified as that which on the surface of the earth was (inter alia) indicated and marked by the northern wall of the garage and the post-and-wire fence. There was no exact delineation of the vital boundary, the southern or south-western boundary. The area is not stated and, in my opinion, there is nothing which would have inclined a court to hold, as a matter of construction, that the property conveyed was to be identified otherwise than by reference to what was to be found on the site. The parcels, however, do not stop there. They proceed: “. . . and for the purposes of facilitating identification only is delineated and shown by the colour pink on

the plan drawn on a conveyance dated ", and then there is a reference to the Ansell-Turner conveyance of 1932. I do not, for my part, doubt that that reference is, at least, a strong indication to the reader of the deed of April, 1952, that the subject of that deed was the same as the subject of the deed of 1932; but is that inference from the language so compelling as to govern the matter to the exclusion of the facts to be discerned from looking at the land? Counsel for the defendant, in what to me was a forceful and persuasive argument, drew attention in this respect to the difference between the language in this case and that which had come for the determination of *MORTON, J., in Wallington v. Townsend* (1), for in the latter case, where the problem was of a similar nature, the deed of conveyance contained this very different formula, "... as the same is more particularly delineated on the plan annexed hereto and thereon coloured pink ..." *MORTON, J.*, stated that the view which he felt compelled to adopt was one which he would not adopt unless the words were so strong that he felt himself judicially incapable of resisting their proper inference, and that he thought that those words which I have just read were too strong. He said ([1939] 2 All E.R. at p. 236):

"... I find myself unable to come to any conclusion other than that, on the true construction of the contract, the disputed strip is included in the land contracted to be sold to the plaintiff."

As will have been observed from what I have just read, that was a case of contract, where it might perhaps have been thought that there was less compulsion than in the case of a conveyance, and I do not minimise the effect that must be given to the circumstance that we are dealing with the completed deed, a conveyance. As I have already indicated, however, I have found, for my part, great force in the argument of counsel for the defendant that the somewhat imprecise language in the present case, which is certainly very different language from that in *Wallington v. Townsend* (1), is not of so compelling a character that one should conclude, as a matter of construction, that the area conveyed in 1952 must be the same as the area indicated in the deed of 1932 and that the former is to be regarded as comprehending a strip bounded on the south side by an absolutely straight line.

It is plain that, when a building estate is divided as this one is, the plots shown on the plan are clearly intended to be regular and uniform. I have, however, felt that there was much force in the submission that, although the words which I have read from the deed of April, 1952, are plainly apt to describe the original subject-matter of the deed of 1932, they are also equally apt to describe a plot of land which is to some extent (I think it is a matter of degree, and I would, therefore, say a small extent) different from the original as a result of some slight differences on the surface. I gave an example during the argument. If, in making up Hamlet Road for public use, some small piece at a corner or along the front had been taken from or added to the area originally intended as the north plot, I should, for my part, have been strongly inclined to suppose that the description which I have read was apt, on its fair reading, to describe the slightly altered configuration of that which was, in substance, the same plot. My two brothers, however, do not take that view. They take the view, which the learned judge expressed, that, as a matter of construction, the deeds of 1952 must be taken to have conveyed the same property as had the deed of 1932, and they indicate that a contrary view (tempting though it is, because in line with the manifest intention of both parties) is to yield to distortion of the language in order to try to give effect to intention, a thing which in itself is not, of course, legitimate. Having regard to the view which they take, I do not, therefore, propose to express any conclusion of my own on this part of the case.

I turn to the question of estoppel, on which the learned judge found in favour of the defendant. I have already disposed of the point taken in reply by counsel for the plaintiff that the position of the defendant as the individual owner of the

A south plot and as a director of the company which owned the north plot qualifies the natural consequences which would flow from activities otherwise to be attributed to the company. Counsel for the plaintiff also maintained that the conclusion based on estoppel was erroneous because of the absence of what he said was an essential element in a case of estoppel of this kind, namely, knowledge by the party alleged to be estopped of that party's true right. He referred us to the formulation of requisites by FRY, J. (15 Ch.D. at p. 105) in the class of case with which he was dealing in *Willmott v. Barber* (2). In my judgment, that formulation was addressed and limited to cases where the party was alleged to be estopped by acquiescence and was not intended to be a comprehensive formulation of the necessary requisites of any case of estoppel by representation. The doctrine of such estoppel, which is really a rule of evidence, is to be found in many circumstances and is of a much more general character. In SPENCER BOWER ON ESTOPPEL BY REPRESENTATION, at p. 9, I find a statement of the governing principle which I am content, for the purposes of this judgment, to adopt as accurate:

D "From a careful scrutiny and collation of the various judicial pronouncements on the subject, of which no single one is, or was perhaps intended to be, quite adequate [I think that "adequate" there means "exhaustive"] . . . the following general statement of the doctrine of estoppel by representation emerges: where one person ('the representor') has made a representation to another person ('the representee') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto."

In my judgment, on the facts of the present case there was, beyond a peradventure, a representation by the company to the defendant having all the qualities which MR. SPENCER BOWER enumerated and, therefore, having all its consequences. In effect, and by way of paraphrase only, the defendant said to the company: "Our boundary shown on the small plan has never been marked out on the land. I want to build a bungalow and a garage. I have made plans and I believe that the boundary goes as it is shown on my plans. I want to build accordingly. It may be that I take a little bit of your land or that you take a little bit of mine, or both, but do you assent to the boundary being so assumed and fixed?" The company, in effect, replied: "Yes, we do. What is more, we will assist you to carry out your purpose and build your house and garage for you at your cost." If matters had turned out otherwise and it had been necessary to decide the point, I think that this would be a case of mutual representations of fact which were made with the intention that they should be acted on, and which were acted on; but in the circumstances I am concerned only with the representations on behalf of the company and, in my judgment, it is quite clear that the company then represented that the position of the boundary was where the defendant had shown that, as he thought, it ought to go. Is it really suggested—for this must, I take it, follow from an argument to the contrary—that the company, having assented to what had been proposed, having participated in what followed, and having taken the sum of £2,200 from the defendant for building the garage and his house in the places which he had identified, could turn round later and tell the defendant that, having now measured the plot more accurately, he must take down that part of the garage which encroached on the company's land and which the company had just built

at the defendant's expense? It seems to me that such a suggestion would, A indeed, shock common sense and the realities of the case.

If that is right, the question is whether the disability on the company's part from averring the boundary to be in any place other than that where the company and the defendant had put it is equally binding on the plaintiff. In my judgment, that can also be answered clearly in favour of the defendant; and I accept the passage which counsel for the defendant read from the judgment of MANSFIELD, C.J., in *Taylor v. Needham* (3). That was a case of estoppel between lessor and lessee, but the principle is the same. MANSFIELD, C.J., said (2 Taunt. at p. 282): B

"Then the question comes, whether the assignee of the lease may be allowed to controvert the title of the lessor, when the lessee, under whom he derives, could not controvert the title of the lessor; so that the assignee should have a better right than he from whom he derives it. Exclusive C of all the dicta, it would be a very odd thing in the law of any country, if A. could take, by any form of conveyance, a greater or better right than he had who conveys it to him; it would be contrary to all principle. But it does not rest merely on the general principle; for if you look into all the books upon estoppel, you find it laid down, that parties and privies are estopped, and he who takes an estate under a deed, is privy in estate, and therefore D never can be in a better situation than he from whom he takes it."

My conclusion, therefore, on the present appeal is that counsel for the plaintiff has failed to satisfy me that there are any good grounds for differing from the judge's conclusion.

I now come to the vexed but trivial matter of the manhole. When the builder began to erect the plaintiff's bungalow on the north land, the manhole which was under the surface soil came to light and was found to be in a position inconvenient for and unsuitable to the position of the bungalow. The builder then communicated both with the plaintiff and the defendant. It had become clear to the builder (and, through him, to the plaintiff) that an underground drain from the defendant's land led into the manhole, and the builder wondered what he had better do about the drain when altering the position of the manhole. As the plaintiff refused to take any responsibility in the matter, the builder moved the manhole to a more suitable situation and then re-connected the drain leading surface water from the defendant's land into the manhole at its new position. What exactly happened as regards the outflow is not so clear, but from a plan prepared by the plaintiff's surveyors it appears that the outflow went back again on to the defendant's land, and I infer (and the facts fully justify the inference, particularly since the onus in this matter is on the plaintiff) that the substantial result remained that the manhole served the discharge from both plots, and that the discharge was taken from the manhole into an outflow across the defendant's land into the main drain or sewer in Hamlet Road. Although, in the prayer of the claim, the plaintiff sought to say that the wrong of which he complained was the putting or building on the plaintiff's land of a manhole and a drain, it became clear that the real cause of complaint was (technical though it be) something in the nature of a nuisance rather than a trespass, namely, the discharge through an underground drain on to the plaintiff's land of water from the defendant's land. E F G H

The judge's conclusion was to the effect that, at the time when these arrangements for underground drainage were originally made, something in the nature of an equitable easement came into existence, but that the defendant's rights were not binding on the plaintiff owing to failure on the defendant's part to register them. The judge, however, went on to say that the effect of the re-connection with the drain was that the defendant had a licence to go on discharging until the licence was revoked and that the licence had been revoked by a letter of June 2, 1954, from the plaintiff to the defendant. I have, with all respect, come to a different conclusion. I think that the learned judge omitted to I

- A take note of the fact (which I have stated and which I have inferred) that from the manhole the outflow taking both the plaintiff's water and the defendant's water came through an underground channel under the defendant's land into the main drain. There was, therefore, something in the nature of mutual licences; and it seems to me, as a matter of plain justice and of law, that a person who is enjoying one part of such reciprocal licences cannot at the same time purport to revoke the other part which imposes a burden on him. In other words, so long as the defendant was taking the plaintiff's water, or was liable to take it, through his drain under his land, the plaintiff was not entitled to revoke or purport to revoke the licence which the defendant had to discharge into the manhole of the plaintiff. In my judgment, therefore, the sum of one shilling should not have been awarded to the plaintiff. There should have been no award, and this part
- C of the plaintiff's claim, like the rest of it, should have been dismissed.

[HIS LORDSHIP then dealt with the question of costs, and held that as the appeal failed and the cross-appeal was substantially successful, the defendant was entitled to the costs of the appeal and the cross-appeal, and should recover one-half of his costs in the court below.]

- D **JENKINS, L.J.:** I agree that this appeal fails. The defence, as pleaded, was to the effect that, on the true construction of the conveyances, the conveyance of Nov. 18, 1952, from Mr. Lister to the plaintiff conveyed to the plaintiff only that area of land remaining on the footing that the wall which had been erected from the north-western extremity of the defendant's frontage back to the garage which had also been erected, the northern wall of the garage itself, and eastward
- E of that again the chicken-wire fence, constituted the southern boundary of the plot. On that footing, of course, there would have been no encroachment. The learned judge rejected that contention and, in my opinion, he was right in rejecting it. The title to the northern plot begins with a conveyance of June 22, 1932, from Mr. Ansell to Mr. Turner. In that conveyance the property conveyed is described as having the several dimensions following. Then the frontage to
- F Hamlet Road of forty feet or thereabouts is given, the length along the north-east side of 173 feet or thereabouts is given, and, finally, the width at the rear or south-east side of thirty feet or thereabouts is given. The southern boundary is described only by saying that the property conveyed "is adjoined on its south-west side by other land about to be conveyed by the vendor to the purchaser", and the description concludes by saying that the premises are "for the purpose
- G of facilitating identification only delineated and shown by the pink colour on the plan drawn on these presents". The plan referred to shows coloured pink a somewhat elongated piece of land extending eastward from the then proposed Hamlet Road. It shows the frontage to that road of forty feet, the depth on the north side of 173 feet, and the width at the rear of thirty feet. To the south it shows the plot bounded by what is, to all appearance, a straight line.
- H Speaking for myself, I have no doubt that this conveyance must have operated, as the learned judge held, to convey a plot of land with three sides of the dimensions stated, and the fourth side a straight line from the southern extremity of the plot's frontage to the proposed Hamlet Road to such a point as would give the stipulated width of thirty feet to the rear boundary of the plot. That the southern boundary should be anything else but straight seems to me an impossibility. If it were not straight, the whole matter as regards the parcels would be
- I involved in complete uncertainty. It might be a wavy line, it might be a curved line, and no one could tell how much land was being conveyed or what its shape or area might be. One, therefore, starts with a conveyance, as I think, of a plot with a straight southern boundary between the points which I have mentioned. In every subsequent conveyance the same description in all material respects is used, and there is in each such conveyance a reference back to the same plan. It is true that the plan is referred to as being for the purpose of facilitating identification only, and, therefore, cannot control the parcels in the body of

any of the deeds. Nevertheless, the use of the same plan, I think, makes it clear beyond argument, having regard to the repetition of precisely the same dimensions, that what was conveyed on each occasion, so far as the northern land was concerned, was precisely the same plot as was conveyed in 1932. Speaking for myself, I fail to see how the meaning of the language of the conveyance to the plaintiff can be affected by the circumstance that, before the conveyance to Mr. Lister, W. & M. Brown (Builders), Ltd., and the defendant had made these allegedly encroaching erections. Accordingly, I am unable to take the same view as my Lord on this part of the case; for, to my mind, the learned judge was clearly right in holding that this contention failed and that, accordingly, the low wall running back from the north-west corner of the defendant's premises, and the northern portion of the garage to a width varying from two feet to about five feet, did encroach on the plaintiff's land as conveyed to him by Mr. Lister.

That, however, does not conclude the matter; for the defendant also relied on the doctrine of estoppel, the suggestion that this doctrine might be relevant in the circumstances having fallen from the learned judge in the course of the hearing. I will not take up time by repeating the reasons which my Lord has given for his view on this aspect of the case; for, in my judgment, a clear case of estoppel is made out, having regard to the circumstances in which the wall and the garage were erected. I think that probably the most apposite statement of the rule regarding estoppel is the one to which the learned judge himself referred, which was cited with approval by SIMONDS, J., in *Re William Porter & Co., Ltd.* (4) ([1937] 2 All E.R. at p. 363), and which comes from the judgment of LORD CAMPBELL, L.C., in *Cairncross v. Lorimer* (5). I need not take up time by referring to the passage at length again, but I think it is in complete accord with the conclusion that the company was estopped in this case. If the company was estopped, it follows (as my Lord has said) that, on the principle stated in *Taylor v. Needham* (3), the plaintiff, as successor in title of the company, can be in no better position. Accordingly, I agree that the appeal fails.

As to the trifling but somewhat difficult matter of the manhole, the story seems to have been this. When the defendant was building his bungalow, some means had to be devised for carrying rain water away from his building. When the northern land also was built on, which, no doubt, was plainly contemplated at that time, it would be necessary for a similar provision to be made for the rain water from the buildings on that plot also. In those circumstances, by agreement between the defendant and the company, a manhole was installed on the company's land and it was connected by means of a pipe to the appropriate gutters or other means of conveying water on the defendant's land. As explained by the defendant's father, it was necessary that the water collecting in this manhole should be carried off to the main sewer. That would involve, not only laying a pipe from the manhole to the road, but taking up the road for the purpose of making connection with the sewer. That, no doubt, would be a laborious and somewhat expensive matter, and this arrangement had the advantage of avoiding the duplication of that operation, for one connection was made between the manhole which I have mentioned and the main sewer, coming back across the defendant's land for that purpose, with the result that, if and when an additional connection for carrying rain water from the company's property had to be made, the one exit to the main sewer would serve both. It appears that, when the plaintiff's objection to the presence of the manhole was raised, his builder removed the old manhole and substituted another, but, as I understand the evidence, the pipe from the plaintiff's premises was re-connected and connection was also made with the main sewer by means of the existing pipe which had been led across the defendant's property. There is no suggestion in the evidence that this means of connection with the main sewer was abandoned or that any new means of connection was provided. The plaintiff in his evidence

A said: "I don't know if water from this manhole flows back on the defendant's land. His manhole was too high to take my surface water away. It may be that my water runs across his land." I think, as the evidence stands, it is a fair inference that the water from the existing manhole is still flowing across the defendant's land by means of the pipe laid in his ground.

B In those circumstances, as my Lord has pointed out, the position is this. The original manhole was laid under a reciprocal arrangement whereby the company was to receive the defendant's rain water and collect it in a manhole on the company's property, the company was to be at liberty to make a further connection to that manhole, and connection between the manhole and the main sewer would be made for the benefit of both parties by means of a pipe running across the defendant's land. I think it is a fair inference on the evidence that, C although a fresh manhole was substituted, the existing system of pipes, in conjunction with the new manhole, continued to perform the function contemplated at the time of the original installation. That being so, I agree with my Lord that it is not open to the plaintiff to object to the defendant's pipes or the flow of water through the defendant's pipes on to his land as constituting a trespass, inasmuch as this is part of a reciprocal arrangement of which the D plaintiff still has the benefit in the shape of the flow of water allowed to him through the pipe going back on to the defendant's land, across that land, and into the main sewer in the roadway outside. Accordingly, in my view, the appeal fails and the cross-appeal should be allowed, with the consequences which my Lord has indicated.

E **MORRIS, L.J.:** In my judgment, it has first to be considered what land is referred to and denoted in the conveyance to the plaintiff of the plot which he bought. The conveyance was made on Nov. 18, 1952, the vendor being Mr. Lister. The description of the land which was conveyed begins with the words:

"All that piece of land situate in the parish of Romford in the county of Essex part of the land known as the Havering Park estate",

F and ends with the words:

"and for the purposes of facilitating identification only is delineated and shown by the colour pink on the plan drawn on a conveyance dated June 22, 1932, made between Allen Ansell of the one part and Cyril Regent Turner of the other part."

G A perusal of the conveyance from Mr. Ansell to Mr. Turner shows that the plot of land was there described in almost identical terms. In the earlier conveyance the reference is to a proposed road intended to be called Hamlet Road. The words of description and limitation which are used there contain three measurements, namely, those of the frontage to Hamlet Road, the length of the north-east side and the width at the rear. The plan is to be looked at in order to assist in H identifying the plot of land. If the plan is so used, there is nothing which suggests that the lines of the boundaries connecting the frontage to Hamlet Road with the rear are other than straight. That they should be so would, in my judgment, be the natural supposition and inference.

I Following on the conveyance of June 22, 1932, from Mr. Ansell to Mr. Turner, the land was conveyed by Mr. Turner to Mr. Walker on June 2, 1938, and reference was made to the plan on the conveyance of June 22, 1932. On July 18, 1949, Mr. Walker conveyed the plot to Walter and Maurice Brown (Builders), Ltd., and the land was described substantially as it was in the conveyance of 1932. On Apr. 29, 1952, Walter and Maurice Brown (Builders), Ltd., conveyed the plot to Mr. Lister, and again the description was substantially as it was in the conveyance of 1932. By this date the defendant had built on his plot and had, in fact, encroached to some extent on the plot which belonged to Walter and Maurice Brown (Builders), Ltd., but, in spite of this, the company in executing its conveyance described the plot in almost identical terms with those employed

in the conveyance of July 18, 1949, from Mr. Walker to the company, which were substantially the same terms as those employed in the conveyance of 1932. A

In view of all those circumstances, I have formed the conclusion that, as a matter of construction, the plot which was conveyed to the plaintiff was the same plot as was described in the conveyance of 1932 and that its boundaries in length followed straight and direct lines. It follows from this view that the plaintiff, unless precluded from so doing, can complain of the presence on his land of some part of the defendant's garage and of the low wall. In considering whether the plaintiff can so complain, it has first to be decided whether the company could, in the period just before it sold the plot to Mr. Lister on Apr. 29, 1952, have made complaint. In my judgment, the company could not have done so. The company accepted the instructions of the defendant to build for him on his plot. There was then no marked-out boundary between the two plots. The company acted both through the defendant and also through his father, who held the majority of shares in the company. The bungalow and garage of the defendant were built, and the company received payment. There was no intention of ceding any land from the company to the defendant and the latter had no intention of encroaching over his boundary. The defendant's father said in evidence that he intended to build only on the land of the defendant. D
The defendant said:

"The brick wall was put up intending it for the boundary between my property and the company's. It was so understood by me in my capacity as owner of the south property and as director of the company owning the north property."

If the company, acting through its agents, had said in terms to the defendant that the company recognised that there were no visible boundaries between the two plots, that the company appreciated that the defendant wished to have an assurance that he could safely proceed to build in accordance with his projected plans without being in danger of being accused by the company of encroaching on its land, and that the company was willing to give such an assurance, I cannot conceive that, after the defendant had relied on such assurance and paid the company for building according to plan, the company could subsequently have complained that the defendant was trespassing on its land. The company would be estopped. Although the company did not make express statements in the terms which I have mentioned it did, in my judgment, by its conduct impliedly represent that the defendant could safely proceed to build as he planned, and the company would, in my judgment, at a later date have been estopped from alleging that the defendant had done wrong and was trespassing on the company's land. If this would have been the position of the company, would Mr. Lister have been, and is the plaintiff, better placed? In my judgment, the answer is: No. The judgment of MANSFIELD, C.J., in *Taylor v. Needham* (3) is, in my judgment, clear authority for this view. I, therefore, consider that, as regards these matters, the appeal against the judgment of the learned judge fails. E
F
G
H

In regard to all the other matters relating to the issues of the manhole and the drains, and to the issues in relation to costs, I do not desire to add anything to what my Lords have said, except to say that I am in agreement with the conclusions that they have expressed.

Appeal dismissed; cross-appeal allowed. I

Solicitors: *Sidney Torrance & Co.* (for the plaintiff); *Sackville, Hulkes & Archdale*, Hornchurch (for the defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A

CARMARTHENSHIRE COUNTY COUNCIL v. LEWIS.

[HOUSE OF LORDS (Lord Oaksey, Lord Goddard, Lord Reid, Lord Tucker and Lord Keith of Avonholm), January 24, 25, 26, February 17, 1955.]

Education—Local education authority—Negligence—Child at nursery school—Permitted to run on to highway—Injury to vehicle's driver in avoiding child.

B

A small boy, aged about four years, who was a pupil at a nursery school conducted by the appellants, the local education authority, was made ready with another child to go out for a walk with one of the mistresses. The mistress left them unattended in the classroom, she herself going to get ready. While out of the classroom she met another child who had cut himself and she bandaged him. During her absence of about ten minutes, the boy got out of the classroom and made his way out of the school playground through an unlocked gate down a lane into a busy highway where he caused the driver of a lorry to make the lorry swerve so that it struck a telegraph pole as a result of which the driver was killed. His widow brought an action for damages for negligence against the appellants.

C

Held: (i) in the circumstances of the case, there was no negligence on the part of the mistress concerned.

D

(ii) (by LORD GODDARD, LORDS REID, TUCKER and KEITH OF AVONHOLM; LORD OAKSEY not concurring) the presence of a child as young as the child in the present case wandering alone outside the school premises in a busy street at a time when he was in the care of the appellants indicated a lack of reasonable precautions on the part of the appellants who had given no adequate explanation of the child's presence in the street, and, since it was foreseeable that such an accident as happened might result from the child being alone in the street, the appellants were guilty of negligence towards the deceased and were liable to the respondent in damages.

E

Decision of the COURT OF APPEAL, sub nom. *Lewis v. Carmarthenshire County Council* ([1953] 2 All E.R. 1403) affirmed on a different ground.

F

[**Editorial Note.** Although the decision of the Court of Appeal was affirmed on a different ground, viz., the negligence of the local education authority, not the negligence of the mistress, there was no dispute in any court that, judged by the test of foreseeability, there had been a breach of duty towards the deceased in not preventing a child of about four years of age being unattended in a busy street at a time when he was in the care of a school authority. LORD OAKSEY did not dissent from this, but he did not concur in the decision to dismiss the appeal because he considered that the appeal ought to stand or fall on the issue of the negligence of the mistress.

G

As to the Persons to whom Duty to Take Care is Owed, see 23 HALSBURY'S LAWS (2nd Edn.) 572, para. 825; and for cases on the subject, see 36 DIGEST (Repl.) 15, 61 et seq.

H

As to Circumstances Requiring Explanation to Rebut Negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 672, para. 956; and for cases on the subject, see 36 DIGEST (Repl.) 143, 753 et seq.]

Cases referred to:

I

- (1) *Searle v. Wallbank*, [1947] 1 All E.R. 12; [1947] A.C. 341; [1947] L.J.R. 258; 176 L.T. 104; 2nd Digest Supp.
- (2) *Merryweather v. Nixan*, (1799), 8 Term Rep. 186; 101 E.R. 1337; 1 Digest 683, 2926.
- (3) *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K.B. 370; 85 L.J.K.B. 1289; 115 L.T. 129; 80 J.P. 321; 2 Digest 235, 226.
- (4) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 2nd Digest Supp.
- (5) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

- (6) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (7) *Benmax v. Austin Motor Co., Ltd.*, [1955] 1 All E.R. 326.

Appeal.

Appeal by the education authority from an order of the Court of Appeal, dated Nov. 13, 1953, and reported sub nom. *Lewis v. Carmarthenshire County Council* [1953] 2 All E.R. 1403, affirming an order of DEVLIN, J., at Carmarthenshire Winter Assizes, dated Mar. 31, 1953, and reported [1953] 1 All E.R. 1025. The facts appear in the opinion of LORD OAKSEY.

H. V. Lloyd-Jones, Q.C., and *N. G. L. Richards* for the appellants.

H. Edmund Davies, Q.C., and *D. G. Jennings* for the respondent.

The House took time for consideration.

Feb. 17. The following opinions were read.

LORD OAKSEY: My Lords, this is an appeal from the Court of Appeal affirming a judgment of DEVLIN, J., in favour of the respondent, who is the widow of a lorry driver who lost his life, when driving a lorry, in an attempt to avoid a little boy, named David Morgan (hereinafter called "David"), aged about three and three-quarter years, in College Street, Ammanford. David was a pupil at the nursery school conducted by the appellants, who are the local education authority responsible for the provision and maintenance of schools in the county of Carmarthen. This school included a nursery school, an infants' school and a junior school, the premises of which abut on College Street, Ammanford, and are delineated on the plan put in evidence, from which it appears that the building marked "School Ages 7-11" was the junior school, and the building marked "Nursery School" included both the infants' school and the nursery school, the infants' school occupying the eastern part of the building marked "Ages 5-7" and the nursery school the western part marked "Ages 3-5". The play-pen was used only by the nursery school, and the yard to the south of the nursery school was used only by the infants' school. This yard had access through a gate leading into a lane which led to College Street, and the yard to the south of the junior school had a gate which led directly into College Street.

On Apr. 19, 1951, at about 12.15 p.m. after the midday meal, the mistress in charge of the nursery school, Miss Morgan, was about to take David and a little girl, both of whom had been at the nursery school for a year, out for a walk as a treat which she gave daily to two of the children in the nursery school. She left David and the little girl, who had got their hats and coats ready to go out, in the classroom in which two girls of about nine years old from the junior school were laying out mattresses, whilst she went to the lavatory. As she came back she met a child coming from the play-pen who had fallen down and cut himself. She washed and bandaged him and then was taking him to the head mistress of the school to see if he should be taken to the doctor, as she did not know whether the cut he had was serious, when she met David in the head mistress's office, and it appeared that he had been brought there from College Street, where the accident to the respondent's husband had taken place. Miss Morgan had been away about ten minutes.

In these circumstances, DEVLIN, J., and the Court of Appeal have held that Miss Morgan was negligent in leaving David, and that her negligence caused the accident to the respondent's husband. I should agree that, if Miss Morgan was negligent, her negligence was causally connected with the accident. If a child of under four years, who is in the charge of a schoolmistress, is negligently allowed by the schoolmistress to stray into a crowded street, I am of opinion that the negligence is causally connected with an accident caused by the child. But I do not think Miss Morgan's conduct was negligent.

The standard of care which the law demands is the standard which an ordinarily prudent man or woman would observe in all the circumstances of the case.

A DEVLIN, J., appears, in my opinion, to have disregarded what Miss Morgan said as to her reasons for not returning immediately to the two children. He said:

B “If the case had been that the child was hurt sufficiently badly to give rise to a degree of alarm that drove from Miss Morgan’s mind the other calls on her, or to put her into the position of having to choose between two duties, both of which she could not adequately perform, I should have felt gravely handicapped by lack of material. But I think it emerged quite clearly from Miss Morgan’s evidence that the defence was not that.”

C In my opinion, however, that was exactly what the defence was. Miss Morgan said she bandaged the child who was hurt, and took him to the head mistress to see if he should be taken to the doctor as she did not know whether the cut he had was very serious. The head mistress was called by the appellants, but was asked no question by the judge or the respondent’s counsel on this matter. Doubtless Miss Morgan might have taken other steps. She might have told David that she would only be a few minutes, or have asked the mistress in the play-pen to keep an eye on him, but she knew David to be an obedient child who had been under her care for a year, and she knew that he and the little girl were waiting, dressed up to go out with her for a treat. The learned judge D said that they were “dressed up with nowhere to go . . .” But they were going out with Miss Morgan, and I should have thought that that was exactly what would have made them wait for the mistress who had promised to take them out for a treat.

E In such circumstances, it appears to me perfectly natural that Miss Morgan would never have thought that the children would wander out of the school into the yard, much less go out through the gate into the lane. As she said, they were trained children who had been in the school for over a year. DEVLIN, J., appears to have formed a somewhat unfavourable opinion of Miss Morgan because of her evidence about the gates out of the yards, which was as follows :—

F “Q.—Can children aged five to seven operate the latch of the gate into the lane? A.—Yes. Q.—There is a latch to the gate into the lane, is there? A.—Yes. Q.—Is there a latch to the gate into the highway, or is it the fact you can open it just by pulling it? A.—By just pulling it. Q.—And it is a fact, is it, that you can get from the infants’ yard to the main school yard? A.—Yes, my Lord. Q.—Are those gates ever kept locked during the play hours when the five to seven’s are out? A.—Yes. Q.—They are? G A.—Yes, they are locked. Q.—Always? A.—No, not always. Q.—When are they kept locked and when are they not? A.—The head mistress has charge of them. Q.—That is why I thought perhaps you might not know about it. You know that they are sometimes locked, do you? A.—Yes. Q.—Generally locked, would you say? A.—Yes. Q.—From your observation, they are generally but not always. But you cannot say, because you were not in charge of it, on what system they are kept locked or unlocked? H A.—No, my Lord. Q.—One or other of them must, of course, have been unlocked on this occasion? A.—Yes. Q.—And you cannot say which? A.—No. Counsel for the respondent.—Was the witness referring to both gates when she said they might be locked. Was she referring to the main gate and the lane gate or not, when she said they were locked during play-time? I A.—The lane gate. Q.—Not the other? A.—No. DEVLIN, J.—What about the main gate then? A.—No. Q.—Is it never locked? A.—No.”

Subsequently the head mistress was called by the appellants to correct Miss Morgan’s evidence, and said that the lane gate was closed but never locked.

Both the courts below have based their judgments on the negligence of Miss Morgan, but some of your Lordships are of opinion that, though Miss Morgan was not negligent, yet the appellants were negligent for allowing the gate into

the lane to be left unlocked. It is true to say that, in further and better particulars delivered on Oct. 20, 1952, it was alleged that

“One of the mistresses . . . failed to see that the gates leading from the school premises to the highway were closed.”

But the case was not fought on this issue. In fact, the gates were closed but not locked. No question was asked of the head mistress why the gates were not locked. None of the judges who have heard the case have based their judgments on an obligation on the appellants to keep the gates locked and the matter is not relied on in any of the reasons to the respondent's printed case.

I think, therefore, that the case ought to stand or fall on the issue of Miss Morgan's conduct, and, in my opinion, it cannot be decided in favour of the respondent without inferentially holding that education authorities are bound to keep children under constant supervision throughout every moment of their attendance at school, which, in my opinion, is to demand a higher standard of care than the ordinary prudent schoolmaster or mistress observes. An analogy between the law as to the liability of owners of animals on highways was discussed in your Lordships' House. But although there are certain similarities between children of tender years and animals, I think the law as to straying animals is based on the way in which animals have been kept from time immemorial and the impossibility of keeping them under control in all circumstances and that there is no true analogy. For these reasons I would allow the appeal.

LORD GODDARD: My Lords, I need not reiterate the facts of this somewhat difficult case. The question of general importance that is raised is whether there is a duty on the occupiers of premises adjoining a highway to prevent young children from escaping on to the highway so as to endanger other persons lawfully passing on it. By young children I mean those of such tender years that they may be presumed to be unable to take any care for their own safety, and whom a prudent parent would not allow to go into a street unaccompanied. A long series of cases, culminating in *Searle v. Wallbank* (1) have established, now beyond controversy, that an occupier is under no duty to fence his fields, yards or other premises so as to prevent his cattle or other domestic animals from escaping on to the highway, though by so doing danger, and it may be disaster, is caused to passers by. If, then, an occupier is not liable for the escape of an animal, is he to be held liable for that of an infant, who from the standpoint of reasoning powers is much the same as a sheep or any other domestic animal? Now once a doctrine has become a rule of law it is the duty of the courts to apply and follow it without regard to its origin, but if to follow it would be to extend it, in my opinion it is not only legitimate, but essential, to examine the origin and reason for it if they are known. How some rules of law arose is not always known. For instance, except for the fact that, in 1799 LORD KENYON laid it down categorically in *Merryweather v. Nixan* (2) that there was no contribution between joint tortfeasors, no one has ever discovered whence the rule came, but it remained the law till abrogated by the Law Reform (Married Women and Tortfeasors) Act, 1935. How the rule your Lordships have to consider arose is, I think, known, its origin having been explained particularly by VISCOUNT MAUGHAM, in *Searle v. Wallbank* (1), and in *Heath's Garage, Ltd. v. Hodges* (3) in the judgment of NEVILLE, J. It arose because at least most of the roads in this country originated over unenclosed country when the open field system of farming prevailed and long before fencing became usual, and to this day hundreds of miles of roads run through unenclosed land, so cattle, sheep and all domestic animals could, and still do, wander on and over such roads and the presence of domestic animals was not regarded, to use the words of NEVILLE, J., as inconsistent with the reasonable safety of the public using the road. Whether this doctrine should prevail in these days of swift moving motor traffic, at least in the case of roads in enclosed country, is for the legislature to consider, but it has

A never been applied to the presence on the roads of human beings of whatever age, nor to an inanimate object. Perhaps the simplest way of accounting for the rule is that dedication of roads, at least in country districts, must be presumed to have been sub modo, subject, that is, to the possible presence of domestic animals on them. How far the doctrine applies in towns or populous places may, I think, still be considered a debatable question. Having regard then to its origin, it would, in my opinion, be unwarrantable to extend the rule to the facts of the present case.

The position, then, is that the appellants maintain a nursery and infant school in premises adjoining a highway in a town and are, in my opinion, under a duty to take care that the children neither themselves became involved in or cause a traffic accident. At the trial, the principal matter relied on as establishing negligence was that this child and one other were left unattended by the teacher in charge for a short time during which they got out of the school grounds. The learned trial judge thought it a border-line case, as did SOMERVELL, L.J., but, on the whole, found that the teacher was negligent. This is an inference drawn from the facts found by the learned judge and, in my opinion, is open to review by your Lordships, who, accepting the facts so found, are in as good a position as the courts below to determine whether they justify holding Miss Morgan guilty of a want of care. Reluctant as I must be, and am, to differ on such a matter, I cannot hold that an inference of negligence on her part should be sustained. Her duty was that of a careful parent. I cannot think that it could be considered negligent in a mother to leave a child dressed ready to go out with her for a few moments and then, if she found another of her children hurt and in need of immediate attention, she could be blamed for giving it without thinking that the child who was waiting to go out with her might wander off into the street. It is very easy to be wise after the event and argue that she might have done this or that; but it seems to me that she acted just as one would expect her to do, that is to attend to the injured child first, never thinking that the one waiting for her would go off on his own. The utmost length of time she was out of the room was ten minutes, but it is plain that the child must have gone off very soon and I should think almost immediately after Miss Morgan had gone to the lavatory. He had to go from the room, across the playground, out into the side lane, down to the main road and then some way along the latter, cause the accident and be brought back to the place from which he started, there to be seen by Miss Morgan all within this short space of time. And this was a child described as obedient and who had never before left the school by himself, as he was always fetched by his mother. I cannot bring myself to lay the blame for this tragic accident on Miss Morgan.

But this does not conclude the matter as far as the appellants are concerned. They maintain a nursery school and an infant school on these premises. In the former they accept the care of children from three to five years and in the latter those of five to seven. During the time when this child was in their care, he is found outside the school premises wandering in the street. That, in my opinion, clearly calls for an explanation from the appellants. They have only shown that the child left the room in the temporary absence of the teacher and so got into the playground. In the playground he would have been safe at least from traffic risks. All we know is that the gates must have been open, or so easy to open that a child of three or four could open them. True, the nursery children are put, when out of school, into the play-pen, but infants from five to seven play in the playground. If it is possible for children of that age, when a teacher's back may be turned for a moment, to get out into a busy street, this does seem to indicate some lack of care or of precautions which might reasonably be required. There is no analogy between a school playground and the home in this respect. At any rate, no satisfactory explanation has been given for this child being found in the street at a time when he was in the care of the appellants, and for this reason I would dismiss the appeal.

LORD REID: My Lords, it is admitted that the respondent's husband lost A his life through no fault of his own. He was driving a lorry along a busy street when a child of about four ran on to the road. He must have swerved to avoid the child, and in doing so his lorry struck a lamp post at the edge of the pavement and he was killed. There is no direct evidence about the matter, but there is no suggestion that he did not take the right course in trying to save the child or that he could have avoided the accident. Just how the accident happened B is immaterial. It is not disputed that the cause of his death was the action of the child. Of course the child was not old enough to be responsible, and, if a child of four is alone in a busy street, it is quite likely to do what this child did. This action was brought by the driver's widow, who is the respondent, against the appellants in whose charge this child was when it got on to the street.

The appellants are the local education authority. Adjoining this street C they have a school in which there are three departments, a junior school, an infants' school for children between five and seven and a nursery school for children under five. Nearest the street there is a playground for the juniors, behind that is the junior school building, behind that again is a playground for the infant school and furthest from the street is the building in which the infant school and the nursery school are conducted. There is an enclosed D play-pen adjoining the nursery school for the children under five. There are only two entrances to the school, a gate from the street for the juniors and a gate from the infants' playground for the others. This gate gives access to a small lane which runs from the street along the side of the school.

The child in question, a boy named David Morgan, had been attending the nursery school for about a year before the accident. He was brought to school E every morning by his mother and taken home by her in the afternoon. At about 12.15 p.m. each day the children in the nursery school go into the play-pen where they are watched by one of the mistresses. The nursery school was under the charge of Miss Morgan (who is not related to the child David) and at this time she often took two of the children for a short walk into the town. On the day in question, she was going to take out David Morgan and a girl Shinoa Evans, F and they got their hats and coats. Then Miss Morgan went out of the classroom to get ready to go out, intending to be away for a very short time. But she then found that one of the other children had fallen and cut himself and she stopped to wash and bandage the cut. This took about ten minutes. Then Miss Morgan thought she ought to take this child to the head mistress to see whether a doctor should be called. The head mistress' room was on the other G side of the nursery classroom, and when she entered the nursery classroom she found that the other two children had gone. During this period of ten minutes or so, the two children, David and Shinoa, must have got out of the classroom. We do not know where Shinoa went but David must have crossed the infants' H playground, gone through the gate into the lane, and gone down the lane and about a hundred yards along the street to the place where the accident happened. After the accident he must have been brought back by someone because Miss Morgan found him outside the classroom in a small vestibule which is open to the infants' playground.

When Miss Morgan left the children in the classroom, the door of the room was shut and there were two girls of about nine from the junior school in the room. After their time in the play-pen the nursery children come in to the classroom I and sleep for a time on some kind of beds on the classroom floor and these two girls of nine were laying out these beds when Miss Morgan left to get ready to go out. They were not there when she came back and we do not know when they left, nor do we know how long Miss Morgan expected them to stay. As she only expected to be away for a very short time she naturally gave them no instructions about looking after the small children, David and Shinoa. It appears that the classroom door could be opened by children of four. We know little about the

A gate from the playground into the lane, but we do know that David got through it. There was no one in the infants' playground at that time, but the juniors were playing in the front playground and it seems clear that David must have gone out by the gate into the lane.

In these circumstances, two questions arise for decision. In the first place, was the escape of the child David into the street attributable to negligence of the appellants or of those for whom they are responsible? If it was, then it appears to me to be obvious that his being there alone might easily lead to an accident, and, if the child had been killed or injured, the appellants would have been liable in damages, for they certainly owed a duty to the child to protect him from injury. But then a second question is raised by the appellants. They say that, although they owed a duty to the child they owed no duty to other users of the highway, and that, even if they were negligent in letting the child escape on to the street, they cannot be held responsible for damage to others caused by the action of the child when there.

On the first question, I am of opinion that the appellants were negligent. However careful the mistresses might be, minor emergencies and distractions were almost certain to occur from time to time so that some child or children would be left alone without supervision for an appreciable time. The actions of a child of this age are unpredictable and I think that it ought to have been anticipated by the appellants, or their responsible officers, that, in such a case, a child might well try to get out on to the street and that, if it did, a traffic accident was far from improbable. It would have been very easy to prevent this, and either to lock the gates or, if that was thought undesirable, to make them sufficiently difficult to open to ensure that they could not be opened by a child so young that it could not be trusted alone on the street. The classroom door was not an obstacle and, no doubt, it was convenient that the children should be able to open this door themselves, but that meant that the way to the street was open unless the outer gate was so fastened or constructed as to be an obstacle to them.

There was much argument whether Miss Morgan was negligent in leaving these children for ten minutes. I do not think that she was negligent in the first instance because she intended to come back very soon: the real question is whether, when she found that she had to be absent to attend to the injured child, she ought to have paid some attention to the two who were waiting for her. She was next door to the classroom while attending to the injured child, and, without delaying her attention to the injured child, she could have called to David and Shinoa to come into the play-pen where they would have been under supervision or, at least, she could have opened the door of the classroom to see that all was well. But, no doubt, her whole attention was concentrated on the injured child, and the question whether her omission to give any attention to the other children amounted to negligence is, I think, a very narrow one. I prefer to base my judgment on the fact that such a situation ought to have been anticipated by the appellants and provided for.

The appellants argued that, even if they were negligent and even if they owed some duty to the deceased lorry driver, the accident which caused his death was not reasonably foreseeable; his death, if it was a consequence of their negligence, was too remote to involve them in liability for it. I would deal with that argument in this way. Was it foreseeable by an ordinary reasonable and careful person that a child might sometimes be left alone in the nursery school for a short period? I think it was. I see nothing very extraordinary in the circumstances which caused these children to be left alone. Was it, then, foreseeable that such a child might not sit still but might move out of the classroom? If I am right in my view that it is not safe to make assumptions about the behaviour of such young children, again I think it was. Was it then foreseeable that such a child might go into the street, there being no obstacle in its way? I see no

ground for assuming that such a child would stay in an empty playground when the gate was not more than twenty yards or so from the classroom. And once the child was in the street anything might happen. It was argued that it might be reasonable to foresee injury to the child but not reasonable to foresee that the child's action would cause injury to others. I can see no force in that. One knows that every day people take risks in order to save others from being run over, and if a child runs into the street the danger to others is almost as great as the danger to the child. A

Then *Bolton v. Stone* (4) was cited, and it was said that, although injury to the driver of a vehicle in the street might be foreseeable as a possible consequence of the escape of the child, it was not reasonably probable and, therefore, the appellants are not liable. But, in my view, *Bolton v. Stone* (4) establishes that, if an event is foreseeable, the antithesis of its being reasonably probable is that the possibility of its happening involves a risk so small that a reasonable man would feel justified in disregarding it, and I cannot believe that, if anyone had realised that the result of having a gate so easy to open might be a serious accident in the adjoining road, he would have thought it right to disregard that risk and do nothing. B

I turn now to the second question which is one of novelty and general importance. If the appellants are right, it means that, no matter how careless the person in charge of a young child may be and no matter how obvious it may be that the child may stray into a busy street and cause an accident, yet that person is under no liability for damage to others caused solely by the action of the child, because his only duty is towards the child under his care. There appears to be no reported case of an action of this kind, and the appellants say that this indicates that no one has hitherto supposed that such an action would lie, for there must have been many instances of the driver of a vehicle suffering damage caused by a young child running in front of it. But in most cases of that kind it would not be worth while to sue the person who was in charge of the child, and, in any event, "the categories of negligence are never closed". C

The case most relied on by the appellants was *Hay (or Bourhill) v. Young* (5), where it was held that a motor cyclist was under no duty to a woman who was not in any physical danger from his driving and who did not even see the accident in which he was involved, but who suffered shock from hearing the noise of it. Those facts have not the faintest resemblance to the facts of this case, but the appellants say that the reasoning with regard to remoteness assists them. I do not think that it does. LORD THANKERTON ([1942] 2 All E.R. at p. 399) said that the cyclist's duty was to drive D

"with such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care"

and he referred to "the area of potential danger". LORD RUSSELL OF KILLOWEN (*ibid.*, at p. 401) cited the well-known passage in the speech of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* (6) ([1932] A.C. at p. 580), beginning "Who, then, in law is my neighbour?", as did LORD PORTER ([1942] 2 All E.R. at p. 409). LORD MACMILLAN said (*ibid.*, at p. 403) that a E

"duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed,"

and LORD WRIGHT (*ibid.*, at p. 404) referred to the F

"general concept of reasonable foresight as the criterion of negligence or breach of duty."

If I am right in the view which I have already expressed that injury to other road users was reasonably foreseeable if this child was allowed to escape on to the street, then the reasoning in *Hay (or Bourhill) v. Young* (5), is very much against the appellants, and they could only succeed on this argument if there were, in G

A connection with the care of young children, some special feature which would prevent the application of the general principle.

The appellants say that it would be unreasonable to apply that principle here because, if such a duty is held to exist, it will put an impossible burden on harassed mothers who will have to keep a constant watch on their young children. I do not think so. There is no absolute duty, there is only a duty not to be

B negligent, and a mother is not negligent unless she fails to do something which a prudent or reasonable mother in her position would have been able to do, and would have done. Even a housewife who has young children cannot be in two places at once, and no one would suggest that she must neglect her other duties, or that a young child must always be kept cooped up. But I think that all but the most careless mothers do take many precautions for their children's safety, and the same precautions serve to protect others. I cannot see how any person in charge of a child could be held to have been negligent in a question with a third party injured in a road accident unless he or she had failed to take reasonable and practicable precaution for the safety of the child.

What precautions would have been practicable and what precautions would have been reasonable in any particular case must depend on a great variety of circumstances. But, in this case, it was not impracticable for the appellants to have their gate so made or fastened that a young child could not open it and, in my opinion, that was a proper and reasonable precaution for them to take.

Finally, it was urged that the general principle should not apply here because it does not apply where animals stray on to a highway, and young children, unable to appreciate danger, have some resemblance to domestic animals. E But this analogy seems to me to be misleading. It is true that a person who keeps domestic animals is not bound to prevent them from straying on to a road, or responsible for the consequences if they do stray. But the reason for that appears to be that a person is entitled to keep his animals on open or unfenced ground from which they can stray on to a road, and it has become a rule of law F that he is not bound to do anything to prevent them from straying. That reason has no application to children, and I do not see why the rule of law which has grown out of it should apply to them either. Moreover, a person who brings his animal on to a road or street and then negligently fails to look after it there is not free from liability. Counsel for the appellants did not argue that this rather illogical distinction should be applied to children, and it would be strange if a G person in charge of a child were under a different duty according to whether he let the child stray from his house or garden or took the child on to the road and then let it stray there. Counsel took the only logical course and argued that, even if a person takes a child into the street and then takes no care of it, he cannot be held liable for damage suffered by a third party as a result of its actions, and that argument gains no support from the rules which apply to animals.

H I am, therefore, of opinion that the appeal should be dismissed.

LORD TUCKER: My Lords, during the course of this appeal, the question was raised whether the appellants owed any duty in respect of the children in their charge to users of the highway adjoining the school premises as distinct from their duty to the child or its parents, and in this connection reference was I made to the law with regard to animals. My Lords, I am satisfied that the animal cases are in no way analogous and afford no guidance in the present appeal. I think that, in principle, there can be no doubt that both courts below were right in holding that persons in charge of tiny children (the child in question was just under four years of age) in premises adjoining a busy highway owe a duty to persons using the highway to take reasonable care to see that such children—being of an age when they cannot have acquired sufficient "road sense" to permit of their being allowed to travel unattended to and from school—shall not, during

school hours, escape unattended on to such a highway, it being reasonably foreseeable that an accident involving injury to other road users as well as to the children may well result therefrom. A

In the present case, a child named David Morgan, a week or so before his fourth birthday, had been taken to the nursery school managed by the appellants at Ammanford and left there in charge of the school authorities. Between 12.15 and 12.30 p.m. during school hours the child had somehow got out into College Street—a busy thoroughfare—and caused an accident which resulted in the death of the respondent's husband. My Lords, such an occurrence, I think, calls for an explanation from the appellants. Not because the facts and circumstances are exclusively within their knowledge—a theory to which I do not subscribe—but because it was an event which should not have happened and which *prima facie* indicates negligence on the part of those in charge of the child, just as much as the presence of a motor car on the foot pavement *prima facie* points to negligence on the part of the driver. B C

How, then, did the appellants seek to explain or justify this child's presence in the road? Their case was that the mistress in charge, Miss Morgan, had left this child and one other unattended by any adult for a few minutes while she went to the toilet before taking them out for a walk in the town, and that she had been unexpectedly detained for a few minutes longer attending to another child who had received an injury, and during her absence the two children had got out of the school premises on to the road. The evidence with regard to times and distances showed that the children must have run out almost immediately after Miss Morgan left the room. At the trial, the only question debated, apart from that of the duty owed to the deceased man, seems to have been whether or not Miss Morgan had been guilty of negligence. On this issue, DEVLIN, J., although considering the case a border-line one, decided in favour of the respondent. This view was upheld in the Court of Appeal, although ROMER, L.J., clearly indicated that, but for the fact he did not feel justified in interfering with the trial judge's finding, he would have held otherwise. If the speeches in this House in the recent case of *Benmax v. Austin Motor Co., Ltd.* (7), had been available to the lord justice he would, I think, undoubtedly have dissented. D E F

My Lords, on this issue I agree with my noble and learned friends LORDS OAKSEY and GODDARD, that the evidence disclosed no negligence on the part of Miss Morgan. It is easy after the event to think of several things she might have done which would have avoided the accident which resulted from her absence, but the question is whether her failure to take such action in the circumstances which existed amounted to negligence. For myself, I have no hesitation in holding that Miss Morgan was not shown to have been guilty of any negligence, and that no responsibility for the death of the deceased man attaches to her. G

This does not, however, dispose of the case. The explanation put forward by the appellants entirely fails to explain how or why it was possible for this tiny child to escape from the school premises on to the street. The trial judge drew the inference that the child got out through the unlocked side gate opening on to a lane leading into the street. This was the way the child was brought to, and taken from, school, and I think the judge's inference was the most probable one. No explanation was given why the gate was kept unlocked, or in such a condition that it was possible for a child of four to push it open or unlatch it. Nor was any other means of exit suggested as likely, except by going through other portions of the school premises not forming part of the nursery school and out of a gate leading directly on to the street. H I

My Lords, I think the appellants failed altogether to show that the child's presence in the street was not due to any negligence on their part, or of those for whom they are responsible. It is true that no questions were directed to the appellants' witnesses on this matter, but the respondent should not suffer for the appellants' failure in this respect. If, as is no doubt the fact, it is not possible for

- A every child in the nursery school at every moment of time to be within sight of a mistress in view of the contingencies which must arise from time to time—such as those which occurred in this case—then reasonable precautions must be taken which will be effective to prevent children of this tender age running out on to a busy street. No such precautions were shown to have been taken in this case and, on the evidence as it stood at the conclusion of the trial, the appellants had,
- B I think, failed to rebut the presumption of negligence arising from the facts disclosed.

While entirely absolving Miss Morgan from the finding of negligence against her, I am none the less of opinion that the appellants do not thereby escape responsibility, and for these reasons I would dismiss the appeal.

- C **LORD KEITH OF AVONHOLM :** My Lords, if I find two toddlers, not quite four years of age, unaccompanied in a busy street, exposed to all the perils of a traffic accident, my natural reaction is to think that someone has been thoughtless, or careless, or negligent of their safety. This is not necessarily so, for, with that unpredictability which is characteristic of the very small, they may have eluded all reasonable vigilance of their guardians. If, however, the care-
- D fulness, or carelessness, of the person responsible for their safety becomes a material issue, it is, in my opinion, for the person in charge of them to negative carelessness, or to show reasonable care. The burden of proof is on him. In this matter I agree with DEVLIN, J., and DENNING, L.J. In what I have said, and in what I am about to say, I wish to make it clear that I am dealing with the case of a child so young that it cannot safely be allowed on a busy street by
- E itself. With a child of an age to be allowed to find its own way to school, or to traverse the streets alone, different considerations arise. There can normally be no duty to prevent such a child from getting on to a street and, in the case of a traffic accident in which it is involved, the question of responsibility for the accident will be considered in general with reference to the conduct of the child itself and of the other person involved in the accident. There may also be special
- F cases of country children from wayside cottages using a road in full sight of approaching traffic, or tiny tots on some side street obviously used as a children's playground. Such cases will have to be considered on their special circumstances.

Turning now to the facts of this particular case, I cannot avoid the conclusion that someone was to blame for the small boy, not yet four years of age, getting on to College Street. The child and another child of the same age, all dressed

G to go for a walk in the town with their teacher, were left in the classroom of a nursery school. The teacher had occasion to leave the room. The other small children were playing outside in a play-pen under the supervision of an assistant teacher. The two children were left temporarily without any supervision. Two little girls, nine years of age, from the junior school, may have been for some time in the room preparing beds for the toddlers' afternoon nap. But there is no

H evidence from these girls and no evidence of what the children were doing while the girls were there.

- The room gave on to a vestibule which led directly into a playground, and from the playground access could be had by a gate to a lane leading to College Street, some fifty yards away. Another access to College Street could be had down the side of the junior school and through the junior school playground, but it seems unlikely that the children took that route on to the street. It is
- I obvious that the children got through an open door and gate, or through a door and gate that were easily openable by children of four years of age. Miss Morgan says that the latch on the classroom door was so low that it could be opened by the nursery children. She also says that she relied on the two nine-year-old girls—presumably to keep an eye on the children while she was out of the room. But, as I have said, the two girls gave no evidence, and there is no evidence at all how these little children got out of the school and on to the road, or how long they remained in the room after Miss Morgan left them. She was, apparently,

kept out of the room longer than she expected, through an accident to another child, and during that time no steps were taken to see what the children were doing. A

In that situation, the appellants, in my opinion, have failed to give any explanation that would excuse them from the prima facie inference of carelessness that arises from the children having escaped on to the road. Whether the inference is one of lack of proper supervision, or lack of safeguards against very small children escaping through doors and gateways on to the street, does not, in my opinion, matter. I would say that there was a presumption of negligence here that the appellants have failed to discharge. B

Does there, then, arise any question of a duty arising, in respect of the child's escape, to the respondent's husband? I think there does. The duty owed to the child is to see that it does not become involved in a traffic accident by which it is injured. In my opinion, it should be in the contemplation of any reasonable person that just such an accident may well arise in the case of a very small child that is allowed to escape on to a busy thoroughfare in a town. If such a traffic accident is not too remote to be foreseen it is not, in my opinion, too remote to foresee injury to the person, other than the child, involved in the accident. It is not necessary that the precise result should be foreseen. The case is clearly distinguishable from *Hay (or Bourhill) v. Young* (5), where the circumstances were such as to put the pursuer outside the field of persons to whom the motor cyclist in that case owed a duty. C D

Reference was made to a number of cases related to collisions with animals straying on to the highway. I agree that these cases cannot be equated to a case of small children allowed to stray on to a busy street in a town. The law with regard to straying animals is based on historical reasons which have no application to children of tender years unable to look after themselves. The law with regard to animals on the highway in relation to other users of the highway is not affected by the age or highway experience of the animal in question, and the law with regard to straying children cannot be elucidated by reference to principles derived from a right to depasture cattle in open fields. No assistance in this case can, in my opinion, be obtained from examining cases of straying animals, or considering the circumstances in which their owners may, or may not, be liable for a traffic accident. I would dismiss the appeal. E F

Appeal dismissed.

Solicitors: *A. D. Vandamm & Co.*, agents for *Le Brasseur, Davis & Son*, Newport (for the appellants); *Davies, Arnold & Cooper*, agents for *T. Llewellyn Jones*, Neath (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A Re BRASSEY'S SETTLEMENT. BARCLAYS BANK, LTD. v. BRASSEY.

[CHANCERY DIVISION (Danckwerts, J.), February 10, 1955.]

B Settlement—Investment—Power to invest in shares of companies in any British “colony or dependency”—*Companies in Dominion of Canada—Statute of Westminster, 1931* (22 Geo. 5 c. 4), s. 7.

Trust and Trustee—Powers of trustee—Power to invest—Shares of banking companies in Dominions—*Trustee Act, 1925* (15 & 16 Geo. 5 c. 19), s. 57.

C By a settlement made in 1936 trustees were empowered to invest money subject to the settlement in any of the ordinary stock or shares of any “company . . . in . . . any British colony or dependency”. The trustees, wishing to invest in shares of banking companies in Canada, applied to the court to determine the question, among other questions, whether the description “any British colony or dependency” extended to the Dominion of Canada. They further asked, if the settlement did not authorise such investment, that power for the purpose should be conferred under s. 57 of the Trustee Act, 1925.

D Held: the description “British colony or dependency” in the investment clause of the settlement did not include the Dominion of Canada, and accordingly the investing of funds subject to the settlement in the stock or shares of Canadian banking companies was not authorised by the settlement; but, under the Trustee Act, 1925, s. 57, the court would confer an appropriate power on the trustees to invest settled funds in the shares of banking companies in any British Dominion.

Re Maryon-Wilson's Estate ([1912] 1 Ch. 55) considered.

[As to the Meaning of Colony and of Dependency, see 5 HALSBURY'S LAWS (3rd Edn.) 432, 433, paras. 985, 986.

F For the Statute of Westminster, 1931, see 6 HALSBURY'S STATUTES (2nd Edn.) 193.]

Cases referred to:

(1) *Re Maryon-Wilson's Estate*, [1912] 1 Ch. 55; 81 L.J.Ch. 73; 105 L.T. 692; 43 Digest 935, 3729.

(2) *British Coal Corpn. v. Regem*, [1935] A.C. 500; 104 L.J.P.C. 58; 153 L.T. 283; Digest Supp.

G Adjourned Summons.

H The trustees of a settlement dated Aug. 5, 1936, being desirous of investing trust funds in shares of Canadian banking companies, applied by originating summons for the determination of the question, among others, whether the words “any British colony or dependency” as used in cl. 6 (A) and (D) of the settlement included all or any of the following, viz., the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa and the Dominion of Ceylon. At the hearing the trustees asked alternatively that they might be empowered under the Trustee Act, 1925, s. 57, to invest in the manner proposed.

A. H. Droop for the plaintiffs, the trustees.

I R. Cozens-Hardy Horne for the first defendant, the tenant for life.

J. Bradburn for the remaining defendants, persons beneficially interested in remainder.

DANCKWERTS, J. : This is a question of construction which arises on a settlement of Aug. 5, 1936, made by the first defendant to the summons. It arises entirely on the investment clause, cl. 6, of the settlement. The settlement was, it is to be observed, later in date than the Statute of Westminster, 1931, which either declared or regulated the status of British Dominions and the

United Kingdom as between themselves. Clause 6 of the settlement is in these terms: A

"Trust moneys may at such discretion as aforesaid be invested in or upon (A) Any of the public stocks or funds or government securities of Great Britain or Northern Ireland or India or any British colony or dependency or any foreign government or state or any security the interest on which is or shall be guaranteed by Parliament . . . (D) The stocks funds bonds debentures debenture stock mortgages obligations or securities or the guaranteed preference or ordinary stock or shares of any company (whether limited or unlimited and whether public or private) or corporation authority or body (whether public municipal county local or otherwise) in Great Britain or Northern Ireland or India or any British colony or dependency or any foreign country." B C

The trustees (and in this they are supported by the beneficiaries) are desirous of investing part of the funds, the subject of the settlement, in stocks or shares of banking companies carrying on business in the Dominion of Canada. Therefore the question arises whether they may lawfully make that investment under the terms of this investment clause. D

I have been referred to a decision in the Court of Appeal in 1911 of *Re Maryon-Wilson's Estate* (1). The point in that case at that time was whether a power to invest in "stocks or securities of any British colony or dependency"—similar words to the material words in the present case—permitted investment "in the stocks of any province of the Dominion of Canada unless that province has complied with the requirements of the Colonial Stock Act, 1900". Therefore the question in that case really was whether investments in the stocks of a constituent province of the Dominion of Canada was permissible under that clause. The point decided by the Court of Appeal was no more than that, subject to the provisions of the Colonial Stock Act, 1900, the provinces of Canada were neither British colonies nor British dependencies but were part of the whole Dominion of Canada. The case is of some interest because the court expressed the opinion that "dependency" was a wider term than "colony". They said: "Its exact meaning has not been judicially determined", but they expressed the opinion that Canada was a colony or dependency. It was observed that the word "dependency" might in certain ways be regarded as a more dignified phrase than "colony". On the other hand, the Court of Appeal did say that "clauses in trust instruments enlarging the power of investment beyond what the general law sanctions ought to be construed strictly." E F G

It is said on behalf of the persons who wish investments of this kind to be made that if Canada was a dependency in 1911 it would still be a dependency now, because certain sections of the British North America Act, 1867, have been expressly reserved by the Statute of Westminster, 1931, s. 7. Therefore, if Canada was a dependency, it is still a dependency and is still within the words in the relevant investment clause. H

The Statute of Westminster, 1931, was passed as a result of certain imperial conferences, and in the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 it is said:

"They [Great Britain and the Dominions] are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or internal affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations. On the question raised with regard to the legislative competence of members of the British Commonwealth of Nations other than Great Britain, and in particular to the desirability of those members being enabled to legislate with extra-territorial effect, we think that it should similarly be placed on record that the constitutional practice I

A is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominions concerned."

The statute recites in the preamble:

B "And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom: And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion: And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom."

Then the statute provides by s. 1 that

E ". . . the expression Dominion means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland."

Those last two have ceased to be Dominions, Newfoundland by becoming a province of Canada by virtue of the British North America Act, 1949, and the Irish Free State by virtue of the Ireland Act, 1949, which provides that the Irish Free State has ceased to be a Dominion though it does not become a foreign country for the purposes of any instrument. Then s. 2 of the Statute of Westminster, 1931, provides:

F "(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion. (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

G An example of the exercise of that power was the Act passed by the Canadian Parliament restricting the right of appeal to the Privy Council [Canadian Statute 23 & 24 Geo. 5 c. 53] which was considered by the Privy Council in *British Coal Corp'n. v. Regem* (2). In that case a preliminary objection was taken to the competency of a petition for special leave to appeal to the King in Council from a judgment of the Court of King's Bench (Appeal Side) of the province of Quebec in a criminal matter on the ground that the petition was incompetent by reason of the Canadian statute. It was held by the Privy Council that the petition was incompetent. As stated in the headnote ([1935] A.C. 500):

I "Before the Statute of Westminster, 1931, the Canadian legislature was subject to the limitations imposed by the Colonial Laws Validity Act, 1865, by which legislation repugnant to an Act of the Imperial Parliament was declared void, by s. 129 of the British North America Act, 1867, and also by the doctrine forbidding extra-territorial legislation. These limitations were abrogated by the Statute of Westminster . . ."

The result was that the preliminary objection succeeded.

However, counsel for the persons interested in remainder under the settlement in the present case, relied on a passage in the advice of the Privy Council delivered by VISCOUNT SANKEY, L.C., in which he referred to s. 7 of the Statute of Westminster, 1931, which reserved from the effect of the statute certain sections of the British North America Act, 1867, being sections which prevented any alteration of the Canadian constitution. There LORD SANKEY observed (*ibid.*, at p. 520):

"But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar. It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the statute. But that is theory and has no relation to realities. In truth Canada is in enjoyment of the full scope of self-government: its legislature was invested with all necessary powers for that purpose by the Act, and what the statute did was to remove the two fetters which have already been discussed."

In deciding this question I must have regard to realities and not to abstract theory. It appears to me that, since the Statute of Westminster, 1931, I cannot possibly hold that the Dominion of Canada is either a colony or a dependency. No doubt the change in political thought was gradual, but there has been a change, as it seems to me, in the way in which the position of the Dominions and the United Kingdom was regarded during the years which passed between 1911 and 1931, and the statute of 1931 was passed to give effect to that change in political thought. That change in thought is expressed in the Report of the Imperial Conference of 1926 in the words which I have already read. It described Great Britain and the Dominions as being equal in status, and in no way subordinate one to another in any aspect of their domestic or internal affairs, being united by a common allegiance to the Crown, and being freely associated as members of the British Commonwealth of Nations. I cannot see how states equal in status and in no way subordinate one to another in any aspect of their domestic or internal affairs can possibly be said in any respect to be dependent one on another. As it seems to me, they are equal sovereign states and not dependencies, and, of course, not subordinate to the Parliament of the United Kingdom. The Statute of Westminster, 1931, gave effect to that conception, and I also have to give effect to it. Accordingly, I am compelled to conclude, however convenient it might have been to decide in the other way, that in this settlement the words "British colony or dependency" cannot be given effect to in such a way as to include the Dominion of Canada.

It is very strange that a clause should have been inserted in 1936 in this form. No doubt it was taken from some older and obsolescent precedent in a book of conveyancing precedents. It would have been so easy to have inserted the word "dominion" before the words "colony or dependency". I cannot say why the draftsman elected to omit that word, but I am afraid I must construe the words in the investment clause as I find them, and the decision must be as I have already stated.

I am prepared to make an order under s. 57 of the Trustee Act, 1925, conferring power on the trustees to invest funds subject to the settlement in the shares of banking companies in Canada.

[After discussion HIS LORDSHIP made an order empowering the trustees in terms similar to para. (D) of cl. 6 of the settlement to invest in the shares of banking companies in any British Dominion.]

Order accordingly.

Solicitors: *Norton, Rose & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

A WESTMINSTER & KENSINGTON FREEHOLDS, LTD.
v. HOLME.

[COURT OF APPEAL (Singleton and Romer, L.J.J.), February 7, 1955.]

B *Rent Restriction—Rates—Increase—Landlords liable under lease to pay rates—Statutory tenancy after end of lease—Statutory tenant's liability for increased rent—Increase in respect of rate-increase before statutory tenancy began—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 2 (1) (b), (3), s. 15 (1), as amended by Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 Geo. 6 c. 71).*

C A flat was let for a term of fourteen years beginning on Mar. 25, 1928, the landlords undertaking in the lease to "pay all the rates taxes and assessments charged or to be charged on the premises". On Sept. 2, 1939, the flat became subject to the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. The rates on the flat were increased by about £12 annually between Sept. 1, 1939, and the end of the contractual tenancy, viz., Mar. 25, 1942. After Mar. 25, 1942, the tenant continued in possession as a statutory tenant. The landlords brought an action for a quarter's rent due on June 24, 1954, computed at a rate which included increases for increased rates. On the question whether the landlords were entitled to so much of the quarter's rent as was attributable to an increase above the standard rent in respect of the £12 increase in rates which occurred while the contractual tenancy and the landlords' obligation to pay rates were continuing,

E **Held:** the landlords were entitled to recover under s. 2 (1) (b) of the Act of 1920 increased rent in so far as it was attributable to the £12 rate-increase notwithstanding that under the lease the landlords had been required to pay the rates.

Appeal dismissed.

F [For Increases in the Rent of Houses subject to the Rent Restrictions Acts in respect of Rates, see 20 HALSBURY'S LAWS (2nd Edn.) 323, para. 384; and for cases on the subject, see 31 DIGEST (Repl.) 680, 7724-7731.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (b), (3) and s. 15 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 984, 987, 1017.]

Appeal.

G This was an appeal by the statutory tenant under the Rent Restrictions Acts of a flat, No. 43, Morpeth Mansions, Morpeth Terrace, London, against an order of GLYN-JONES, J., dated Dec. 13, 1954, dismissing an appeal from an order of Master CLAYTON dated Dec. 6, 1954, ordering that judgment be entered under R.S.C., Ord. 14, for the plaintiff landlords for the sum of £114 12s. 2d. claimed in an action commenced by a writ issued on July 13, 1954. The sum claimed comprised one quarter's rent due on June 24, 1954, £66 5s.; one quarter's payment in respect of improvements to the premises, £1; a charge for the supply of hot water, £6 5s.; excess rates, £8 15s. 6d.; and the balance of the amount due and unpaid in respect of the previous quarter, £32 6s. 8d. Under the terms of the original lease of the flat for fourteen years from Mar. 25, 1928, the landlords covenanted to pay all rates charged in respect of the premises. On Sept. 2, 1939, the flat became subject to the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, under the Act of 1939. On the expiry of the lease in 1942, the tenant remained in possession as statutory tenant. The landlords claimed to be entitled by virtue of s. 2 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to recover from the tenant the increase in the amount payable by them in respect of rates over the amount paid in respect of the corresponding quarter of 1939. The tenant contended that the making of any such charge would impose a new burden on the tenant within the meaning of s. 2 (3) read with s. 15 (1) of the Act of 1920, since the excess rates claimed

included increases attributable to the period from Sept. 1, 1939, to Mar. 25, 1942, in respect of which the landlords had been liable under the original lease. The increase of rates during that period was about £12 annually. There were also subsequent increases in rates.

W. T. Williams for the tenant.

J. W. Miskin for the landlords.

SINGLETON, L.J., stated the facts, held that the defences set up by the tenant in respect of items other than excess rates could not be supported, and continued: The only remaining claim arises in respect of what are described on the writ as excess rates. That claim has given rise to a little difficulty. The rental of the flat, as agreed in 1928, was £265 a year. It is common ground between the parties that, by reason of the rateable value of the premises, they fall within the terms of the Rent Restrictions Acts. The lease was a lease for a term of fourteen years from Mar. 25, 1928; it continued throughout that period, and thereafter the tenant remained in the premises and became a statutory tenant. Under cl. 5 of the lease, the landlords covenanted with the lessee:

"(A) That the lessors will during the continuance of the term pay all the rates taxes and assessments charged or to be charged on the premises."

The lease expired on Mar. 25, 1942, and until that date the landlords were under covenant to pay, and did in fact pay, all the rates, and up to that time they could not make any charge against the tenant in respect of rates, because they had covenanted to pay them themselves. The question which arises is: what is the true position as to rates after the expiration of the lease?

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), provides:

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act . . ."

Counsel for the tenant claims that the landlords are seeking to put an additional burden on the tenant, for they say: "As from the end of the contractual tenancy we are entitled to charge against you additional rates, i.e., increases in rates, made after Sept. 1, 1939, but not commencing to run until the end of the tenancy." He submitted that, as there were increases of rates between Sept. 1, 1939, and the end of the tenancy in March, 1942, those increases could not be imposed on the tenant, for so to impose them would be adding to his burden within the meaning of s. 2 (3) of the Act of 1920.

Counsel for the landlords relied on s. 2 of the Act of 1920, which permits landlords in certain cases to make increases of rent against the tenant. Section 2 (1) provides:

"The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows—"

Paragraph (a) covers a case in which the landlord has incurred expenditure on improvements, in which event he may be allowed eight per cent. of their cost. Paragraph (b), the important one in this case, reads:

"An amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included Sept. 1, 1939, or in the case of a dwelling-house for which no rates were payable in respect of any period which included the said date, the period which included the date on which the rates first became payable thereafter."

A The date, Sept. 1, 1939, is the result of an amendment by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and Sch. 1.

Counsel for the tenant claims in aid the concluding four lines of para. (b), which begin "or in the case of a dwelling-house for which no rates were payable." His submission is that his case falls within those words, and that this ought to be regarded as a dwelling-house for which no rates were payable in respect of the period by reason of the fact that the tenant was not paying rates up to the end of the lease because of the provisions of cl. 5 of the lease.

B

I do not think that that submission is sound. The words are not "shall in the case of a dwelling-house for which no rates are payable by the tenant." The words cover the case of a dwelling-house for which no rates were payable at the material time. That means payable by anyone. Paragraph (b) would meet the case of a house built after Sept. 1, 1939, or a house which had not been subject to rating for one reason or another, and which later becomes subject to rating. I do not think that it helps the tenant in this case.

C

Counsel for the tenant saw his difficulty if his case was not covered by the last four lines of s. 2 (1) (b), and, indeed, it is obvious, for, if it is not, one is forced back to the correct construction of the earlier part of para. (b). I will read it along with the commencement of the section:

D

"The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows . . . (b) An amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included Sept. 1, 1939 . . ."

E

The notices are, admittedly, in order as notices. The landlords gave notice that they claimed, when the contractual tenancy had ended and the statutory tenancy had come into play, that there was an increase in the amount for the time being payable by the landlords in respect of rates over the corresponding amount payable on Sept. 1, 1939, and there is no doubt as to that. It appears that between Sept. 1, 1939, and Mar. 25, 1942, there had been an increase in the rates of something over £12 a year, and after 1942 there were further increases of rates.

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Counsel for the tenant agreed that the landlords were entitled to recover against the tenant increases after Mar. 25, 1942, but he submitted that the £12, or thereabouts, each year, the amount of the increase before the conclusion of the contractual tenancy, could not be recovered even in respect of a period after the contractual tenancy had ended. On the strict wording of s. 2 (1) (b), it appears to me that the submission made by counsel for the landlords is right. There is an increase over the corresponding amount paid in respect of the period which ended Sept. 1, 1939, and on the reading of the Act, I think the landlords were entitled to recover the amount of that increase in respect of each period after the contractual tenancy came to an end. Section 15 of the Act of 1920, *supra*, does not apply, for, though the tenant is entitled to the benefit of all the terms and conditions of the original contract of tenancy, that only applies so far as it is consistent with the provisions of the Act, and one provision is that, under s. 2 (1) (b), the landlords are entitled to claim and to recover against the tenant additional rates over and above those which were payable on Sept. 1, 1939. For these reasons it seems to me that this appeal should be dismissed.

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I ought to add that the claim of the tenant could only be two years' increased payment if the tenant was right. That arises under s. 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, which amended s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, under which there had been a limit of six months; but perhaps this case is of more importance than appears at first sight, because it would appear that the judgment of this court covers rent for the future. The appeal of the tenant must be dismissed.

ROMER, L.J.: I agree. The only point of substance in this appeal relates A
to the landlords' charge in respect of increases of rates which took place between
1939 and 1942, and it appears to me that the tenant here can only succeed by
doing violence to the language of s. 2 (1) (b) of the Act of 1920. That sub-section
refers to two periods of time. The first period is that which included Sept. 1,
1939, and the second period, which is introduced in the case of a dwelling-house B
for which no rates were payable in respect of the first period, is the period which
included the date on which the rates first became payable thereafter. It is plain
that, if either of those periods applies to the present case, the landlords were
justified in demanding the increases required by their notice of 1948. But the
tenant seeks to alter the provision by, in effect, introducing for the purposes C
of the present case a third period, which would include the date when the tenant
ceased to be a contractual tenant and became a statutory tenant instead. The
justification for that third period is the argument that, in this sub-section where
the legislature talks about payment of rates, it is meaning payment by the
tenant. I can see no warrant for that suggestion, and if one takes the language
of the sub-section as one finds it, it is quite clear on the facts that the relevant D
period is the first period mentioned in the sub-section, viz., the period which
included Sept. 1, 1939. From that it follows that, applying the language there
used, when the contractual tenancy came to an end, the landlords were entitled
to increase the standard rent by reference to the period specified in the first
part of the sub-section.

It is true that that does result, in some measure, in the transfer of a burden
from the landlords to the tenant which, during the contractual tenancy, had been
borne by the landlords. But I think that consideration in itself affords no E
answer to the argument of the landlords, which is founded on the express lan-
guage of this provision, and to which effect must be given accordingly. I fail to
see any hardship in a landlord transferring such a burden to the tenant so that
it would form a term of his future right to occupy the premises, where as these
landlords did, over a period of years the landlords have assumed the liability for F
any increase of rates which might from time to time occur during the period
of the contractual tenancy, when that tenancy comes to an end and the tenant
is imposed on them willy-nilly as a person with an irremovable status. I agree
that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Greenwood, Milne & Lyall* (for the tenant); *Pierron & Morley* (for
the landlords).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A

WELLS-KING v. WELLS-KING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 26, 27, 28, 1955.]

Divorce—Appeal—Divisional Court—Jurisdiction—Application for re-hearing—

B

Discovery after date of hearing of alleged adultery by other spouse—Appeal to Court of Appeal on ground of “error of the court at the hearing”—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 36 (1), (2).

By the Matrimonial Causes Rules, 1950, r. 36: “(1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court . . . (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal.”

C

The wife presented a petition dated June 22, 1953, for divorce on the ground of the husband's cruelty. The husband denied the allegations of cruelty and the suit came on for hearing before a commissioner on July 26, 1954. On July 28, 1954, the commissioner found that the husband had been guilty of cruelty and granted a decree nisi in favour of the wife. On Sept. 7, 1954, the husband filed (i) a notice of appeal to the Court of Appeal for an order that the decree nisi be set aside and the petition dismissed, or, alternatively, that there should be a new trial and (ii) a notice of motion to the Divisional Court, under the Matrimonial Causes Rules, 1950, r. 36 (1), for a re-hearing on the ground that since the autumn of 1949 the wife had frequently committed adultery with a certain man, a fact which was unknown to the husband at the date of the hearing. The correctness of the commissioner's judgment was thus being challenged in the Court of Appeal, but the ground of application to the Divisional Court, viz., the discovery of the adultery alleged, did not impute any error in the decision of the commissioner. The husband being unwilling to abandon the grounds on which the notice of appeal to the Court of Appeal might be supported,

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Held: regard should be had to the case as a whole, and as, if so regarded, the case was one in which error of the court at the hearing was being alleged, the appeal should be dealt with by the Court of Appeal under r. 36 (2).

Prince v. Prince ([1950] 2 All E.R. 375) applied.

G

[As to Applications for Re-hearing where no Error of the Court is alleged, see 10 HALSBURY'S LAWS (2nd Edn.) 779, para. 1233; and for cases on the subject, see 27 DIGEST (Repl.) 595, 596, 5571-5578.]

For the Matrimonial Causes Rules, 1950, r. 36 (1), (2), see 10 HALSBURY'S STATUTORY INSTRUMENTS 215.]

Cases referred to:

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(1) *Prince v. Prince*, [1950] 2 All E.R. 375; [1951] P. 71; 2nd Digest Supp.

(2) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 2nd Digest Supp.

(3) *Petty v. Petty*, [1943] 2 All E.R. 511; [1943] P. 101; 112 L.J.P. 97; 169 L.T. 224; 2nd Digest Supp.

(4) *Everitt v. Everitt*, [1948] 2 All E.R. 545; 2nd Digest Supp.

I

(5) *Peek v. Peek*, [1947] 2 All E.R. 578; [1948] P. 46; [1948] L.J.R. 833; *affd.* C.A., [1948] 2 All E.R. 297; 2nd Digest Supp.

(6) *Alhadeff v. Alhadeff*, [1951] W.N. 367; 95 Sol. Jo. 547; 2nd Digest Supp.

Motion.

The husband applied to the Divisional Court for a re-hearing of a divorce suit pursuant to the Matrimonial Causes Rules, 1950, r. 36 (1).

A. C. Munro Kerr for the husband.

N. Leron for the wife.

LORD MERRIMAN, P.: It is an essential condition of an application under the Matrimonial Causes Rules, r. 36 (1), that the cause should have been heard, as this cause was, by a judge alone, and that no error of the court at the hearing is alleged. By r. 36 (2):

"Any other application for re-hearing shall be made by way of appeal to the Court of Appeal."

The petition in this case was dated June 22, 1953, was amended in certain particulars on July 24, 1954, and came on for hearing as a contested suit before Mr. Commissioner BLANCO WHITE, Q.C., on July 26. The contest was continued for three days. The six weeks from the date of the decree nisi expired on Sept. 8, 1954. The first date for the application to make the decree nisi absolute was Sept. 9, 1954. On Sept. 7, in time to ensure that for the time being, at any rate, the decree was not made absolute, two notices of motion were filed, one to this court under r. 36 (1) asking for a re-hearing on the ground that no error of the court was alleged and another, although it stated no reason, to the Court of Appeal asking for a re-hearing and that the wife's petition might be dismissed, or, alternatively, that a new trial might be had between the parties.

It has been made clear by counsel for the husband that the validity of the judgment of the learned commissioner is being emphatically challenged in the Court of Appeal. I do not think it necessary to go through the detail of the careful judgment, of which we have read a transcript, and we have not seen any notes of the evidence on which the wife's case and the husband's answer were founded; but it was extracted from the wife in cross-examination, and the admission was accepted as accurate, that the main body of her case was the charge of sodomy, and of attempts to commit sodomy, in the course of which, and in connection with which, much of the ill-treatment of which she complained was said to have occurred. It is plain that the learned commissioner dismissed the charge of sodomy as such, that is, the completed offence. In effect, he said that on the evidence which was presented to him he was satisfied that no criminal court would convict, and he did not propose to do so himself. It is not so certain that he disregarded altogether the allegations of attempts, but there are parts of the judgment which we have read which appear to leave it in the air whether or not some of the quarrels between a husband, whom he described as highly sexed, and a wife who was plainly dreading the possibility of a sixth or seventh pregnancy, were accompanied by attempts at irregularity in sexual matters. There were added, by further and better particulars, certain charges of ill-treatment in connection with chastisement of the daughter of the marriage. Put briefly, the suggestion was that when the wife resented and tried to interfere, the husband transferred his attentions to her, and she was the victim of his temper.

We have no right to go into the merits of the criticisms and comments against this judgment, but at the end of it all, as I understand it, the substance of the matter is that having got rid, at any rate, of the actual charge of sodomy, having formed the opinion that that was really the background and the main part of the wife's case, the learned commissioner nevertheless found a charge of cruelty proved, on material which, it was suggested, did not reach the required standard. Bearing in mind the fact, which I emphasise, that the present case was contested, the nature of the challenge against the correctness of the judgment makes it impossible, to my mind, to say that no error of the court at the hearing is alleged. It is plain that from that point of view it is a matter for appeal to the Court of Appeal.

That, however, is not the end of the matter. It is now said that, unknown to the husband both at the time when the events of which the wife complained were happening, and at the time of the hearing, and, indeed, at any material time, the wife was conducting with a certain man a clandestine association of an

- A adulterous character. It is said that it is no fault of the learned commissioner that that aspect of the matter, if it exists at all, was not taken into account at the hearing, because nobody knew about it, least of all the learned commissioner, and it is on that ground that we are asked to order a re-hearing. In effect, having taken appropriate steps to ensure that they were in time, whichever way the spin of the coin resulted, we are now asked to deal in isolation with one
- B aspect of a matter which seems to me to be indivisible. I will assume, for the purposes of the argument, that had the learned commissioner's judgment on the materials then before him been unchallenged and unchallengeable, it would have been appropriate to move this court, on the basis that there was this undisclosed and unknown matter with which, through no fault of his own, he was precluded from dealing. I say I will assume this, and I do not think that it is
- C necessary to go through the case law on this subject again. We have been referred to cases, some of which were decided before the jurisdiction of this court was narrowed in consequence of the Supreme Court of Judicature Act, 1890, s. 1, and the Matrimonial Causes Rules, 1924, r. 46. Rule 46 is in substantially the same terms as r. 36 of the rules of 1950. I need only say that the result of re-reading *Prince v. Prince* (1) has increased my admiration, if I may humbly
- D say so, for the masterly survey of the history of this matter, and of the case law on the subject, in the judgment of SIR RAYMOND EVERSHED, M.R. By that test, and leaving out this question of adultery, it is, in my opinion, so plainly a case for the Court of Appeal that it is unnecessary to discuss the matter in detail.

- The question then is whether the matter is disposed of by assuming, for the purposes of the argument, that if the introduction of the new issue of the wife's
- E adultery afforded the only challenge against the learned commissioner's judgment and this motion were based solely on the introduction of that fresh element, it might have been proper to come to this court, notwithstanding that on such fresh material it might also have been open, in a contested case, to go to the Court of Appeal. Further, bearing in mind that it does not matter whether or not there is a formal allegation of error, if in fact error is, and must be, alleged, I
- F agree with counsel for the wife's view that, although a formal allegation of error is implicit in the filing of the notice of appeal to the Court of Appeal, the withdrawal of that particular challenge to the judgment might leave it open to us to deal with the adultery issue separately. In the present case, however, counsel for the husband made it abundantly plain that he was not prepared to abandon either of the two horses and ride only one, and the appeal to the Court of Appeal,
- G with full force and effect, stands adjourned. In my opinion, the only thing which has caused any doubt at all has been, on what basis was the appeal adjourned by the Court of Appeal? I think it was at any rate suggested that when, as it happened, the appeal came into the list in that court before the present motion was due to come on in this court, some expression of opinion or direction (it was not suggested that there was an order) was made that it was
- H a proper case for us to deal with rather than the Court of Appeal, and that if we went wrong, there would be an appeal, and so the two appeals could come on together in the Court of Appeal. I must say that it would have been surprising if that had been the basis of any direction to us to hear the merits of the motion, for it is plain that the mere fact that if we went wrong there could be an appeal to the Court of Appeal which could be heard at the same time as the other
- I appeal could not possibly give us jurisdiction if we had not already got it. Another thing that was mentioned was that the Court of Appeal were told (and this is common ground) that it would be more convenient if we dealt with the case because the husband was a poor man, and because to bring out the points of criticism in the Court of Appeal would involve the production of a transcript of the evidence, which would not necessarily be required here. That again, though no doubt a matter of practical importance, could not possibly give us jurisdiction if we did not already possess it. However, there being no shorthand

note of the proceedings in the Court of Appeal, and nothing of which we could get a transcript, I made such inquiries as were open to me during the adjournment yesterday, and, as I said afterwards, it is plain beyond the slightest doubt that no direction that we should hear the case, nor anything resembling such a direction, was given. All that happened, as I understand it, was that when it was made clear that the present proceedings were pending at the same time, it was intimated that if the two proceedings were both effective it was manifestly convenient that this one should come on first, and, for that purpose, the other should be adjourned, but that there was no decision that this proceeding was right and that we must deal with it. A B

Now if, as I am satisfied, the right course was taken in going to the Court of Appeal by way of challenging the correctness of the judgment of the learned commissioner, it seems to me to be beyond doubt that it would be open to the husband to attempt to persuade the Court of Appeal either to hear the new evidence introducing the charge of adultery against the wife, or, if they did not wish to take that course, to order a re-hearing in order that the whole case might be considered at the same time. It really is unarguable that on a charge of cruelty by a wife, the fact that she is, during the whole of the material time, alleged to be conducting a clandestine adulterous association, is entirely disconnected with the charge of cruelty. It is said that in the present case the husband is not alleging that any wrong (if he did anything wrong, which he denies, of course) was provoked by his knowledge, or suspicion even, of an adulterous association. Be it so. But that is not the only test. It goes without saying that a tribunal which is made aware of the fact that all the time covered by her complaints the wife is, or ought to be, suffering from a guilty conscience, must necessarily have an effect on her attitude to the married life; and it is plainly a matter to be taken into account in assessing allegations of cruelty, particularly of cruelty in connection with sexual matters. Apart from that, of course, the effect on the wife's credibility of her having suppressed, if she has suppressed her own guilt, not only to her husband at the material time but to the court to which she comes to complain, is obvious. And there is one other point of view—that a situation might be reached in which, if she succeeds in proving her charge of cruelty, and the husband also succeeded in proving his cross-charge of adultery, it would be a question for the judge who heard the case to decide whether to dismiss both the petition and the answer outright, on the rival discretionary bars provided by those circumstances, or to give a decree to the one or the other, according to his assessment of culpability, or even to give a decree to both. C D E F G

All these matters would be dealt with together on the appeal on the case as a whole. We are asked to deal with only one aspect of it, and to order a re-hearing, because the learned commissioner did not know about the adultery and was not asked to deal with it. In my opinion, it is clear that the present case, regarded as a whole, as it ought to be regarded, is one for the Court of Appeal and not for this court. H

COLLINGWOOD, J.: I agree. This is a motion for a re-hearing under the Matrimonial Causes Rules, 1950, r. 36 (1), and the grounds for the application are that the wife frequently committed adultery with a named man, a fact unknown to the husband at the date of the hearing. The date of the decree nisi was July 28, 1954, and after that date the husband alleges that he obtained evidence of adultery on the part of the wife, and that having done so, on Aug. 20, 1954, he submitted it for the consideration of the Queen's Proctor. On Sept. 6, 1954, an intimation was received from the Queen's Proctor that he did not propose to take any action. On Sept. 7, 1954, the day before the expiry of the six weeks after the decree nisi, two notices were filed, one a notice of application to this court and the other a notice of appeal to the Court of Appeal. I

A Rule 36 provides:

“(1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate, Divorce and Admiralty Division . . . (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal.”

B The result is that on Sept. 7, the husband (i) invoked the jurisdiction of this court, a condition of his right to do so being that no error of the court at the hearing is alleged, and (ii) gave notice to the Court of Appeal, thereby clearly challenging the correctness of the decision of the trial judge, albeit in a separate document. That appeal has not been withdrawn, and is still pending.

C As LORD MERRIMAN, P., has said, there have been a number of decisions with regard to the limitations on the jurisdiction of this court under r. 36 (1), and it is not necessary to go into them in any detail, particularly as the law on the matter was exhaustively gone into by SIR RAYMOND EVERSHED, M.R., in *Prince v. Prince* (1). After considering the early history of the rule and *Winter v. Winter* (2), the Master of the Rolls says ([1950] 2 All E.R. at p. 380):

D “Up to this point the Divisional Court had not considered any application for a re-hearing of a cause in which there had been a conflict of evidence on vital matters and in which the loser was seeking to obtain a re-hearing on the ground that fresh evidence was available which would put an entirely different complexion on the case. In such a case, if the Divisional Court has exclusive jurisdiction to order a re-hearing, such power obviously trenches on the general jurisdiction of the Court of Appeal to make a similar order. The question whether the Divisional Court had jurisdiction to order a re-hearing in a case in which there would be an obvious right of appeal was first raised in *Petty v. Petty* (3) . . . The application was by the wife for the re-hearing of a contested case in which the wife asked for a divorce on the ground of her husband’s cruelty and desertion and the husband denied those charges and charged the wife with desertion. Both parties gave evidence and called witnesses and the judge dismissed the wife’s prayer and gave the husband a decree because he preferred the husband’s evidence to that of the wife. The basis of the wife’s application for a re-hearing was that since the hearing she had obtained statements from several witnesses whose evidence would persuade the court that the truth lay with the wife and not with the husband. Also it was said that the preparation of the wife’s case had been interfered with by enemy action.”

Now comes the passage to which I particularly wish to refer (*ibid.*):

H “LORD MERRIMAN, P., in his judgment, said ([1943] 2 All E.R. at p. 513): ‘We feel . . . that the peculiar jurisdiction vested in this court by r. 36 . . . should only be exercised in cases in which it is plain that this court is intended to have the jurisdiction to the exclusion of the Court of Appeal . . .’ After reviewing the history of the jurisdiction now embodied in the rule LORD MERRIMAN, P., said that, in his view, it was impossible to attach to the word ‘error’ in the rule any interpretation or limitation based solely on any part of the earlier history of the court. He continued (*ibid.*): ‘. . . it is much more likely that the words were deliberately chosen as being supposedly apt to impose a limitation upon our special jurisdiction to order a re-hearing, notwithstanding the vesting in the Court of Appeal of the general right to deal with such applications from this Division.’ LORD MERRIMAN, P., when presiding in the Court of Appeal in the recent case of *Everitt v. Everitt* (4), again emphasised this limitation of the jurisdiction

of the Divisional Court under r. 36. He said ([1948] 2 All E.R. at p. 548):
 'In dealing with cases under r. 36 the Divisional Court has always been
 careful to avoid any semblance of trespassing on the exclusive jurisdiction
 of the Court of Appeal . . . *Petty v. Petty* (3) and *Peek v. Peek* (5); although,
 if the Divisional Court is satisfied that a case comes within the rule it is
 bound, as I pointed out in *Peek v. Peek* (5), to deal with it because no other
 court can do so.'

Applying those principles to the present case, it is clear that in the absence
 of any allegation of error the discovery, after the hearing before the learned
 commissioner, of a hitherto undiscovered adultery by the wife would be a ground
 for application under r. 36 (1). An outstanding example of that is *Althadeff v.*
Althadeff (6). But the fact remains that in the present case it is abundantly
 clear that the husband is alleging error on the part of the trial court, and that
 is so whether or not one has regard to the existence of the notice of motion
 to the Court of Appeal. In my opinion, the limitations which have been placed
 on the jurisdiction of this court in those passages which I read from the judgment
 of LORD MERRIMAN, P., exclude the case put forward on behalf of the husband
 from our consideration. Finally I agree with what LORD MERRIMAN, P., has
 said with regard to the evidence which it is proposed to bring with reference to
 the adultery by the wife in the present case. The sexual life of the parties,
 certainly from 1949, when the association with the named man is alleged to have
 begun, is of vital import in the case. The question whether or not there was an
 adulterous association on the part of the wife at that time, is of paramount
 importance in (i) throwing light on the charges of abnormality which she brings
 against her husband, and (ii) affording a possible cause to which her nervous and
 mental condition was referable. In my opinion this matter should be dealt
 with by the Court of Appeal, and not this court.

Order accordingly.

Solicitors: *Gustavus Thompson & Sons*, agents for *Herrington & Carmichael*,
 Camberley (for the husband); *Kinch & Richardson*, agents for *Close & Son*,
 Camberley (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

NOTE.

HENLEY v. HENLEY (BLIGH cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), February 14, 15, 16,
 17, 1955.]

*Divorce—Evidence—Privilege—Statements made to conciliator—Vicar acting as
 conciliator.*

[As to Privileged Communications other than those between Client and Legal
 Adviser, see 13 HALSBURY'S LAWS (2nd Edn.) 726, para. 800 note (b); and for
 cases on the subject, see 22 DIGEST (Repl.) 401, 4295-4307, 412, 4434-4440; and
 also 27 DIGEST (Repl.) 368, 3043-3047.]

Cases referred to:

- (1) *Mole v. Mole*, [1950] 2 All E.R. 328; [1951] P. 21; 27 Digest (Repl.)
 368, 3046.
- (2) *McTaggart v. McTaggart*, [1948] 2 All E.R. 754; [1949] P. 94; [1949]
 L.J.R. 82; 27 Digest (Repl.) 368, 3044.

Petition for divorce by the wife.

The parties were married in 1941, and there were two children of the marriage.
 On Feb. 3, 1954, the wife left the matrimonial home and on Feb. 11 she presented
 a petition for divorce on the ground of the husband's adultery with a woman

- A whose name was unknown between Jan. 12 and Jan. 26, 1954. On May 5, 1954, the husband filed an answer in which he denied the adultery alleged against him and alleged that the wife had committed adultery with the party cited, Mr. B., from 1946 to the date of the answer, and cross-prayed for a decree of divorce. The husband filed a discretion statement in which he stated that he had committed adultery with a named woman on Feb. 2, 1954. The wife denied the adultery.
- B At the hearing of the suit, counsel for the husband informed the court that he wished to call a clergyman who would give evidence as to statements made to him by the wife. Counsel for the wife objected on the ground that such statements were privileged. The clergyman was called and answered questions put to him by SACHS, J., as to the circumstances in which the statements were made by the wife.
- C This report deals with the ruling of SACHS, J., on the question of privilege.
C. R. C. J. Binney for the wife.
R. F. G. Ormrod for the husband.

D **SACHS, J.:** I start with the proposition stated in *Mole v. Mole* (1) ([1950] 2 All E.R. at p. 329) that one must bear in mind that in a matrimonial dispute the state is also an interested party and is more interested in reconciliation than in divorce. It was with that overriding consideration in mind that the Court of Appeal have laid down that in certain circumstances intermediaries and conciliators are persons to whose evidence privilege attaches, one fundamental reason being that if privilege did not attach, those whom they sought to reconcile would tend not to be frank with them and that in itself would be an impediment to reconciliation.

E The position in the present case is that the Vicar of Benenden, who, by virtue of his office in a country parish, is a person who can be trusted by his parishioners to have the highest motives in seeking to effect a reconciliation and to be a person to whom, of all people, they can best allow themselves to be frank, very properly took certain steps when the estrangement between the husband and the wife came to his notice. He went to the husband as a conciliator and as a conciliator he was accepted by the husband. Thus accepted, he went to the wife as a conciliator and made it clear to her that he was a conciliator; and, on her realising that, a conversation took place. It is urged by counsel for the husband that the authorities *McTaggart v. McTaggart* (2) and *Mole v. Mole* (1) only apply when one of the two parties has taken the initiative and sought out the conciliator, and do not apply when one of the parties has been approached by and accepts the person concerned as a conciliator. That would produce a very sad result as regards the interests of the state because it would tend, if he be right, to deprive frankness towards an accepted intermediary of the privilege which, in my view, it should have. I do not accept the argument that for privilege to attach the initiative must have come from one of the parties and that one can exclude cases where the conciliator from a knowledge of the circumstances, thinks it wise and proper in the interests of the parties, and thus in the interests of the state, to make the approach. In the present case I see no distinction between the position of the vicar if he had been asked by the husband to go to the wife, or the vicar's position if he went to the husband and was accepted by him as a conciliator before going on to the wife. In those circumstances I hold that the conversation is privileged.

Rule accordingly.

[At the conclusion of the hearing HIS LORDSHIP granted a decree in favour of the wife and dismissed the husband's cross-prayer.]

Solicitors: *Hancock & Scott* (for the wife); *Kenneth Brown, Baker, Baker*, agents for *Murton, Clarke & Murton-Neale*, Cranbrook (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

HAYMILLS HOUSES, LTD. v. BLAKE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), February 4, 7, 8, 1955.]

Rent Restriction—Possession—Conditional order—Subsequent conditional postponing order—Conditions ultimately fulfilled—Discharge of original order—Jurisdiction—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 5 (2), as substituted by the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5 c. 32), s. 4 (2)—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 180 (1).

By a written agreement dated Sept. 1, 1948, the landlords let to the tenant a flat to which the Rent Acts applied and reserved a right of re-entry for non-payment of rent. On Aug. 28, 1954, rent being in arrear, the landlords issued a plaint claiming possession of the flat, and £20 8s. 7d. arrears of rent and £2 10s. costs. On Sept. 29, 1954, the landlords obtained judgment against the tenant, who did not attend the hearing, ordering him to give up possession on or before Oct. 27, 1954, unless the arrears of rent and costs (together amounting to £39 1s.) were paid into court before that day. By Oct. 27, 1954, the tenant had paid only £32 16s. 1d. The landlords applied for a warrant of possession which was issued. On Nov. 6 the tenant paid all the arrears. On Nov. 29, 1954, the county court judge, on the application of the tenant, made an order postponing the date of possession for twenty-eight days on condition that all arrears of rent and costs were paid by the time when the twenty-eight days would expire and ordering that if they were so paid (as in fact they were) the order of Sept. 29, 1954, would be discharged.

Held: there is power to discharge or rescind an order for possession of a dwelling-house under s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, where subsequent to the original order for possession there has been another order within the sub-section (e.g., an order postponing possession on conditions), if the conditions imposed by the second order have been complied with. As in the present case there had been both an original conditional order (i.e., the order of Sept. 29, 1954) and a subsequent conditional postponing order (i.e., the order of Nov. 29, 1954), the court had power under s. 5 (2) to discharge or rescind the order of Sept. 29, 1954, on the conditions imposed by the second order being fulfilled.

Per SIR RAYMOND EVERSLED, M.R.: it may well be that, if an absolute order for possession is made, then while it is not yet executed the court may make an order under s. 5 (2) postponing the date of possession on conditions and, if the court did that and if the conditions were performed, it may well be that the final words of the sub-section would give power to discharge the original order, even though absolute in form (see p. 598, letter F, post).

Dictum of SIR RAYMOND EVERSLED, M.R., in *Mills v. Allen* ([1953] 2 All E.R. at p. 542) explained.

Semble: an absolute order as such cannot be discharged under s. 5 (2) (dictum of SOMERVELL, L.J., in *American Economic Laundry, Ltd. v. Little* ([1950] 2 All E.R. at p. 1189) considered).

Appeal dismissed.

[**Editorial Note.** Section 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by the Act of 1923, confers power to make an order postponing the date for possession under a prior order for possession. SIR RAYMOND EVERSLED, M.R., indicates at p. 596, letter F, post, a suitable form for such postponing orders to take in future cases. If orders are made in proper cases in such form it will be competent for courts, if they wish, to include provision for the discharge of the original order for possession (*ibid.*).

- A For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 990; and for cases on the subject, see 31 DIGEST (Repl.) 721, 8048-8050.

For the County Courts Act, 1934, s. 180 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 123.]

- B Cases referred to:

(1) *American Economic Laundry, Ltd. v. Little*, [1950] 2 All E.R. 1186; [1951] 1 K.B. 400; 31 Digest (Repl.) 665, 7645.

(2) *Mills v. Allen*, [1953] 2 All E.R. 534; [1953] 2 Q.B. 341; 3rd Digest Supp.

Appeal.

- C The landlords appealed against a decision of His Honour JUDGE TUDOR REES sitting at Brentford County Court, dated Nov. 29, 1954.

R. O. C. Stable for the landlords.

A. C. H. de Piro for the tenant.

- D **SIR RAYMOND EVERSHERD, M.R.:** The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2), as substituted by the Rent and Mortgage Interest Restrictions Act, 1923, s. 4 (2), reads:

- E “At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any such dwelling-house [i.e., any dwelling-house to which the Act applies], or for the ejectment of a tenant therefrom, or in the case of any such order or judgment which has been made or given, whether before or after the passing of this Act, and not executed at any subsequent time, the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the court thinks fit, and,
- F if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment.”

- G It is, I think, clear that the sub-section is not syntactically elegant, but it comprehends two types of case, namely, that in which the powers of the sub-section may be available at the time of the application for making an order for possession, and that in which an order for possession having been made, but not executed, the powers of the sub-section are available at any subsequent time, so long of course as the order remains unexecuted. The present case is related to the second type of case.

- H The property in question is a flat, No. 78 The Ridings, in London, W.5, and it is not in doubt that that flat is a dwelling-house within the comprehension of the Rent Acts. The plaintiffs were in respect of that flat the landlords of the defendant under a written agreement dated Sept. 1, 1948. The agreement provided that the tenancy was determinable on three months' notice. The rent was a sum of something over £90 per annum. There was a right of re-entry reserved to the landlords in case of non-payment of rent. It has been said by counsel for the landlords that the tenant has in the past been unsatisfactory in that he has shown
- I a lack of promptitude in payment of rent. Whether or not that is so is a matter with which we have not been concerned; but if it be true then, as I ventured to observe during the course of argument, the continuance of that lack of promptitude on the part of the tenant may be found by him to be most disadvantageous if there be future excursions to the county court. However that may be, on Aug. 28, 1954, a plaint was issued and served on the tenant claiming possession on the ground of arrears of rent, and the form of the plaint showed that the rent in arrear was £20 8s. 7d.; a sum of £2 10s. for costs was added, making a monetary claim of £22 18s. 7d. The landlords claimed in accordance with the terms of the

agreement to exercise their right of re-entry as on a forfeiture for non-payment of rent, and in obedience to s. 180 (1) (a) of the County Courts Act, 1934, there appeared on the face of the plaint the following:

"If you pay the rent in arrear and costs into court five clear days before the date of hearing the action will cease."

It has been pointed out that before the case came on for hearing the particulars of claim were amended by adding further arrears of rent which had accrued since the issue of the plaint, and counsel for the tenant said that that amendment was, in strictness, out of order. The effect, however, was to increase the total sum which was due or alleged to be due for rent by about £9 17s. 6d.

When the case came on for hearing on Sept. 29, the tenant had not availed himself of the suggestion made on the plaint of payment into court within five days of the return date, but he had sent to the landlords a cheque for the sum which was alleged to be due for rent and costs on the plaint in its original form, namely, £22 18s. 7d. At the date of the hearing that cheque had not been cleared and the landlords, therefore, had not received the money. The landlords were represented at the hearing, but the tenant abstained from attending. It appears that the court had received from the tenant a further cheque for £9 17s. 6d., the balance alleged to be due on the amended claim, and that cheque, which was in fact post-dated, was handed down at the hearing to the landlords or their representatives. In those circumstances the order made by the court on Sept. 29 was as follows:

"It is adjudged that the [landlord] is entitled to recover against the [tenant] possession of the land mentioned in the particulars annexed to the summons in this action, that is to say lower flat 78 The Ridings, W.5, the rent of the said land amounting to £30 6s. 1d. [being £20 8s. 7d. plus £9 17s. 6d.] being in arrear and the [landlord] having a right to re-entry or forfeiture in respect thereof and it is adjudged that the [landlord] do recover against the [tenant] the sum of £30 6s. 1d. for the arrears of rent aforesaid and the sum of £8 15s. for costs, amounting together to the sum of £39 1s. And it is ordered that the [tenant] do pay the said sum of £39 1s. to the registrar of this court, on or before Oct. 27, 1954, and it is ordered that the [tenant] do give to the [landlord] possession of the said land on or before the said Oct. 27, 1954, unless the said rent in arrear and costs be paid into court before such Oct. 27, 1954."

It will be observed that the order was what has been many times called a conditional order for possession, a type of order commonly made in these cases and, by the description which I have given to it, distinguishable from what is called an absolute order for possession, namely, an order on the defendant to give up possession on some fixed date without any condition attached thereto, performance of which would make the order inoperative. I have stated that the tenant had given to the landlords two cheques, the total of which on their face was £32 16s. 1d., a sum, as will be appreciated, less by £6 4s. 11d. than the total amount mentioned in the order. The two cheques appear to have been met; but when Oct. 27, 1954, arrived (that being the date fixed in the order for possession unless in the meantime the sums stated in the order had been paid) nothing further in fact had been paid. The result was that according to its terms the order for possession was liable forthwith to operate.

Section 180 (1) of the County Courts Act, 1934, provides:

"Where a lessor is proceeding by action in a county court . . . to enforce against a lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent, the following provisions shall have effect: (a) If the lessee pays into court not less than five clear days before the return day all the rent in arrear and the costs of the action, the action shall cease, and the

- A lessee shall hold the land according to the lease without any new lease; (b) If the action does not cease as aforesaid and the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture, the court shall order possession of the land to be given to the lessor at the expiration of such period, not being less than four weeks from the date of the order, as the court thinks fit, unless within that period the lessee
- B pays into court all the rent in arrear and the costs of the action; (c) If within the period specified in the order, the lessee pays into court all the rent in arrear and the costs of the action, he shall hold the land according to the lease without any new lease, but if the lessee does not, within the said period, pay into court all the rent in arrear and the costs of the action, the order shall be enforced in the prescribed manner, and so long as the order
- C remains unreversed, the lessee shall be barred from all relief . . . ”

From what I have said it will be apprehended that the tenant in the present case failed to avail himself of the provisions not only of sub-s. (1) (a) but also of sub-s. (1) (c), for he had not on Oct. 27, 1954, paid into court the sum ordered to be paid by way of rent arrears and costs. The date Oct. 27 was plainly fixed in the light of sub-s. (1) (b), for it was a date twenty-eight days from the date of the order. Counsel for the tenant contended that the words “so long as the order remains unreversed” carry implicit in them a power in the county court judge himself, on some later application, to reverse or rescind or extinguish his original order so as to give rise to a revival, so to speak, of the contractual tenancy, notwithstanding failure on the lessee’s part to avail himself of the provisions of sub-s. (1) (b) and (c). I do not find it necessary to express any view on that

E matter. In the events which have happened counsel for the tenant plainly conceded that the contractual tenancy must now be treated as gone. The right of forfeiture for non-payment of rent was in the circumstances effectively exercised; but this is, as I have said, a Rent Act case and therefore, apart from and in succession to his contractual rights, the tenant has the rights conferred on him by those Acts, compendiously referred to as the rights of a statutory

F tenant. Accepting, as I do, counsel for the tenant’s concession on this matter, the question henceforth is: What is the position of the tenant? Is he now bound to go out at once, as counsel for the landlords contended, or can he remain on, but in the latter case with only the rights of occupation conferred on a statutory tenant?

[His LORDSHIP referred to two points taken in argument, of which he found one not to be open on the appeal and the other not to be necessary to be pursued, and continued:] I now go back to the narrative of the present case, which was as follows. The tenant, preferring to remain inops consilii and persisting in his reluctance to pay more quickly than absolute compulsion required, took no further step after Oct. 27 to pay the balance of the sum of £39 1s., and a warrant for possession was applied for. This action did stir him into a measure of activity,

H for he applied in person on Nov. 6, 1954, to the judge to suspend the possession order and on the same day he took the precaution of paying the added sum of £7 2s. (that is, the balance of the £39 1s. swollen by the charges for the warrant) into court or to the landlords. Nevertheless, on Nov. 12, 1954, the tenant, personally applying to the county court, failed in his application for a suspension of the order. At that point of time he wisely thought it would be desirable to take

I professional advice. The order still being unexecuted, on Nov. 24, 1954, the solicitor, whose aid the tenant had somewhat belatedly sought, applied on his behalf as follows:

“Take notice that the [tenant] intends to apply to the judge . . . on Monday, Nov. 29, 1954 . . . for suspension of the possession warrant issued in this action under an order of the court dated Oct. 1, 1954 [the date when the order of Sept. 29 was drawn up] and further for a suspension of the operation of the said order for possession of the premises in question

on the ground that the [tenant] has discharged the whole of the arrears and the costs of the action in respect of which [he] was held to be liable for forfeiture of his tenancy of the said premises." A

It is the fact that on that day his two cheques (for £22 18s. 7d. and £9 17s. 6d.), plus the sum of £7 2s. had made up the full sum for which he was then liable for arrears in rent, costs and solicitors' charges. The matter coming before the learned county court judge on Nov. 29, 1954, and his attention being, as I assume, directed to the terms of s. 5 (2) of the Act of 1920, as substituted by s. 4 (2) of the Act of 1923, he made the following order: B

"It is ordered that the time of the order of Sept. 29, 1954, be extended for a further twenty-eight days. Debt and costs have been paid; order therefore of Sept. 29, 1954, be extinguished. Possession warrant revoked. Costs of today £2 2s. to [landlord]." C

I have ventured to refer to the inelegance of the sub-section which we are called on to construe, and I hope I shall be forgiven if I use similar language in regard to this order, which seems to me on certain vital matters to be in addition somewhat obscure. For example, were the words "ordered that the time of the order of Sept. 29, 1954, be extended" meant to relate merely to the date on which possession should be given, leaving the date for performance of the condition as it originally stood? Or was it meant to substitute in all material places in the original order for Oct. 27 another date described as arriving at the end of "a further twenty-eight days"? And it is also not entirely clear to me, at first sight at any rate, whether the further twenty-eight days were intended to run from Oct. 27 or from Nov. 29. Read in its context I have come to the conclusion that the county court judge intended to make an order to the following effect (and for future reference may I perhaps express the hope that orders should in similar circumstances take broadly the form I am now going to state): D

"In exercise of the powers under s. 5 (2) the date of possession in the earlier order, namely Oct. 27, 1954, be postponed for twenty-eight days from the date of this order, namely until [and then I suppose the date would have been Dec. 27] on the condition that on or before such last mentioned date the defendant shall pay or shall have paid the sum of £39 1s. mentioned in the order of Sept. 29, together with the further sum of £X for costs since incurred, including £2 2s. for the costs of today's hearing." E F

I think that if the order had taken that form it would have been in strict accordance with the power in s. 5 (2) to postpone the date of possession for a period the court thought fit subject to a condition in regard to the payment of arrears of rent and otherwise as the court thought fit. I think it would then have been competent for the judge, again within the terms of the sub-section, to have gone on as follows: G

"And it further appearing that the defendant has on or before this date paid the whole of the sums above mentioned, then it is further ordered that the order of Sept. 29, 1954, be discharged from this date." H

I do not think that the word "extinguished" was one appropriate to be used. I have said that I think that was the intention, and I have said also that I think an order in that form would have been in proper compliance with the powers set out in s. 5 (2). The result, of course, would have been the same as that produced in the present case by the order of Nov. 29. I

I will read again so much of s. 5 (2) as relates to the second or alternative class of case, of which the present is one:

"... in the case of any such order [that is, an order for the recovery of possession of a dwelling-house] ... which has been made ... and not

- A executed at any subsequent time, the court may . . . stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment."
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Notwithstanding the inelegance which I think must be confessed to exist in this language, I cannot myself see any answer to the proposition that the final words of the sub-section empower the county court, given the preceding circumstances, to discharge or rescind the original order. It was strongly argued by counsel for the landlords that, if an unconditional order for possession is made, there is no power in any circumstances for the court afterwards to discharge it or rescind it. The making of the first order has, so counsel for the landlords argued, such a quality of finality as does not permit of that power of revision. It was in support of that view that certain observations from other cases were cited, observations of my brethren in this court and of SOMERVELL, L.J., and of myself, directed however to differing circumstances and in other contexts. I shall presently refer to two only of those observations, for I do not myself think that any of the others cited has any relevance to the problem with which we are concerned or in any way disables the conclusion which I reach on the application of this sub-section to the facts of the present case. I agree with counsel for the landlords, and it is I think necessarily inherent in the language of the sub-section, that an order discharging a previous order for possession can be made only where there has been a subsequent order in accordance with the terms of the sub-section itself. So far as now relevant, the power of discharge arises where the date of possession in what I will call the first order has been postponed subject to conditions and those latter conditions have been complied with. I emphasise those last words. The power to discharge depends on compliance with conditions imposed by what I will call the second order. As I have interpreted the order of Nov. 29, 1954, which I will call the second order, that order did postpone the date of possession on conditions, the conditions being, in part, the performance of the obligation to pay the same sum as the first order specified and, in part, the payment of certain further sums. Those conditions were fulfilled and, therefore, as I think, the power did vest in the county court judge in the exercise of his discretion to discharge the first order.

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I propose to confine myself in this judgment to that set of facts and to such a limited interpretation of this sub-section as is necessary to deal with the present case. I do so more particularly because of the two observations from other cases to which I said a few moments ago I should wish to refer. The first was *American Economic Laundry, Ltd. v. Little* (1), which came before JENKINS, L.J., and BIRKET, L.J., sitting with SOMERVELL, L.J. It was a case quite different from the present; a case in which a final order had been made against the tenant of certain premises and he, the tenant, then applied for and obtained a suspension of the execution of the order, but during the period of the suspension the tenant died. The question was, what was the position of his daughter, who claimed to have succeeded under the definition in s. 12 (1) (g) of the Act of 1920? The form of the order for possession, and this is the only real relevance of this case, had been an absolute order for possession. It was not one made subject to condition, in the sense, for example, that the possession order would not issue if the tenant paid certain sums or performed certain other obligations within a stated time. The distinction between absolute and conditional orders having been raised, SOMERVELL, L.J., used this language ([1950] 2 All E.R. at p. 1189):

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"The difference between those two kinds of orders is illustrated by the concluding words of s. 5 (2), where it is said in reference to an order made subject to conditions: ' . . . if such conditions are complied with, the court

may, if it thinks fit, discharge . . . any such order . . . ' That cannot be done when an absolute order has been made. I am not deciding what the position would be in a case of this kind where a conditional order had been made . . . "

Counsel for the landlords contended that when SOMERVELL, L.J., spoke of conditional orders he was meaning that the power of discharge following the making of conditional orders only arose if all the conditions according to their strict terms had been ab initio performed, that is to say not only the conditions in the second order, but the conditions in the first also. I am unable to accept that. If the conditions in the first had been performed according to their terms, of course no second order would ever have been made; but the language does also lend support to the general proposition for which counsel for the landlords argued, namely, that the power of discharge, simpliciter, does not apply to an absolute order for possession.

In *Mills v. Allen* (2), a case of great complexity, the main question involved was the validity of a certain justices' warrant. The case came before BIRKETT, L.J., ROMER, L.J., and myself, and there was some discussion as to the form of order. In the course of my judgment I expressed the view that I might perhaps assist in the future administration of this difficult branch of the law if I made some observations about the form of order. I referred to *American Economic Laundry, Ltd. v. Little* (1) and to certain other cases, and I am reported as saying ([1953] 2 All E.R. at p. 542):

"I begin by observing that, though the original order be absolute, nevertheless, as I read s. 4 (2) of the Act of 1923*, it may not only be discharged on application, but it may, in effect, be converted thereafter into a conditional order, for the language at the end of the sub-section seems to contemplate that possibility."

That general observation may, I think now, require to be expounded. I still think it may well be that, if an absolute order for possession is made, then while it is not yet executed the court may under the sub-section make an order postponing the date of possession on conditions, and if the court did that, and if the conditions were performed, it may well be that the final words of the sub-section would give power to discharge the original order, even though absolute in form. If that is right, then it would justify the language I there used that an absolute order may be in effect converted into a conditional one so as to give rise to the power of discharge. But I am not saying anything which would conflict with SOMERVELL, L.J.'s expression of opinion that an absolute order, as such, would not be liable to be discharged under the powers of the final terms of the sub-section. I prefer not to express further than I have already tried to intimate conclusions as to the general operation of this sub-section, but to confine myself, for the present at any rate, to the particular facts of this particular case, which is one in which there followed one after the other, as I understand them, two so-called conditional orders.

From what I have said and interpreting the order of Nov. 29 as I have done, it will be appreciated that in my judgment the county court judge had jurisdiction to do what he did and that therefore the appeal based on the invalidity, through want of jurisdiction, of the order of Nov. 29 fails. Counsel for the landlords suggested that the making of an order in the form which I have explained would not have been a proper exercise of discretion having regard to the previous performances, as regards rent payments, of this tenant. Quite plainly that matter was not raised or argued before the county court judge. It is no doubt easy to be wise after the event; but it was not raised, and according to well settled principles it is in my judgment not now open to the landlords. True it is that the application of the tenant's solicitor was in terms one for suspending

* The Rent and Mortgage Interest Restrictions Act, 1923, s. 4 (2), substituted a new sub-s. (2) in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5.

- A** rather than postponing the date of possession and for ultimate discharge, but still the matter obviously was dealt with in accordance with the general scope of the jurisdiction. If matters of that sort are gone into it will be also recalled that by amendment of the particulars of claim the landlords may have gained an advantage over the tenant for the purposes of the proceedings which might in strictness be open to some challenge. These matters, I think, are, however,
- B** irrelevant and not now open on one side or the other. I think that this appeal fails, but I do venture to repeat that, if there be truth in what counsel for the landlords said, the tenant would be well advised to take advice, as he now has taken it, and to observe a greater promptitude in the performance of his obligations.

- I conclude only with this. If it be said, as was suggested in the argument,
- C** that as I have construed it the power to discharge a previous order is linked to a particular class of case only, namely, cases where conditions have been imposed which have been fulfilled, then that seems to me sensible enough; for obviously the kind of case with which s. 5 (2) is dealing (and it would seem to be right that it should be limited to that type of case) is the kind of case where the default on the part of the lessee is one which is fairly capable of remedy, of which the
- D** simplest case is such a case as the present, namely, failure to pay promptly the rent that is due. For the reasons which I have given in a somewhat complicated matter, I think that the appeal fails. I would like to repeat my indebtedness to counsel for their most lucid exposition of the problem presented.

JENKINS, L.J.: I agree.

- E** **MORRIS, L.J.:** I agree.

Appeal dismissed.

Solicitors: *S. A. Redfern, Barron & Morton* (for the landlords); *Edward Mackie & Co.*, Brentford (for the tenant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

RANDALL v. TARRANT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
February 4, 1955.]

Negligence—Driving of motor vehicle—Stationary vehicle on highway hit in daylight by agricultural tractor and baler—Narrow margin of space for passing—Onus on driver of moving vehicle to disprove negligence.

Highway—Trespass—Nuisance—Motor car parked by plaintiff on highway leading only to defendant's farm—Plaintiff, in person, trespassing on farm—Whether trespasser also on highway in respect of car.

At about 7 p.m. on Aug. 3, 1953, the plaintiff drew up his motor car in a country lane, which was a public highway but led only to a farm of which the defendant was the tenant, the fields adjoining the lane being part of the farm property. After parking the car as close to the nearside of the lane as possible, the plaintiff went into one of the fields, while his wife and another passenger remained in the car. The lane was about fifteen feet wide at this spot, and the plaintiff's car was about five feet six inches wide. While the car was stationary, the defendant, driving a tractor, came out of a field and turned into the lane in the direction of the plaintiff's car. The tractor was towing a baler which was nine feet wide. On approaching the car the defendant slowed down. Then, thinking that the car was unattended, and acting on the advice of a servant, who was sitting at the back of the baler, the defendant attempted to pass the car, and, in doing so, damaged it. The plaintiff having claimed damages against the defendant for negligent driving, the defendant denied negligence and pleaded that the plaintiff was a trespasser.

Held: (i) where there was a collision between a moving vehicle and a stationary vehicle which was plainly visible, the onus was on the driver of the moving vehicle to show that he had taken all reasonable care, and, on the facts the defendant had failed to show that he had taken all the steps which reasonably ought to have been taken in the circumstances; accordingly, the defendant was negligent.

(ii) the mere fact that the plaintiff was trespassing in the defendant's field at the time when the accident occurred did not justify the conclusion that the plaintiff was also a trespasser on the highway in respect of the motor car (*Hickman v. Maisey* ([1900] 1 Q.B. 752) distinguished), or that he was committing a nuisance on the highway by leaving his car there, and, therefore, the defence based on trespass failed.

Appeal allowed.

[As to Presumption of Negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 671-675, paras. 956-958; and for cases on the subject, see 36 DIGEST (Repl.) 143-146, 753-773.]

As to Right of Passage on Highway, see 16 HALSBURY'S LAWS (2nd Edn.) 238, para. 288; and for cases on the subject, see 26 DIGEST 316-318, 482-506.

As to Nuisance on Highway, see 16 HALSBURY'S LAWS (2nd Edn.) 354-363, paras. 483, 484; and for cases on the subject, see 26 DIGEST 425, 426, 1440-1455.]

Cases referred to:

- (1) *Hickman v. Maisey*, [1900] 1 Q.B. 752; 69 L.J.Q.B. 511; 82 L.T. 321; 26 Digest 317, 492.
- (2) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 36 Digest (Repl.) 120, 604.
- (3) *Foster v. Bush House, Ltd.*, (1952), 96 Sol. Jo. 763; 36 Digest (Repl.) 145, 770.

Appeal.

The plaintiff appealed from an order of His Honour JUDGE ELDER-JONES,

- A at Windsor County Court, dated Nov. 24, 1954, whereby he dismissed the plaintiff's claim in respect of damage to the plaintiff's motor car arising out of an accident which occurred on Aug. 3, 1953, at Eton Fields, near Windsor, when a tractor owned and driven by the defendant collided with the plaintiff's car. By his particulars of claim the plaintiff alleged that at the time of the accident his car was parked close to the hedge on the nearside of the road and
- B that the accident was due to the negligence of the defendant in driving the tractor. By his amended defence the defendant denied negligence and pleaded, further or in the alternative, that the plaintiff was a trespasser. The county court judge held that the defendant was not negligent.

J. D. Stocker for the plaintiff.

- C *G. D. Lane* for the defendant.

SIR RAYMOND EVERSHED, M.R.: This case is by no means easy and has raised questions of no little interest. When counsel for the plaintiff began to open the appeal, I thought that he was faced with a short but fatal answer to the appeal; for this was an action for damages for negligence and there is a finding by the learned judge that the defendant was not negligent. *Prima facie*,

D that would be a finding of fact from which, in a county court case, there could be no appeal to this court; but after further attention to the argument of counsel for the plaintiff, and after hearing argument also from counsel for the defendant, I have now reached a conclusion contrary to that which I was first inclined to entertain.

- E The facts may be shortly stated. On Aug. 3, 1953, which was a bank holiday, the plaintiff, accompanied by his wife, his son, another lady and a dog, had driven the motor car which was subsequently damaged from their home until they reached a small lane in the neighbourhood of Windsor. It was about 7 p.m. The lane was a public highway which led only to farm property. The fields which lay on either side of the lane were part of the farm to which it led. The fee simple in that property belonged to Eton College, and the defendant,
- F a farmer, was the tenant in possession. The plaintiff, having driven his car a little way up this narrow highway, drew it into the nearside and got out, accompanied by his son and the dog. He left his wife and the other passenger in the car. While the car was so stationary in the highway the defendant, who had been taking advantage of the favourable weather to do some hay-making, drove out of one of the fields into the lane on a tractor to which was attached,
- G by means of an articulated coupling, a baler, at one end of which there was what is called a string box of a width of nine feet. The learned judge found that, having regard to the width of the lane, the margin which was allowed for the defendant to pass the plaintiff's stationary car without impact was a small one of six inches to nine inches; and there has been no question on this finding. The margin is one which the judge in his own language described as a "dangerous
- H margin of safety" a formula to which I attach a little significance, as will presently appear. The tractor successfully passed the plaintiff's motor car and so did the baler until the string box was reached. Then the string box, as the judge found, struck the offside wing of the plaintiff's car and damaged it. The accident was not serious. The damage to the wing cost some £9 to repair; but the plaintiff, by reason of his occupation as a salesman for timber merchants, was able to
- I establish further special damage. This was the cost of hiring another car for a number of days, so that, if the plaintiff were entitled to recover, the total damage properly to be derived from the alleged negligence would be, as the judge held, £21 *ls.* 6*d.*

There was an acute conflict of evidence on one matter. The plaintiff and his son alleged that they were in the road at the time when the accident occurred and that they saw what happened. The judge, however, plainly disbelieved the plaintiff and the plaintiff's son. In particular, he wholly discredited the somewhat

extravagant estimate which the son gave of the speed of this tractor pulling a baler in a narrow lane. The son said it was going at no less than twenty-five miles an hour. Another matter on which the plaintiff and his son were disbelieved has a bearing on a point of great interest taken by counsel for the defendant. In the amended note of the judgment which has been agreed between the parties, the judge said: "I am led to believe plaintiff and son did not see the accident and were, in fact, on the other side of the hedge". The significance of that finding is this. On the other side of the hedge was the defendant's field on which was standing hay. It is clear that the plaintiff and his son went into the field at some stage, for they were warned to go off it by a policeman. They were, in truth, trespassers. According to the defendant, the plaintiff and his son, at the time of the accident, were still in the field trespassing. In this matter, and, indeed, in other matters of conflict, the judge accepted the evidence of the defendant in preference to that of the plaintiff and his son. A B C

So far the case appears, therefore, to be of this character. A man driving a tractor with a large agricultural implement in tow on a public highway in daylight sees a motor car stationary on that highway. The question then arises, inevitably where the highway is narrow: is there or is there not room to pass? If, in fact, there was no room to pass and passage was impossible, and if a man attempted to pass without pausing to make any further investigation and, as would, inevitably, be the result, a collision occurred, I should have thought that, *prima facie*, the driver must be negligent. Counsel for the defendant did not contest that proposition. In the present case, however, there was room to pass. At the greatest width of the baler there were some six inches to nine inches to spare between the two vehicles when they were passing, but in regard to that the judge used this pregnant phrase: "It was a dangerous margin of safety". The judge added a note about that phrase and I take it to mean that, the road being so narrow and the baler being so wide, to pass in such circumstances was an enterprise attended with risk. It needed, obviously, great care if a collision were to be avoided. In those circumstances, what is the evidence of the care taken? Accepting, as the judge did and as I do, the evidence of the defendant and his servant, it seems that, as the defendant approached the plaintiff's motor car, he reduced his speed to the very low rate of two miles an hour or thereabouts. The servant, who was seated somewhere at the back of the towed baler, shouted to the defendant: "I think we can get through, guv'nor". Acting on that cheerful prophecy the defendant proceeded on his way; but unfortunately the prophecy was falsified and the string box struck the car. D E F G

That, I think, is a fair summary of the evidence, subject only to this. The defendant said, and was believed, that he did not see that there were two persons, the plaintiff's wife and the other lady, in the car at the time. The conclusion which the judge reached on that matter and on that evidence was as follows:

"Defendant reduced speed to safety consistent with long vehicle behind him and signals from man behind him and was directed by man and was not guilty of negligence in attempting to pass and proceed on his lawful occasion. It is too much to say [that the defendant] should be precluded from moving as he had a small margin of safety. He saw nobody in the car and he had to make up his mind to give up or to go on and attempt to do it. He was justified in making the attempt with all possible care and without excessive speed. Not insurer of plaintiff's car against possibility of its being struck." H I

It was submitted by counsel for the defendant that there was evidence which justified the conclusion, and the vital conclusion, that the defendant was justified in making the attempt "with all possible care"; but, in my judgment, there was not. A driver along a highway who sees a stationary vehicle or other object on the highway plainly has to take "all possible care" to avoid a collision, and,

- A if there was, in fact, room to pass but nevertheless a collision occurred, then it seems to me that prima facie the defendant has failed to discharge the duty which those circumstances have laid on him. I am unable to conclude that merely reducing the speed and relying thereafter on the prognostication of the servant behind was taking all the care which he should have done. It is, I hope, not illegitimate to have in one's mind the kind of operation in which so many
- B of us are sometimes engaged when driving a motor car in or out of a place where there is very little room between other cars. If one has a friend or another person available, it is common knowledge that that other person often watches and warns one, if, as one slowly proceeds, it is apparent that there is not sufficient room in the direction or in the line in which one is going. Quite apart from the fact that greater care would have disclosed the presence of the two ladies in
- C the car, there is, in my judgment, no evidence in the present case to support the view that "all possible care" was in fact taken. It is true, as counsel for the defendant suggested, that the impact might have been caused by the fact that some roughness on the surface of the road threw the trailer slightly off its proper line and thus cast it, so to speak, on to the motor car. If there had been any evidence that that was so, it might well have been that the accident would be
- D properly attributed to something that reasonable care in all the circumstances could not have foreseen, but to suggest that that was the cause is merely to speculate. Prima facie, given the circumstances of a stationary motor car on a highway and another car approaching with room to pass, the onus is on the driver of the moving vehicle, if an accident occurs, to show that "all possible care" was taken. For if there was, in truth, room to pass, and yet a collision
- E occurred and the moving vehicle struck the stationary vehicle, how did it come to do so?

I have read the judge's phrase "all possible care", but I do not, of course, forget that in judging of negligence the standard is that of reasonableness. The test is: given the circumstances which I have stated, did the driver take all the careful steps which a reasonable man in those circumstances should have

F taken? I think that in such circumstances the reasonable man would, indeed, take what may be called in ordinary language "all possible care", at any rate a greater degree of care than is shown by the facts of this case which amounted to no more than driving at a very slow speed in reliance on the shouted assurance of the defendant's servant who was seated somewhere on the baler. On that matter, therefore, I conclude that the defendant is not shown to have taken

G all the steps which reasonably ought to have been taken in the given circumstances.

Another point was taken by the defence in this court. The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins; but, if the driver of a vehicle on the highway pauses—for some purposes, at any rate—from time to time on the highway,

H that, equally clearly, is not a user of the highway beyond what is legitimate. On the other hand, it is well established that if one is using a highway for a purpose other than passage along it, one cannot do so legitimately merely by the pretext of walking up and down along it. Counsel for the defendant referred to *Hickman v. Maisey* (1), in which the defendant, who was the proprietor of a publication which gave accounts of the doings of racehorses in training,

I walked up and down a highway making notes of the performance of horses in training in order that his paper might be better equipped therewith. It was held that that was not a legitimate use of the highway as such by a member of the public and, since the racehorses' trainer was in lawful possession of the land adjoining the highway, the defendant was thereby trespassing. By analogy to that case, counsel for the defendant sought to contend that, as it was found that the plaintiff and his son, at the critical point of time, were trespassing on the defendant's field, in so far as they were trespassers on the field the motor car

left standing by them on the highway was equally trespassing: it constituted a part of the trespass of the plaintiff. In other words, there was no longer a legitimate use of the highway by the plaintiff, since he had put the car there so that he could go as a trespasser into the defendant's field. Alternatively, counsel for the defendant contended that the motor car standing thus on the highway was *prima facie* an obstruction and, therefore, a nuisance, and that the obstruction could not be justified since its manifest object, or the activity with which it was shown to be essentially connected, was the wrongful activity of the plaintiff and his son in trespassing on the field. Given those premises, said counsel for the defendant, the standard of care required from the defendant was for all practical purposes discharged. According to counsel's submission, the defendant owed to such a wrongdoer or his motor car no duty of care such as the user of a highway in ordinary circumstances is entitled to demand; his obligation was limited to that which LORD HAILSHAM, L.C., thus expressed in *R. Addie & Sons (Collieries) v. Dumbreck* (2) ([1929] A.C. at p. 365):

"An occupier is in such a case [namely, where a trespasser comes on to the premises] liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

I agree with counsel for the defendant that, if the premises were established and that was a correct statement of the consequent extent of liability on the defendant, beyond doubt the defendant amply satisfied what was required of him. According to the reports, or at least so far as the investigations of learned counsel have discovered, no similar case has been before the courts. On some future occasion it may be necessary to consider the application of those principles. In the present case, however, I am satisfied that the facts do not justify the premise of the argument. The mere circumstance that, as the judge found, the plaintiff and his son were on the wrong side of the hedge at the time when the impact occurred does not seem to me to involve the conclusion that the plaintiff, in resting the motor car where he did on the road and leaving it there, was a trespasser also in respect of the motor car or was committing a nuisance on the highway by reason of the motor car's presence there. It does not require much imagination to picture the kind of circumstance that so often arises, particularly on a bank holiday, where a driver of a motor car, having driven for some time, pauses to rest. He may or may not thereafter do something which is wrong, by which I mean that he may trespass on someone else's land. It seems to me, however, to be going altogether too far to hold, in the present case, that the parking of the car was so bound up with the act of trespass, which was ultimately proved, as to make the car itself either the symbol of a trespass or the instrument of a nuisance. I am, therefore, unable to accept that argument in support of the judge's conclusion. For the reasons which I have already stated, I think that there was no justification on the evidence for the conclusion which the judge stated in the language which I have earlier read from the note of his judgment.

The only other case to which I shall refer is *Foster v. Bush House, Ltd.* (3), which was heard in this court. As I am reported to have said, the case was a difficult one. A waitress stumbled against the leg of a chair on which a diner was sitting and thereby decanted some soup on to the diner or the diner's dress. The learned judge held that negligence had not been established. I remember, from my participation in the hearing of the appeal, the great difficulty which we ourselves entertained, and I think I am right in saying that one or more of us expressed the view that, on our understanding of it, we felt strongly disposed to think that if we were trying the case at first instance we should have come to a different conclusion. But a waitress in a busy restaurant has to work quickly,

A carrying food; she is apt to be called by other customers, and that, inevitably, distracts her attention to some extent from where exactly she is going. *Foster's* case (3), therefore, seems to me to be a different kind of case from that of a man driving a tractor in bright daylight along a lane in which he sees, plain to his view, a stationary motor car. If, as I assume, the court rightly held in *Foster's* case (3) that there was evidence to support the judge's finding acquitting
B the waitress of want of reasonable care, it does not follow that the facts in the present case equally had the effect of justifying a conclusion of no negligence in favour of the defendant. Appreciating the great difficulty of the case, I have, on the whole, come to the conclusion that the evidence led on the defendant's side did not discharge the *prima facie* conclusion from the collision in the circumstances of the case—the conclusion that all reasonable care was not taken by the
C defendant. I therefore think that the plaintiff should have recovered judgment for £21 ls. 6d., and I would allow the appeal.

JENKINS, L.J.: I agree. In my opinion it follows from the facts as found by the learned judge that, as a matter of law, the defendant should have been held guilty of negligence. The plaintiff's car, an Austin A.40, was drawn up in
D the lane as close to its nearside as possible; it had a width of five feet three inches to five feet six inches as compared with the total width of the lane of only some fifteen feet. The baler which the defendant was towing had a width of nine feet. It follows that there would be a clearance between the defendant's vehicle and the plaintiff's vehicle of only some six inches to nine inches in the event of the defendant seeking to take his vehicle past the plaintiff's vehicle where it stood in the lane. The learned judge thought that the six inches or
E nine inches was what he called a dangerous margin of safety, and in his notes for judgment, which are appended to his notes of the evidence in the case, he added a postscript in these terms:

“By the rather obscure expression ‘dangerous margin of safety’ I intended to convey that with only six inches to nine inches maximum
F clearance available between his own string box and the car's wing the defendant towing a baler with a tractor could not pass the car without considerable risk of touching it.”

I think that it must have been obvious to the defendant, when he did attempt to pass the car, that he was undertaking an operation fraught with considerable risk. In his evidence he said:

G “When I saw the car, which was unattended, I just thought we could not get through; then I thought we could. My man was on the baler and he shouted: ‘I think we can get through, guv'nor’.”

The defendant said that the car was unattended. In that he was in error. The plaintiff and his son had left the car, but the plaintiff's wife and the other lady
H who made up the party were in the car. The wife was sitting in the driver's seat.

In those circumstances it seems to me that there is force in the dilemma put against the defendant. Either there was room to pass or there was not. If there was room to pass, then the fact that he damaged the plaintiff's vehicle in passing was *prima facie* evidence of negligence. If there was no room to pass, then he was negligent in attempting to do so when there was no room. If the
I plaintiff's vehicle had, in fact, been unattended, it may very well be that the defendant would have been justified, having assured himself that it was unattended, in going on his way with all the care he could. It might be unreasonable to expect him to hold up his operations until such time as the owner of the car chose to return. He took no steps, however, to satisfy himself that the car was unattended. If he had taken the simple precaution of stopping his vehicle, going forward and seeing whether there was anyone inside the car, the car could have been driven away to a place which would have allowed the tractor and the

baler towed by it sufficient room to pass and the accident would never have happened. Accordingly, I agree with the learned Master of the Rolls that the defendant should be found guilty of negligence. A

As to the defence based on trespass, I need only say that I agree that the evidence before the court has not sufficiently established that the plaintiff, by his motor car, was trespassing on the road or that the car standing on the road was a nuisance. Accordingly, it is unnecessary to express any view of the consequences which might have ensued if the presence of the car had been shown to be wrongful in either of these two ways. I agree that this appeal should be allowed. B

MORRIS, L.J.: I also agree. It seems to me that, if there was no room for the defendant to have passed, then he ought not to have proceeded. If there was room to enable him to pass and get through in safety, then it seems to me that he should have got through in safety and that a failure to do so convicts him of negligence. On the facts of this case I can find no material for saying that, in what was, after all, a very ordinary and often-experienced situation, any entirely unexpected circumstance came into play. In my judgment, the evidence showed that there was negligence in the defendant. There was a failure to take any of the possible courses open to him which a reasonable man could have adopted. He could have stopped. He could have gone to the car. If he had done so he would have found the two ladies in it, one of them being at the driving seat. If he had wanted the car moved, either the plaintiff's wife was able to move it or her menfolk were within easy call and they could have moved it. If it had not been thought necessary to move the car, then the defendant could have put his servant on the road and, with the guidance of his servant so placed, he could have proceeded at such a speed and in such a manner as to avoid touching the stationary vehicle. I am confident that, with the exercise of reasonable care, no impact in this case need have occurred. In my judgment, in the light of the facts as found and the facts admitted, it is not right to say that the defendant took all reasonable steps, but, on the contrary, it is shown that he was negligent and that it was his negligence which resulted in the damage caused to the plaintiff's car. C D E F

Appeal allowed.

Solicitors: *John Holt* (for the plaintiff); *Crawley, Arnold, Ellis & Ellis*, agents for *Horwood & James*, Aylesbury (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A BUCHANAN v. MOTOR INSURERS' BUREAU.

[QUEEN'S BENCH DIVISION (McNair, J.), November 15, 1954.]

Street Traffic—"Road"—"Road to which public has access"—*Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 121 (1).*

B The plaintiff was injured by a lorry in an accident on a road within the premises of the Port of London Authority. The driver of the lorry was not insured under the Road Traffic Act, 1930, s. 35. Passes were required to enter the dock area and unauthorised persons were refused admission. The plaintiff was awarded damages against the lorry driver and, the judgment being unsatisfied, claimed to recover the damages from the defendants. The defendants contended that the road concerned was not a road within the meaning of the Road Traffic Act, 1930, s. 121 (1).

C **Held:** the road concerned was not a "road" within the meaning of s. 121 (1) of the Act because it was not a road to which the general public had access either as a matter of legal right or by tolerance of the Port of London Authority; accordingly, the lorry driver was not required to be insured under s. 35 of the Act, and the plaintiff's claim must fail.

D Dicta of LORD CLYDE in *Harrison v. Hill* (1932 S.C. (J.) at p. 16) applied.

[**Editorial Note.** The present case shows the legal approach in English law, following a Scottish decision, to the question whether a road is within the definition of "road" in the Road Traffic Act, 1930. The particular road with which the case was concerned is now, as is stated at p. 609, letter E, post, within the definition by reason of the Port of London Act, 1950, s. 21 (2) (29 HALSBURY'S STATUTES (2nd Edn.) 803).

E For the Road Traffic Act, 1930, s. 35, s. 121, see 24 HALSBURY'S STATUTES (2nd Edn.) 602, 661.]

Cases referred to:

- (1) *Harrison v. Hill*, 1932 S.C. (J.) 13; Digest Supp.
 (2) *Bugge v. Taylor*, [1941] 1 K.B. 198; 110 L.J.K.B. 710; 164 L.T. 312; 104 J.P. 467; 2nd Digest Supp.

Action.

I In December, 1951, the plaintiff, Mr. Walpert Jocelyn Buchanan, was awarded £2,064 4s. 6d. damages in an action against Mr. Terence Wilcox, a lorry driver, in respect of injuries which he, the plaintiff, had sustained in an accident on a road in St. Katharine's Bay, London Docks, forming part of the premises of the Port of London Authority. At the time of the accident the lorry driver was not insured under the Road Traffic Act, 1930, s. 35. Passes were required by persons entering the dock area, and the Port of London Authority police had instructions to refuse permission to enter the area to any unauthorised person. The damages not having been paid, the plaintiff sought to recover them from the defendants, the Motor Insurers' Bureau, who, in June, 1946, entered into an agreement with the Ministry of Transport, by which they undertook to provide for the satisfaction of unsatisfied judgments in respect of any liability required to be covered by a policy of insurance or security under the Road Traffic Act, 1930, Part 2, whether or not the person against whom judgment was obtained was covered by a contract of insurance. The defendants contended that the road in the dock where the accident happened was not a road within the meaning of the Road Traffic Act, 1930, s. 35 (1) and s. 121 (1), and, therefore, the lorry driver did not require to be insured.

R. Castle-Miller for the plaintiff.

Ryder Richardson, Q.C., and *A. H. Head* for the defendants.

McNAIR, J. : The plaintiff brings this action against the defendants to recover from them the sum of £2,064 4s. 6d., that sum being the amount of the judgment which he obtained in an action in this Division in December, 1951,

against a lorry driver who caused him injury whilst that lorry driver was uninsured. The basis of the plaintiff's claim is that the lorry driver at that time ought, under s. 35 of the Road Traffic Act, 1930, to have been insured; and, if the circumstances of the accident were such that the lorry driver ought to have been insured, then it is admitted that the defendants accept liability for judgments such as this, where the judgment obtained is in fact ineffective by reason of the defendant's want of means.

The circumstance which it is said resulted in the lorry driver not being required to be insured was that the place where the accident happened, namely, a road within the confines of the London Dock, forming part of the premises of the Port of London Authority, was not a road within the meaning of the Road Traffic Act, 1930. The definition of road in that Act is to be found in s. 121 (1), and is in the following terms:

" ' Road ' means any highway and any other road to which the public has access, and includes bridges over which a road passes."

Accordingly, my decision must turn entirely on whether I take the view on the facts as proved before me that the place where this unfortunate accident happened was a road within that definition.

I have been referred to two cases where this or similar questions have been considered by the courts, but it seems to me that the case which gives me the most assistance on the matter is a decision of the Scottish courts in *Harrison v. Hill* (1), which has been considered and adopted in this Division in the decision of the Divisional Court in *Bugge v. Taylor* (2). In the Scottish case, the Lord Justice-General, LORD CLYDE, who was considering whether, in the case before him, a road leading from a public highway down to a farmhouse was a road within the meaning of the Road Traffic Act, 1930, had occasion to interpret the definition which I have just read, and said this (1932 S.C. (J.) at p. 16):

" It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public ' has access ' to it. I think that, when the statute speaks of ' the public ' in this connection, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways. I think also that, when the statute speaks of the public having ' access ' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed—that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor."

LORD SANDS uses much the same language when he says (*ibid.*, at p. 17):

" In my view, any road may be regarded as a road to which the public have access upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied."

A Those judgments seem to me to give me very clear guidance as to the proper way of approaching the question of fact in this case. [HIS LORDSHIP reviewed the evidence and continued:] It seems to me that it is quite impossible for me to hold that the place where this accident happened was a road to which the public, by which I mean the general public, have access either as a matter of legal right or by tolerance of the Port of London Authority. The very odd
B circumstance in this case is that, apparently, under the private Act which regulated the Port of London Authority at the time of this accident, namely, December, 1949, i.e., the Port of London (Consolidation) Act, 1920, s. 457 (1), it was provided that, for certain purposes, the dock premises were to be deemed to be public places. The provision is in this form:

C "The quays wharfs docks and other premises of the Port Authority . . . shall be deemed to be public places within the meaning of [s. 54 of the Metropolitan Police Act, 1839,] passed . . . for the purposes of making liable to the penalty imposed by [that] section every person committing within the same premises any of the following offences but no further or otherwise . . . "

D and one of the offences referred to is this:

"Every person who shall ride or drive furiously or so as to endanger the life or limb of any person or to the common danger of the passengers on the premises of the Port Authority."

Apparently, if one drove a donkey cart in the Port of London Authority area furiously or to the common danger one could be prosecuted under the Metro-
E politan Police Act, 1839, for doing that in a public place, but not if one drove a motor car dangerously, because s. 11 of the Road Traffic Act, 1930, dealing with dangerous driving, was not incorporated into the Port of London legislation until 1950, when, in the Port of London Act, 1950, express provision was made in s. 21 (1), by which dock roads were to include, in effect, any land which is accessible to motor vehicles. Further, by s. 21 (2), it is provided that:

F "The Road Traffic Acts shall have effect as if in the provisions thereof hereinafter mentioned the expression 'road' included a dock road . . . "

and amongst the sections incorporated is s. 35 of the Road Traffic Act, 1930, which requires users of motor vehicles to insure against third-party risks, and also the provision to which I have already referred, s. 11, dealing with reckless
G and dangerous driving. Accordingly, if this accident had happened, not in December, 1949, but after the commencement of the Act of 1950, namely, after July 12, 1950, the defendants would have been liable on their promise. Apparently it is thought right on behalf of the defendants to take this point, and all I can say is that, in law, it is a good point. There must, accordingly, be judgment for the defendants.

H *Judgment for the defendants.*

Solicitors: *Darracotts* (for the plaintiff); *Hair & Co.* (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

ORMAN BROTHERS, LTD. v. GREENBAUM. A

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Romer, L.J.J.), February 17, 1955.]

Landlord and Tenant—Notice to quit—Business premises—Notice to quit given after the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107) but before Landlord and Tenant Act, 1954 in operation—Notice expiring after Act in operation—Notice not in prescribed form—Validity of notice—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 24 (1), (3), Sch. 9, para. 1. B

The Landlord and Tenant Act, 1954 (which was passed on July 30, 1954, and came into operation on Oct. 1, 1954), provides by s. 24: “(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part [Part 2] of this Act . . . (3) Notwithstanding anything in sub-s. (1) of this section . . . (b) where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of this Act applies after the giving of the notice”. Section 25 (1) provides: “The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form . . .” Paragraph 1 of Sch. 9 to the Act provided that the power under s. 66 of the Act to make regulations prescribing forms of notices for the purposes of the Act might be exercised at any time after the passing and before the commencement of the Act so as to bring the regulations into operation at any time after they were made. Pursuant to s. 66 the Lord Chancellor made the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107), which came into force on Aug. 27, 1954, and which prescribed the form of notice to quit to be given under the Act. C

The tenant of business premises under a lease which expired on Mar. 9, 1954, was permitted to hold over, but on Aug. 31, 1954, the landlords gave him notice to quit on Oct. 4, 1954. The tenancy was one to which the Act of 1954 applied but the notice to quit was not in the form prescribed by the Act. D

Held: (i) although the notice to quit was given before the Act of 1954 came into operation, it was rendered ineffective by s. 24 (1) because it was not in the form prescribed by the regulations of 1954, which were already in force when the notice was given. E

(ii) section 24 (3) (b) did not assist the landlords, because that paragraph was directed to preserving the operation of a notice to quit given in respect of a tenancy which, at the date of the notice, was a tenancy to which Part 2 of the Act did not apply, e.g., a tenancy of a dwelling-house, but which, before the notice expired, changed its nature, viz., by the dwelling-house becoming converted into a shop, so that the tenancy was *prima facie* one to which Part 2 did apply. F

Decision of **DEVLIN, J.** ([1954] 3 All E.R. 731) affirmed. G

[**Editorial Note.** This decision, the immediate application of which is limited to the transition at the commencement of the Landlord and Tenant Act, 1954, touches also another branch of the law, namely, that concerning the commencement of the operation of statutes. Statutory powers, conferred by Acts passed since 1889, may, for the purpose of bringing the Act into operation, be exercised in the interval between the date of the passing of the Act and of its coming into force, unless a contrary intention appears (Interpretation Act, 1889, s. 37; 24 HALSBURY'S STATUTES (2nd Edn.) 228). On the other hand a statute is *prima facie* prospective and not retrospective in operation and is strictly construed I

- A in relation to any question affecting adversely existing rights (see, e.g., 31 HALSBURY'S LAWS (2nd Edn.) 513, 516). In the present case it is, therefore, of particular importance that the notice to quit was served after the date when the regulations came into force and would have ended the tenancy at a date after the Act came into force, as well as to note the particular enactments in the Act of 1954 which showed that the regulations were to be effective at a date before
- B that at which the Act was brought into force.]

Appeal.

- The landlords appealed from an order of DEVLIN, J., dated Dec. 3, 1954, and reported [1954] 3 All E.R. 731, dismissing the action of the landlords for possession of business premises. DEVLIN, J., held that, the notice to quit given by the landlords not being in the prescribed form as required by the Landlord and Tenant Act, 1954, s. 25 (1), the tenancy had not been terminated in accordance with the provisions of Part 2 of the Act and that, therefore, by reason of s. 24 (1), the tenancy had not come to an end.
- C

Roy Wilson, Q.C., and M. Waters for the landlords.

C. Lawson for the tenant.

- D **LORD GODDARD, C.J.:** This is an appeal from a judgment of DEVLIN, J., who held that a notice to quit, given by landlords on Aug. 31, 1954, to terminate the lease of business premises on Oct. 4, 1954, was rendered ineffective by the Landlord and Tenant Act, 1954. The judgment of the learned judge, in my opinion, is entirely right and impeccable, and I should be quite content to adopt it as my own, but out of deference to the argument which counsel for the landlords
- E addressed to this court, I will add a few words.

- The Landlord and Tenant Act, 1954, received the royal assent on July 30, 1954, and, by s. 70, the Act came into force on Oct. 1, 1954. At first sight it appears an attractive argument to say that in those circumstances the notice to quit which was served in this case was a good notice at common law and was not affected by the provisions of the Act, but DEVLIN, J., held that that argument was
- F unsound.

Section 23 (1) of the Act of 1954 provides:

"Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

- G Section 24 (1) provides:

"A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

- The phrase "A tenancy to which this Part of this Act applies" clearly only
- H means a tenancy of premises occupied for the purposes of a business as mentioned in s. 23, and has nothing to do with the commencement of the Act. The phrase in s. 24 (1) is intended to indicate that the provision relates to the sort of premises with which s. 23 deals; i.e., premises to which this Part of this Act applies.

Section 25 (1) provides:

- I "The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination')."

I do not think that it can be denied that the effect of s. 24 (1) and s. 25 (1) is that when the Act is in operation the landlord can only terminate a lease of property to which this Part of the Act applies by giving notice in the prescribed form. The object of the Act, as is shown in its long title, is, among other things, to

provide security of tenure for tenants occupying residential property under certain leases at low rents, and for occupying sub-tenants of tenants under such leases, and to enable tenants occupying property for business, professional or certain other purposes, to obtain new tenancies in certain cases. The notice to quit which has to be given by a landlord is a somewhat lengthy and formidable document telling the tenant whether the landlord is willing to negotiate a new lease or whether he must go to the court, and setting out the relevant provisions of the Act. A
B

Therefore we have reached this position: that the Act was passed on July 30, 1954, and came into force on Oct. 1, 1954, and that when the Act is in force the landlord must give a notice in the prescribed form. No one doubts that the words in s. 24 (1):

“ A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act ” C

mean that the tenancy shall not come to an end unless it is terminated by the method laid down by the Act, i.e., by notice to quit in the prescribed form.

I then turn to s. 66 (1) of the Act, which is in these terms:

“ Any form of notice required by this Act to be prescribed shall be prescribed by regulations made by the Lord Chancellor by statutory instrument.” D

If the matter stood there, there is no doubt that under the Interpretation Act, 1889, s. 37, which applies to all Acts unless the contrary intention is shown, or unless it is expressly excluded, the Lord Chancellor, who is the rule-making authority, could have made any rules or regulations which were necessary for the working of the Act when it came into force. The Interpretation Act, 1889, s. 37, provides: E

“ Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or bye-laws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.” F
G

Provision very often has to be made for the working of an Act in circumstances where it is to come into operation on a certain date and rules or regulations have to come into force on the same date. In such cases the rules and regulations can be made by virtue of s. 37 of the Act of 1889 before the Act comes into force, but ordinarily those rules will not come into force, unless a contrary intention appears, before the Act itself comes into force. In this case it is quite clear that a contrary intention does appear, because para. 1 of Sch. 9 to the Act of 1954 provides: H

“ The power under s. 66 of this Act to make regulations prescribing forms of notices for the purposes of this Act may be exercised at any time after the passing and before the commencement of this Act so as to bring the regulations into operation at any time after they are made; and where the date, or the end of a period, specified by a notice which is given in a form so prescribed falls after the time at which this Act comes into operation the notice shall not be invalid by reason only that it was served before that time.” I

- A Thus an express power is given to the Lord Chancellor to make regulations under this Act to come into force whenever he chooses and before the Act itself comes into force. We are dealing with a notice to quit given after the Landlord and Tenant (Notices) Regulations, 1954, came into force. The regulations came into force on Aug. 27, 1954, and the notice to quit was given on Aug. 31, 1954, and expired on Oct. 4, 1954, i.e., after the Act came into force. We are not dealing
- B in this case with a notice to quit given before the regulations came into force, nor are we dealing with a case in which the notice to quit was given for a day before the Act came into force; we are dealing with a case where the regulations had come into force three days before the notice to quit was given, and where the date of expiry of the notice to quit was three days after the Act came into operation. In my opinion, when one bears that in mind, it is unarguable that the
- C landlords had not to use the statutory form. The provisions of the Act are, first, that the Lord Chancellor can prescribe by regulation when a particular form is to become effective; i.e., he can prescribe the date of the regulation coming into operation. The regulation came into force on Aug. 27, 1954, and by that time a particular form of notice to quit had been prescribed. That notice having been prescribed, s. 25 (1) provides:

D "The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form . . .",

and s. 24 (1) says:

- E "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

So the tenancy does not come to an end, unless it has been terminated in the way laid down in the Act, and that is by means of giving the prescribed form of notice. If it had not been for the words of Sch. 9 as to the Lord Chancellor's regulations coming into force at the time they are made and before the Act comes into force, the matter would have been unarguable the other way, and

F counsel for the landlords' point would be quite right. I cannot read the words in s. 24 (1), "A tenancy to which this Part of this Act applies", as meaning that the Act is not to apply to any tenancy before the Act comes into operation. Those words refer to the class of tenancy, viz., the tenancies mentioned in

G Part 2, which may be for convenience called business premises.

The only other point on which I think that it is necessary to say a word is this. Counsel for the landlords' submission was that if we were against him on the point with which I have just dealt, the position is saved for him by s. 24 (3), which provides:

- H "Notwithstanding anything in sub-s. (1) of this section . . . (b) where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of this Act applies after the giving of the notice."

The learned judge thought that it was quite clear that that sub-section meant

I that if one has a tenancy, we will say, of a private house to which Part 2 does not apply at all, and notice to quit that house is given, that notice will remain good and effective, although before the notice becomes effective the house has been turned into a shop, and therefore would otherwise be the subject of Part 2 of the Act. That was the view that the learned judge took of the meaning of that sub-section, and it is one with which I entirely agree. I think the judgment of

DEVLIN, J., was perfectly right, and that this appeal fails.

SINGLETON, L.J.: I agree.

ROMER, L.J.: I agree, and I would only like to add a few words. Section 68 (2) of the Act of 1954 provides: A

“The transitional provisions set out in Sch. 9 to this Act shall have effect.”

Then, when one looks at para. 1 of Sch. 9, one finds this is the second part of it:

“ . . . where the date, or the end of a period, specified by a notice which is given in a form so prescribed [by rules made by the Lord Chancellor] falls after the time at which this Act comes into operation [Oct. 1, 1954] the notice shall not be invalid by reason only that it was served before that time.” B

It appears to me that from that provision it is an almost irresistible inference that the legislature, in saying that where a notice given before Oct. 1, 1954, is in the prescribed form it shall not be invalid by reason only that it was served before that time, is indicating that any notice which is served before that time and which is not in the prescribed form is invalid, and it seems to me that that presents an obstacle to the argument of counsel for the landlords which is well-nigh insuperable. C

The next point is that unless the intention of Parliament was that the regulations which could be made and brought into operation before the commencement of the Act were to have immediate obligatory force and effect, I, for my part, find the greatest difficulty in seeing what the object of providing for these regulations was; because if the whole object was merely to show the landlord beforehand what the form of notice would be after the Act came into operation, the regulations could have been made under the Interpretation Act, 1889, s. 37, and I think counsel for the landlords' attempted explanation of the point by referring to the Landlord and Tenant Act, 1927, and the Leasehold Property (Temporary Provisions) Act, 1951, is not, if I may say so, satisfactory or adequate. I agree that the appeal should be dismissed. D

Appeal dismissed. Leave to appeal to the House of Lords refused. E

Solicitors: *E. Kleinman* (for the landlords); *Tringhams* (for the tenant). F

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

THEOCHARIDES v. JOANNOU.

[CHANCERY DIVISION (Harman, J.), February 10, 11, 1955.]

Legal Aid—Costs—Taxation—Attendance of country solicitor on examination of witness on commission—Fees for instructions to counsel on examination and for supplemental instructions—Attendance of country solicitor at conference, consultations, and trial in London—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), Sch. 3, para. 4 (1).

B

Costs—Taxation—Review by court—Objection as to quantum—Fee for instructions on brief reduced on taxation from £630 to £210—Attendances of country solicitor in London.

C

The defendant in an action in the High Court was granted a civil aid certificate under the Legal Aid and Advice Act, 1949. The case was a complicated and difficult one and involved, among other things, the examination of a witness on commission. The defendant's country solicitor attended at this examination, and attended also consultations and a conference in London and at the trial there. After the case had been before the court on four days

D

it was adjourned, and it then became necessary for the defendant's solicitor to prepare supplemental instructions to counsel. Terms of settlement having been agreed between the parties and approved by the judge, an order was made in the action for the taxation of the defendant's costs in accordance with the Legal Aid and Advice Act, 1949, Sch. 3. On taxation the taxing master disallowed or reduced among other items—(a) fees and expenses (items Nos. 2/5) for the attendance of the country solicitor at the examination of the witness on commission including the solicitor's travelling expenses to London; (b) a fee of £3 3s. (item No. 1) for instructions to counsel on the examination of the witness on commission; (c) fees for attendances of the country solicitor at conferences and consultations and at court in London (items No. 12A and others); (d) a fee of £630 (item No. 12) for instructions for the main brief to counsel; and (e) a fee of £52 10s. (item No. 27) for drawing up the supplemental instructions to counsel.

E

F

The fees mentioned at (a) above were reduced and journey expenses were disallowed on the ground that the attendance of the country solicitor at the examination of the witness on commission was not necessary. The fee at (b) above was disallowed, the work being taken into consideration in the amount allowed for instructions for brief (item No. 12). The fees at (c) above were reduced and, having allowed them at the R.S.C., Appendix N. amounts, the taxing master added £21 to the amount allowed (£210) for instructions for the main brief (item No. 12). In allowing £210 for the instructions for the main brief the taxing master took into consideration, in addition to the instructions for the examination of the witness on commission, the supplemental instructions (item No. 27). On a summons to review the taxation,

G

H

Held: (i) in the circumstances the country solicitor's attendance at the examination of a witness on commission was justified and, as the question whether or not the fees and expenses (items Nos. 2/5) should be allowed was one of principle, the court had jurisdiction to overrule the decision of the taxing master, and the expenses would be allowed.

I

(ii) the £21 which the taxing master had allowed as compensation to the country solicitor in respect of attendances in London (items No. 12A, etc.) ought not to be included as part of an addition to the sum allowed on the instructions for the main brief (item No. 12) but should be allowed and distributed among the specific items to which it related.

(iii) instructions for the examination of a witness on commission (item No. 1) were different from instructions on the main brief (item No. 12), and the fee for the former should not have been included in the amount

allowed for the latter; the fee of £3 3s. for instructions on the examination (item No. 1) would be allowed. A

(iv) on the facts the supplemental instructions (item No. 27) to counsel were justified and the fee for them should have been distinct from the fee allowed for instructions for the main brief (item No. 12); accordingly, a fee of £26 5s. would be allowed in respect of the supplemental instructions.

(v) the decision of the taxing master to reduce the fee for instructions on the main brief from £630 to £210 was within his discretion over the quantum of costs, the difference in amount was not such as of itself to show that the discretion had not been exercised properly, and the court had no jurisdiction to interfere with his decision. B

White v. Altrincham Urban District Council ([1936] 1 All E.R. 923) and *Coon v. Diamond Tread Co. (1938), Ltd.* ([1950] 2 All E.R. 385) applied. C

Self v. Self ([1954] 2 All E.R. 550) explained.

Observations on the proper practice in reviews of taxation in legal aid cases (see p. 617, letter G to p. 618, letter C).

[**Editorial Note.** In relation to the allowance of costs for the attendance of a country solicitor in London at a trial the present decision may usefully be compared with that in *W. F. Marshall, Ltd. v. Barnes & Fitzpatrick* ([1953] 1 All E.R. 970). There PEARSON, J., said ([1953] 1 All E.R. at p. 974, letters B-D) that the rule of practice that the costs of attendance of a country solicitor at a trial in London are only to be allowed in exceptional cases applied to a taxation under the Legal Aid and Advice Act, 1949. The present case is in contrast with that decision, where the costs were not allowed, as the present case involved a dispute sufficiently complicated to justify the attendances. E

It may be useful to note for any future cases in which questions arise that, at the request of the court, the Lord Chancellor authorised the Official Solicitor to instruct counsel to argue the case in the interest of public funds.

As to the Principles followed by the Court on Review of Taxation, see 31 HALSBURY'S LAWS (2nd Edn.) 228, para. 252; and for cases on the subject, see 42 DIGEST 214-216, 2387-2431. F

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 566.]

Cases referred to:

(1) *Marshall (W. F.), Ltd. v. Barnes & Fitzpatrick*, [1953] 1 All E.R. 970; 3rd Digest Supp.

(2) *Warman v. Barclays Bank, Ltd.*, [1953] 2 All E.R. 1575; 3rd Digest Supp. G

(3) *Self v. Self*, [1954] 2 All E.R. 550; [1954] P. 480.

(4) *Coon v. Diamond Tread Co. (1938), Ltd.*, [1950] 2 All E.R. 385; 2nd Digest Supp.

(5) *White v. Altrincham Urban District Council*, [1936] 1 All E.R. 923; [1936] 2 K.B. 138; 105 L.J.K.B. 366; 154 L.T. 656; 29 B.W.C.C. 105; Digest Supp. H

Summons for review of taxation.

The plaintiff, a Cypriot, brought an action in the High Court against his brother alleging a partnership in two restaurants. Both parties were granted certificates of civil aid under the Legal Aid and Advice Act, 1949. The action was heard before ROXBURGH, J., on Apr. 28, 29, 30, and May 1, 1953, and on May 4, 1953, it was adjourned over with liberty to apply to restore it (see [1953] 2 All E.R. 52). On June 23, 1953, terms of settlement were approved by the judge under which the plaintiff accepted, in full satisfaction, the sum of £500, for which the Law Society, with leave of the Treasury, agreed to forgo its lien, and an order was made for the taxation of the plaintiff's and the defendant's costs in accordance with the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1). On taxation of the defendant's costs the taxing master disallowed certain items and reduced others. The defendant objected to the taxation. I

A The relevant items of objection were as follows:

(a) Items Nos. 2/5. The defendant's country solicitor attended in London at the examination of a witness on commission. Fees and travelling expenses were charged. The fees were reduced and the travelling expenses were disallowed. The ground of reduction and disallowance was that the examination could have been attended by the defendant's solicitor's London agents. The taxing master in his answers cited *W. F. Marshall, Ltd. v. Barnes & Fitzpatrick* (1) ([1953] 1 All E.R. 970), and ruled that the expenses were incurred by over-caution.

B (b) Item No. 1, a fee of £3 3s. for instructions for brief to counsel to attend the examination of the witness on commission. This was disallowed, the taxing master stating that the item was taken into account in assessing the amount allowed for instructions for the main brief (item No. 12).

C (c) Items Nos. 12A, 17, 19, 21, 23, 25, 26, 28 and 30. These were fees charged for the defendant's country solicitor's attending a conference, consultations and at court for the trial in London. The taxing master allowed the R.S.C., Appendix N items for the attendances. He added a sum of £21 to the amount allowed for instructions for the main brief (item No. 12) by way of extra remuneration for the extra time involved through attendance from the country.

D (d) Item No. 12, instructions for the main brief. A sum of £630 was claimed and £210 was allowed, apart from the additional £21 mentioned at (c) above. The allowance was made by the taxing master in the exercise of his discretion over quantum, after considering all the circumstances. Particular circumstances were that the effective period covered by the civil aid certificate was fifty-six days and that the defendant's solicitor did not produce any record or entry of attendances but stated that the time to keep such records could not be afforded.

E (e) Item No. 27. This was a fee for supplemental instructions for brief, prepared after the trial had lasted several days and for the purposes of its continuance after an adjournment. The fee claimed was £52 10s. The taxing master disallowed the fee, stating in his answers that he had taken it into account in the instructions for the main brief (i.e., item No. 12).

F The defendant applied by summons for a review of the taxation.

M. Nesbitt for the defendant.

Peter Foster for the Official Solicitor as amicus curiae.

G **HARMAN, J.:** This is a summons to review a taxation in a case where both parties were given legal aid under the Legal Aid and Advice Act, 1949. There have been previous applications of this kind which appear in the law reports, one of them having been before me in *Warman v. Barclays Bank, Ltd.* (2), and another before SACHS, J., in *Self v. Self* (3). The difficulty in these cases is that the applicant, whose solicitor's costs are being taxed, has, in almost every case, no interest in the matter. If he has a nil contribution, he cannot have any interest, and with a contribution of the sort which is usually found in legal aid cases, he practically never will have an interest. The application, therefore, is made for the benefit of the solicitor and possibly for the benefit of counsel who have been concerned in the case. In *Self v. Self* (3) it was for the benefit of counsel, because, where counsel takes a legal aid case, he agrees to be satisfied with a proportion of the taxed fee, and there is no agreement between him and the solicitor, such as exists between solicitor and counsel in an ordinary case, to pay him the fee marked on his brief. Another anomaly is that the other party to the litigation is not interested either. It is the legal aid fund that is interested. The result is that there is nobody to put the other side of the picture, and the taxing master suffers under that difficulty. He may well consider himself to some extent forced into the position of guardian of the public purse because there is no one else to see to it. A good deal of the dissatisfaction in the present case is that the taxing master avowedly adopted that attitude here. I do not think that he could help it. When this matter came before me, I was not satisfied

to ply the labouring oar in that way. I, therefore, made application to the Lord Chancellor, by whose directions the Official Solicitor was appointed as *amicus curiae*, to put before me such considerations as the public interest demands, and counsel on his behalf has very ably and temperately carried out that task. There still remains, or may remain, a difficulty which I foresee, and that is this. In this case, as, indeed, I think, in *Warman v. Barclays Bank, Ltd.* (2), though not in *Self v. Self* (3), the legal aid committee had given a fresh certificate, or made an amendment to the certificate, to enable the application to be made. Suppose, then, the application wholly to fail. Then costs might be given against the applicant to the extent of his means, and one would arrive, as far as I can see, at the position where the assisted person might be liable to pay, at any rate in part, the costs of an application which was made solely for the benefit of his solicitor or counsel and which could not inure to his benefit in any event. That is an extraordinary state of things which has not yet arisen, and I do not know what may happen when it does arise.

The present case was a remarkable one. The defendant's bill of costs was brought in for some £2,400, and of that the taxing master disallowed about £1,100. The defendant's solicitor says, in effect, that such a disallowance shows, on its face, that the taxing master was not exercising a judicial discretion. I felt bound to reject that plea because I do not think that there is any evidence to support it. I shall now turn to the details of the objections, which were thirty-three in number and, for the most part, were for comparatively small sums. I have dealt with a good many of them as the case proceeded. Those which I have allowed are certain items for the attendance of the country solicitor at the examination of a witness on commission, because, as it seems to me, those were not matters of quantum. They were matters of principle, and it is not right that the country solicitor's expenses of attendance on difficult matters, as these were, should be denied him when his attendance is really required. Consequently, Nos. 2, 3, 4 and 5 of the objections, which were in respect of the country solicitor's fees and expenses for attending the examination were allowed on that footing. I have also allowed a small item, No. 8, which was for a copy of the statement of claim which seemed to me reasonably made in the circumstances.

A number of items were abandoned, and I disallowed Nos. 6, 10, 32 and 33 on the footing that they were mere matters of quantum. There remains a series of items (Nos. 12A, 14, 17, 19, 21, 23, 25, 26, 28 and 30), which represent the fees for the solicitor's attendance, at a conference, at consultations and at court. They are all minimum fees, based on R.S.C., Appendix N. When that was pointed out to the taxing master on the objections, he regarded it, I think, as a reasonable objection and added twenty guineas to the (so to speak) block fee for instructions on brief to compensate the country solicitor. That seems to me not to be a right way of doing it. I propose to distribute that twenty guineas among those items. That will have the effect of reducing the amount allowed by the taxing master for instructions on brief (item No. 12) to two hundred guineas.

There are two other matters with which I have not dealt. The first (item No. 1) was in respect of the instructions given to counsel who attended on the examination on commission of a witness. A modest fee of three guineas was asked for, and the taxing master disallowed it. He overruled the objection, saying that he had taken that item into account in assessing the fee which he would allow for instructions on brief. How much he took into account in regard to those instructions, I do not know. He dealt in a similar manner with item No. 27, which was a fee to the solicitor of fifty guineas for drawing supplemental instructions on the brief. These supplemental instructions were given to leading counsel during the intermission of the hearing, when the case was adjourned after being before the court on four days. At that point, having regard to the conduct of the case and the course which it had taken, a supplemental set of instructions

- A became necessary. The solicitor asked fifty guineas for drawing it, and there were long and complicated documents. In his answers, the taxing master again says: "I have taken this item into account in the item 'Instructions for brief' ". He considered that there should be only one item "Instructions for brief", which should include all the remuneration that the solicitor gets for drawing whatever instructions he gives to counsel at whatever stage in the proceedings.
- B There was one set of instructions for examining or cross-examining the witness on commission (item 1), there were the main instructions for the brief (item 12), and there were the supplemental instructions necessitated by the changes in the situation occurring during the hearing (item 27). It does not seem to me to be right to lump all those items together. Instructions to counsel for the examination or cross-examination of a witness on commission are quite a different matter
- C from instructions for the trial, and the exceptional circumstances of the litigation, which was between two Cypriots whose affairs were in the greatest obscurity and whose conduct was difficult to ascertain, as their language also was hard to make out, would well justify further instructions to counsel quite distinct from the instructions on which his brief was based. I propose to allow items 1 and
- D 27, but not at the amounts asked for. I propose to allow three guineas for item 1 and twenty-five guineas for item 27.

After taking out those two items, I have left the two hundred guineas which the taxing master thought a proper fee for the instructions on the main brief. It was submitted by counsel for the defendant, first, that the fact that this sum falls far short of the six hundred guineas which was asked for, shows that the

E taxing master could not have given the matter proper consideration. Secondly, counsel said that the taxing master went wrong because he did not believe that the work on which the instructions were based had all been done after the civil aid certificate was granted. It was submitted that the taxing master had no right to disbelieve or discredit the solicitor's clerk who told him that the whole staff had been engaged on this matter for the fifty-six days between the date

F when the certificate was granted and the commencement of the trial and that he could produce no attendances and no diary to show how that had been done, such as a London office might have been able to furnish. I do not think, however, that the taxing master did anything of the kind suggested. What he said, in effect, was that he had kept in mind the fact that the work for which

G payment could be made under the certificate was only the work of the last fifty-six days before the trial; as the action had started and the pleadings had closed long before the certificate was issued, he was entitled to consider that the solicitor must have previously gathered a certain amount of information on which the defence had been settled. The taxing master was entitled, I think, to take into account the fact that, when the certificate was given, the

H solicitor did not start entirely *de novo*. He was also, I think, entitled to take into consideration the fact that, although a lot of time must have been spent on the work, no details were given. After all, however, the amount of a fee for work of this sort is not given according to how many half hours were spent. The fee is a guess at its worth. It seems to me that the taxing master's guess is quite as good as another's, and very much better than anything of mine would be,

I because he is very much more experienced. I cannot say whether or not two hundred guineas is the sort of fee which ought to be allowed on this sort of occasion. Before I could reject the decision of the taxing master that, in the circumstances, two hundred guineas was the proper amount to allow, I should have to be satisfied that that was not an amount which any reasonable taxing officer could assess, and I can find no possible basis on which I can do that. The taxing officer knows much better than I do how these things go. I have never looked into this particular question before, and probably shall never do so again,

because it is well settled that a taxing officer, except in very exceptional circumstances, must have the last word in these matters. A

The authorities were reviewed to some extent by WYNN-PARRY, J., in *Coon v. Diamond Tread Co. (1938), Ltd.* (4). He there cited *White v. Altrincham Urban District Council* (5), where GREENE, L.J., said ([1936] 1 All E.R. at p. 928):

"The rule that the decision of a taxing officer on questions of quantum ought not to be overruled by the judge on a review of taxation has long been established. This rule, in my opinion, applies generally to taxation in the county court as it applies to taxation in the High Court, and it is only in exceptional circumstances (which do not exist in the present case) that a decision of the taxing officer on a question of quantum should be overruled." B

What are exceptional circumstances is a matter on which it is very difficult to decide, but I do not think that the mere fact that, in the present case, a fee of six hundred guineas was asked and a fee of only two hundred guineas was allowed can possibly be an exceptional circumstance. The difference is merely one of quantum and is not so outrageous as to speak for itself and show that the taxing officer did not exercise his discretion in a proper manner. I feel quite unable to interfere on that ground. C D

It was submitted by counsel for the defendant that a principle had been established in *Self v. Self* (3), and that it is stated in the headnote of that case ([1954] 3 W.L.R. 119) as a principle of law. The first sentence of that headnote reads:

"It is not a proper exercise of judicial discretion so to assess the fees of counsel upon a taxation under Sch. 3 of the Legal Aid and Advice Act, 1949, as to deprive those who do such work under the Act of the eighty-five per cent. of that fair and reasonable remuneration which is provided by the schedule." E

I do not feel that the judgment really justifies that headnote. The judge did say that he would have been prepared to decide the case on the footing that the registrar had disregarded a fee that was fair; in other words, the registrar had not exercised his discretion on a proper basis. What the judge said does not, I think, go beyond that. If it did, it would be a dictum that I could not follow, because it would be saying that the judge, and not the taxing master, is the proper arbiter of what is enough, and that is not the rule. What SACHS, J., said, in effect, was that the registrar, when taxing the bill in that case, arrived at the wrong figure because he took wrong matters into consideration. On that footing, the decision is perfectly understandable and right. I think that the obiter dicta at the end of the judgment need rather a cautious approach. In the present case I do not think that the taxing master has been shown to have taken into account anything which he was not entitled to take into account, or to have left out of account anything which he was bound to take in. That being so, it is a question whether I can interfere, not whether I will interfere; and I cannot interfere. Therefore, I do not propose to alter the fee of two hundred guineas which is allowed as the fee on the main instructions for brief (item 12). F G H

The result of that will be that I allow certain of the objections and reject the rest. I think that an order in that form will be satisfactory and I do not think that I need send the case back to the taxing office. I shall order that the items comprised in objections Nos. 1, 2, 3, 4, 5, and 8 be allowed at the amounts appearing in the bill and that No. 27 be allowed at twenty-five guineas. Item 12 may in effect stand at 220 guineas, although, as I have explained, I have attributed twenty guineas of that sum to certain other items. I propose to make the usual order for taxation of the defendant's costs of this application under the I

- A Legal Aid and Advice Act, 1949, he having a certificate covering the application. It is not a case where I should order him to pay any costs.

Order accordingly.

Solicitors: *Joynson-Hicks & Co.*, agents for *Robert C. Wilson*, Margate (for the defendant); *Official Solicitor*.

- B [Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

C

- D M. RAVOK (WEATHERWEAR), LTD. v. NATIONAL TRADE PRESS, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), February 23, 1955.]

Trade Mark—Infringement—Directory of trade marks—Ownership of plaintiffs' trade mark attributed to another company—Mistake by publishers—Publication of inaccurate statement not a "use" of the trade mark—Trade Marks Act, 1938 (1 & 2 Geo. 6 c. 22), s. 4 (1), s. 68 (2).

- E The plaintiffs were the registered owners of the trade mark "Weatherite", registered in the register of trade marks in relation to waterproof clothing. The defendants published a directory of trade marks in which they inserted, in error, a statement that the trade mark "Weatherite" in relation to those goods belonged to A., Ltd. The plaintiffs brought an action against the defendants for infringement of the plaintiffs' trade mark.

- F **Held:** the publication of the inaccurate statement was not a "use" of the trade mark by the defendants, within s. 4 (1) of the Trade Marks Act, 1938, as it was not a use in the course of trade in the goods in question, and, therefore, the publication did not constitute an infringement of the plaintiffs' trade mark.

- G Per CURIAM: if the inaccurate statement had been inserted or authorised by A., Ltd., it would have constituted an infringement of the trade mark on the part of A., Ltd.

[As to What Constitutes an Infringement of Trade Mark, see 32 HALSBURY'S LAWS (2nd Edn.) 587, 588, para. 895, and notes (k), (l), (m).]

- H For the Trade Marks Act, 1938, s. 4 (1) and s. 68, see 25 HALSBURY'S STATUTES (2nd Edn.) 1183, 1227.]

Case referred to:

(1) *Aristoc, Ltd. v. Rysta, Ltd.*, [1945] 1 All E.R. 34; [1945] A.C. 68; 114 L.J.Ch. 52; 172 L.T. 69; 62 R.P.C. 65; 2nd Digest Supp.

- I **Trial of a preliminary point of law.**

The plaintiffs were the registered proprietors of the trade mark "Weatherite" registered in Part A of the register as on July 2, 1952, in respect of waterproof and rainproof clothing, golf blouses, sports jackets, shorts and trousers. In an action against the defendants the plaintiffs alleged that the defendants had infringed the plaintiffs' registered trade mark by using it in relation to such goods, not being the plaintiffs' goods, in that the defendants had published and distributed a directory called the "Branded Merchandise and Trade Marks Directory, 1954", in which they had listed a company known as S. Aronsohn, Ltd.

as the registered proprietors of the trade mark "Weatherite" in relation to waterproof clothing, sportswear and leather clothing. The plaintiffs claimed an injunction and damages against the defendants. By their defence the defendants admitted that the plaintiffs were the registered proprietors of the trade mark and that the defendants had published and distributed the directory in which they had listed S. Aronsohn, Ltd., as the proprietors of the trade mark in relation to the goods mentioned; but they said that they did not admit that such listing constituted an infringement of the plaintiffs' registered trade mark in law. An order was made, by consent, for the point of law raised by the defence to be tried as a preliminary issue.

M. Waters for the plaintiffs.

N. M. G. Faulks for the defendants.

LORD GODDARD, C.J. : This is a point of law on the pleadings which has been set down for hearing by the court. The point of law is: whether the publication and distribution by the defendants of a directory called the "Branded Merchandise and Trade Marks Directory, 1954", in which they list S. Aronsohn, Ltd. as the registered proprietors of the trade mark "Weatherite" in relation to weatherproof clothing and sportswear, constitutes an infringement of the said trade mark of which the plaintiffs are the registered proprietors in respect of such goods.

The point is, so far as I am aware, one that has never been considered by the courts before, at any rate in this form. There is no dispute as to the facts. The defendants are the proprietors of a publication called "Branded Merchandise and Trade Marks Directory, 1954", and in that directory they inserted this statement under the word "Weatherite": "Waterproof clothing, sportswear and leather clothing: S. Aronsohn, Ltd., 109, Great Eastern Street, London, E.C.2". "Weatherite" is not the trade mark of S. Aronsohn, Ltd.; it is the trade mark of the plaintiffs. I am told that there is no reflection on the good faith of the defendants; it is a mere mistake. It may be that this inaccurate statement gives a cause of action to the plaintiffs; but the action which has been brought is an action for infringement of a trade mark, and I have to consider whether or not the trade mark has been infringed within the meaning of the Trade Marks Act, 1938.

Section 68 (1) of the Act contains a definition of "trade mark" which I need not read. Section 68 (2) reads:

"References in this Act to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark, and references therein to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in physical or other relation to, goods."

There is no doubt in my mind that, if S. Aronsohn, Ltd. had inserted this advertisement, or authorised it to be inserted, they would have been infringing the trade mark. The question is whether the defendants "used" the trade mark merely because they published, in error, a statement that "Weatherite" is the trade mark of somebody whose trade mark it is not.

Section 4 (1) of the Act reads:

"Subject to the provisions of this section and of s. 7 . . . of this Act, the registration . . . of a person in Part A of the register as proprietor of a trade mark . . . in respect of any goods shall, if valid, give or be deemed to have given to that person the exclusive right to the use of the trade mark in relation to those goods . . ."

No one else can use the trade mark in relation to the goods. The sub-section goes on,

". . . and, without prejudice to the generality of the foregoing words, that right shall be deemed to be infringed by any person who . . . uses

- A a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken . . . (b) in a case in which the use is . . . in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as
- B registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade."

- As I have said, there is no authority that assists me in this matter. It seems to me, however, that the governing words in these cases are "in the course of trade", and, as LORD THANKERTON pointed out in *Aristoc, Ltd. v. Rysta, Ltd.* (1) ([1945] 1 All E.R. at p. 43), "in the course of trade" means in the course of
- C trade in those goods. If I take the first part of s. 4 (1) as it stands alone (as counsel for the plaintiffs invited me to do, because the second part of the sub-section is expressed to be without prejudice to the generality of the first part of the sub-section), I do not think that the fact that a person has improperly said, in a directory or other publication, that A.B. is the proprietor of a trade mark is a "use" of the trade mark by the person who has made the statement.
- D If he had been authorised by A.B. to make that statement, it would be a "use" of the trade mark by A.B., but not by the person who has made the incorrect statement. The defendants themselves are not applying the trade mark to goods because they are not dealing with goods; and, certainly, they are not "using" the trade mark "in the course of trade" and "in relation to those goods". They are using it in the course of their own trade, which is that of a
- E publisher of a trade directory. Although the words in para. (b) of s. 4 (1), taken by themselves, give some colour to the argument which was put before me by the plaintiffs, I think that the question still remains: what is a "use" under this section? I think that the publication in the present case does not amount to a "use", and, although I am far from saying that there may not be a remedy, yet the remedy of infringement under the Trade Marks Act, 1938, which has
- F been chosen in this case, is not appropriate, and I do not think that the case comes within the words of the Act. Therefore, I answer the question which is before me by saying that the publication does not constitute an infringement of trade mark. That disposes of the action, and there will be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors: *Davies, Arnold & Cooper* (for the plaintiffs); *Oswald Hickson, Collier & Co.* (for the defendants).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

NOTE.CARAS *v.* CARAS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), January 14, 17, 1955.]

Husband and Wife—Maintenance—Application to High Court—Wilful neglect to maintain—Parties resident in same house—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 23 (1).

[For the Matrimonial Causes Act, 1950, s. 23 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 410.]

Summons.

The wife applied for an order under the Matrimonial Causes Act, 1950, s. 23 (1), on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for her and the infant child of the marriage. The parties were married in 1932 and there were two children of the marriage, the elder of whom was now over twenty-one years of age. After a dispute between the parties in November, 1952, they continued to live in the same house but slept apart and never resumed a normal relationship. In September, 1953, the husband reduced the wife's housekeeping allowance from £11 to £7 a week, and in October, 1953, removed the wife from her position as joint director with him in a company from which the husband received £2,000 a year and the wife £500 a year as directors. The husband continued to pay for the outgoings of the house in which the parties were still living. The husband called for the wife's bank pass-sheets which showed that from June, 1952, to June, 1953, she spent in addition to the £11 a week, a further sum of £143, making a total of approximately £14 a week to run the house.

P. H. M. Oppenheimer for the wife.

M. P. Picard for the husband.

DAVIES, J., after considering the facts and financial circumstances, said that he came without any hesitation to the conclusion that during the relevant period [i.e., from September, 1953, to the beginning of April, 1954] the husband was guilty of wilful neglect to provide reasonable maintenance for the wife and, he supposed, for the son. His LORDSHIP thought, however, that he ought not to make any order in respect of the son, and would leave it to the husband to be sensible about that. The only pointer as to the reasonable cost of running the house was £14 weekly during the period 1952-53. Credit must be given for the fact that the wife had the house and everything free and the fact that the husband was not taking his meals at home. In all the circumstances of the case His LORDSHIP thought that the proper course would be to make an order for payment of £572 per annum, less tax, from Apr. 9, 1954, payable monthly, credit to be given for all payments made by the husband to the wife since that date. He made this order on the basis that the wife was going to continue to live in the house, and that the husband was going to continue to discharge all the outgoings. If the wife were turned out of the house, or if the husband did not pay the bills, then she would have to take such further steps as were available to her.

Solicitors: *Headley, Dalzell & Dickinson* (for the wife); *Amphlett & Co.* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A HARTLEY v. HARTLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 28, February 1, 2, 1955.]

Justices—Husband and wife—Maintenance—Wilful neglect to maintain—Reasonable and honest belief in wife's adultery induced by her—Whether husband connived at or conduced to her conduct—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 6.

B Where, in answer to a complaint made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, by a wife against her husband that he has wilfully neglected to provide reasonable maintenance for her, he asserts that he reasonably believed that she had committed adultery, he cannot maintain a defence based on that alleged belief if the wife's conduct has been brought about or actively promoted by him. It is immaterial whether this principle is founded on analogy to the defences of connivance at the adultery or of conduct conducing to the adultery, which defences are mentioned in s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, or is an illustration of the maxim *volenti non fit injuria*.

C D H. and his wife were married in 1937. The wife formed a close friendship with P., who was a married man separated from his wife. For about two years before 1954 P. spent most evenings with H.'s wife, at times they were out late together and, according to evidence which was accepted, P. practically lived at the home of H. and his wife. Although H.'s wife and P. were on affectionate terms there was no proof of adultery. In 1954, after an occasion when, in the presence of H., H.'s wife and P.'s wife, P. said that he preferred H.'s wife to his own, H. stopped payments to his wife and left their home. H.'s wife took summary proceedings against H. alleging that he had wilfully neglected to provide reasonable maintenance for her. The justices found that H. had at the time when he withdrew from cohabitation a reasonable and bona fide belief that his wife had committed adultery with P.

F **Held:** on the facts neither had H. connived at, nor had he by his conduct conduced to, the conduct of his wife with P., but there was evidence to support the justices' conclusion that H. had reasonably and honestly drawn the inference, induced by his wife's conduct, that she had committed adultery with P., and the appeal would be dismissed.

Appeal dismissed.

G [As to Adultery of Wife as a Defence to her Complaint under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, see 10 HALSBURY'S LAWS (2nd Edn.) 841, para. 1343; and for cases on the subject, see 27 DIGEST (Repl.) 714, 6807.

As to Connivance, see 10 HALSBURY'S LAWS (2nd Edn.) 674, para. 995; and for cases on the subject, see 27 DIGEST (Repl.) 378-382, 3118-3146.

H As to Conduct Conducing to Adultery, see 10 HALSBURY'S LAWS (2nd Edn.) 684, 685, paras. 1015-1017; and for cases on the subject, see 27 DIGEST (Repl.) 422-424, 3523-3547.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 6, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.]

I Cases referred to:

- (1) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, 3040.
- (2) *Chilton v. Chilton*, [1952] 1 All E.R. 1322; [1952] P. 196; 116 J.P. 313; 3rd Digest Supp.
- (3) *Baker v. Baker*, [1953] 2 All E.R. 1199; [1954] P. 33; 117 J.P. 556; 3rd Digest Supp.
- (4) *Gipps v. Gipps & Hume*, (1864), 11 H.L. Cas. 1; 33 L.J.P.M. & A. 161; 10 L.T. 735; 11 E.R. 1230; 27 Digest (Repl.) 381, 3139.

- (5) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 A L.J.P. 17; 173 L.T. 108; 2nd Digest Supp.
- (6) *Douglas v. Douglas*, [1950] 2 All E.R. 748; [1951] P. 85; 27 Digest (Repl.) 380, 3135.

Appeal.

The wife appealed against an order of the Aylesbury justices dated Nov. 9, 1954.

The parties were married in 1937 and there was one child of the marriage. In 1946 the husband went overseas and while he was away he heard that one P., a married man separated from his wife, had become a lodger at the house which was next door to the matrimonial home and which was run as a boarding house by the wife's mother. In 1948 the husband returned from overseas and resumed occupation at the matrimonial home. In 1951 the husband went into hospital for an operation and the wife slept with the child of the marriage; after the husband's return from hospital no sexual intercourse ever took place between the parties. Thereafter, P. used to come into the matrimonial home and sit with the wife in the evening or he and the wife would go out together in P.'s car. The husband protested on occasions but the wife denied that there was anything wrong in her association with P. On his return home from work one evening in February, 1954, the husband, as he was coming up the garden path, saw the front room in darkness; he looked through the curtains and saw, by a light in the hall, the wife and P. kissing and embracing each other. The husband said nothing until, a week later, the wife asked him for money, and he replied "You had better go and ask P. for it". Then, in front of her mother, the husband told her what he had seen, but the wife denied that any such incident had occurred. On his return from work one evening in September, 1954, the husband found the wife, her mother, P. and P.'s wife together. Mrs. P. asked the husband if he knew that P. and the wife had been going about together. The husband replied that he did. The wife then violently abused Mrs. P. Mrs. P. then asked P. "Which of us do you prefer, Hartley's wife or your own?" P. indicated that he would stay with the wife and she, the wife, said nothing.

After Oct. 4, 1954, the husband gave the wife no more money and on Nov. 2, 1954, having consulted solicitors, he left the matrimonial home.

The wife caused a summons to be issued against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on her complaint that he had wilfully neglected to provide reasonable maintenance for her and the infant child of the marriage. On Nov. 9, 1954, the justices dismissed the complaint and the wife appealed.

J. A. P. Hazel for the wife.

D. R. Ellison for the husband.

LORD MERRIMAN, P. : The husband's defence to the wife's complaint was based on the decision of this court in *Glenister v. Glenister* (1), which has been repeatedly followed. It was, in particular, followed and applied in *Chilton v. Chilton* (2), where it was held that if the conduct of a wife has been such as to create in the mind of her husband a reasonable belief that she has been guilty of adultery, so long as that reasonable belief, so induced, lasts the husband has a sufficient defence to proceedings taken by her whether based on desertion or a wilful neglect to provide reasonable maintenance. The decision in *Glenister v. Glenister* (1), of course, related to the charge of desertion. *Baker v. Baker* (3), more recent than *Chilton v. Chilton* (2), applied the same principle the other way round, and decided that a wife who could allege that she was driven to leave home because her husband had so conducted himself as to induce the same sort of belief, could base a charge of desertion thereon.

The present case is directly based on the authority of this court in *Chilton v. Chilton* (2). The justices have held that the husband established that defence,

- A and for that reason dismissed the wife's complaint. It has been remarked that in their reasons they do not expressly find that it was the wife and her own conduct which induced the belief, but counsel for the wife admitted, frankly and rightly I think, that the evidence showed that if the defence was appropriate at all—if the husband could rely on a reasonable belief—it was the wife's conduct which induced it. His contention on behalf of the wife is that the
- B husband ought not to be heard to assert that he had a reasonable belief that his wife had committed adultery, because his conduct was such that, if there had been a substantive charge or a substantive defence that she had actually committed adultery, he ought to be held either to have connived at it or, at least, to have been guilty of conduct which conduced to such supposed adultery. From that he argued, that, by analogy to one or other of those bars to setting up
- C a positive charge of adultery, the husband ought not to be permitted to assert that he believed that his wife had committed adultery, and still less that it was her conduct which induced him to believe it. The point is interesting but I do not think that I need to spend much time on it, because in substance there has been no dispute about the principle. It may be well to see how it is sought to apply it, and for that purpose to take the simplest possible illustration of the
- D principle laid down in *Glenister v. Glenister* (1) as it has been applied and approved in subsequent cases. It is essential to remember that the principle of *Glenister v. Glenister* (1), taken by itself, operates as a defence to a complaint by the wife, whether it be, for the sake of example, of desertion or of wilful neglect to provide reasonable maintenance. The reason for the principle is that if the wife has induced in her husband's mind the belief that she has committed adultery and
- E he leaves the matrimonial home to avoid the suggestion, in effect, that by staying he is condoning the past adultery, or even, it may be, conniving at, or conducing to, any future repetition thereof, it could not be right to hold that the wife is entitled to complain of his departure as desertion of her. I need not go over the classes of case in which that has been dealt with, but it is important to remember that as a defence it may, and frequently does, run in double harness, so to speak,
- F with a substantive charge of the adultery the belief in which the husband says induced him to leave the matrimonial home; and, indeed, the defence may even be alternative or ancillary to a positive complaint on his part of the same adultery, with a view to obtaining, as he now is entitled to obtain* from the justices, a separation order. Take the simplest illustration of all, which has been used more than once in connection with the *Glenister v. Glenister* (1) type of case, that
- G a wife, with every circumstantial detail, has set out to convince her husband of her guilt; but let it also be supposed—(although I do not intend to elaborate this assumption to show how the circumstances could arise)—that this is the culmination of a relationship between the husband and the wife of which it could be said with truth that the husband's own conduct had conduced to the very culmination which the wife was persuading him to believe, and, even,
- H perhaps, that he himself had promoted the very occasion on which he charges the offence as having occurred. Section 6 of the Summary Jurisdiction (Married Women) Act, 1895, reads as follows:

“No orders shall be made under this Act on the complaint of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not . . . connived at, or by his

I wilful neglect or misconduct conduced to such act of adultery.”

I omit deliberately any reference to condonation, which does not come in question in the present case. Manifestly, if either proviso was found to be proved, the husband would neither be entitled to succeed in his complaint in respect of that adultery nor would he be entitled to resist the jurisdiction of the court to make the order on the ground of that adultery. It is argued that those facts having been determined with regard to the substantive charge, by analogy it must be

* Under the Matrimonial Causes Act, 1937, s. 11 (2).

impossible for him to assert of the same set of circumstances that he was driven from home by a reasonable belief, induced by his wife's conduct, that she had committed adultery. A

Counsel for the husband accepted that this is the law, and, speaking for myself, I think that in such circumstances, when the wife's conduct on which he relies as creating the alleged belief in her adultery has actually been brought about or actively promoted by the husband, it would be impossible for any court to allow him to rely on that so-called belief. I do not think it matters whether that result is arrived at by analogy to the defences of connivance or conduct conducing in s. 6 itself, or, more directly and simply perhaps, as an illustration of the maxim *volenti non fit injuria*, for, in the circumstances supposed, he is in the main, if not entirely, the author of the alleged wrong, in which he affects to believe himself to have a real grievance. It is not necessary to pursue that point any more, because the argument has proceeded on the basis that that is the right way to look at it. Counsel for the husband has said with great force, first, that one looks in vain to see that anything like that was ever raised in the present case as a substantive issue, and, secondly, even if it was, that there is no evidence to support anything which could remotely be said to resemble either connivance or conduct conducing, and he argues that therefore there is no reason for interfering with the decision of the justices. The justices said quite definitely that in a case where the only two witnesses were the husband and the wife they preferred the evidence of the husband to that of the wife. Counsel for the wife said, frankly and properly, that it was impossible for him to ask us to say that they had no right so to prefer the husband's evidence; and I propose to approach the case on that basis. B C D E

[HIS LORDSHIP stated the facts and continued:] In the full statement of their reasons the justices say that they heard both parties; that they preferred the evidence of the husband on the question whether or not he had reasonable grounds for believing that his wife had committed adultery with P.; that there had been a friendship between the wife and P. (the justices emphasised that he was a married man separated from his wife) over a number of years, as was admitted by the wife; that there had clearly been ample opportunities for adultery to have been committed; that the husband had himself seen acts of affection between his wife and P., and not only had there been opportunity, they say, for adultery, but the probability that adultery had been committed. They had been together in the house, the justices continue, in the early hours of the morning and obviously P. had supplanted the husband in the wife's affections. Finally, as corroboration, they relied on the interview, which occurred, they say, in August or September, 1954, pointing out that the husband had not been cross-examined on the accuracy of his evidence on this point. Having heard all the evidence, they had retired and directed their minds to the question whether or not the husband had a reasonable belief that his wife had committed adultery with P. They find that he had such a belief, and that it was bona fide held at the time he withdrew from cohabitation. It follows, they say, that he was justified in so withdrawing, and the wife's complaint was dismissed. F G H

It is plain from this statement that they never directed their minds to any question such as the one with which I began, namely, whether it was open to the husband to put forward this reasonable belief if he had so demeaned himself as, in effect, to have been the author of his own wrongs. Counsel for the wife has told us, on instructions, that in reply the wife's solicitor did raise the point, and I am prepared to assume that it was so mentioned. But I do not think that that is enough. In my opinion, if that sort of answer is going to be put forward it should be put forward specifically and unmistakably, and evidence should be directed to the point. It is true, as counsel for the wife has pointed out, that there were occasions in the course of this long history when the husband took no active steps. It is true that at one time, on one of his returns from abroad, I

A he consulted solicitors, but nothing had come of it. It is true that he might have gone to see his solicitors after the incident in February, 1954; but such comment as is made on his failure to do so is plainly discounted to some extent by the fact that it was after the incident at the end of September, 1954, that he went to see his solicitors, and was by them advised that the time had come for him to leave the matrimonial home. Then, it is said, he did not leave because he believed in the wife's adultery, but because he was advised to do so by his solicitors. There is a certain difficulty in reconciling those two arguments; but let that pass. At the end of it all I am satisfied that the husband was never challenged on the basis that he had promoted the situation in which he affected to believe. On the assumption that the point was raised and was not dealt with actually by the justices, we are entitled, indeed I think bound, to express our own opinion about it, and to draw any inference that ought to have been drawn. Accepting the husband's evidence, as the justices have, and accepting, as they have, that it was the wife who, by her conduct throughout and culminating in the incident of September, 1954, induced the belief which the husband expressed in court—namely, that he was certain that she had committed adultery, though he could not prove it—I cannot see, on the basis that he was the witness who was believed, that there is anything in his conduct which any court ought to hold to amount to connivance at that which he believed in, or to conduct conducing thereto. Whether, as I have said, one approaches the matter by analogy to connivance at, or conduct conducing to, the actual offence of adultery or simply on the basis that the husband was the author of the very thing which he affected to complain of, I decline to draw any such inference, and I do not think that any court ought to draw it in the absence of something more definite in the way of acquiescence, wilfulness, wilful blindness, and the rest of it, than is here attributable to the husband, and I think that in that respect the appeal should fail.

COLLINGWOOD, J. : I agree. The ground for the dismissal by the justices of the wife's complaint of wilful neglect to maintain her and the child of the marriage was that the husband had a reasonable belief that his wife had committed adultery with one P., that he bona fide held that belief at the time when he withdrew from cohabitation, and it followed that he was justified in so withdrawing.

In the notice of appeal the grounds of appeal against that decision are (i) that it was against the weight of the evidence and (ii) that it was wrong in law. The justices' finding involves a finding of belief on the part of the husband, reasonably held and induced by the wife's own conduct, that she had committed adultery. That is the basis of the decision in *Glenister v. Glenister* (1), to which LORD MERRIMAN, P., has referred. There is no express finding in the justices' reasons that the belief was induced by the wife's conduct, but it was conceded in limine by learned counsel for the wife that if the finding of the existence of the belief could be supported, then that belief was brought about by the conduct of the wife. It was submitted, however, on the basis that the husband's evidence was rightly accepted by the justices, that they were not justified in finding that the husband did reasonably hold such a belief. That was the first submission put forward on behalf of the wife, and the basis of that submission was that his actions throughout were wholly inconsistent with his believing in his wife's adultery. It was urged that the evidence showed that he took none of the steps which a man labouring under that belief would naturally take; whatever her conduct might be, he sat down under it all; and that when at last he did take action and left the house on Nov. 2, 1954, he left not because of any suspicion of adultery which he entertained but because a summons had been served on him calling on him to answer his wife's complaint of wilful neglect to maintain her and her child. That submission would appear to be envisaged in the first ground of appeal in the notice of appeal.

A second line of argument was put forward, namely, that the husband had

throughout passively acquiesced in his wife's conduct over a very long period, and it was a case, on his part, of voluntary blindness to what had been going on for years past, and it was submitted that just as he could not now be heard to complain of adultery by his wife at which he had connived or to which his conduct had conduced, so also he cannot now rely on a mere belief in such adultery brought about in the same circumstances. That proposition was acceded to by counsel for the husband, and I agree that it would be illogical, indeed absurd, to hold that a husband who failed in his defence of adultery on the ground that he had connived at it could at the same time succeed on the ground of a belief in that adultery at which he had connived. What is involved in connivance has been the subject of a number of cases, to which our attention has been directed. I do not propose to go through them in any detail, because I think all of those that were quoted to us, particularly *Gipps v. Gipps & Hume* (4), were considered in great detail by the Court of Appeal in *Churchman v. Churchman* (5). In that case LORD MERRIMAN, P., delivered the judgment of the Court of Appeal, and said ([1945] 2 All E.R. at p. 195):

"Much of the difficulty in dealing with the question of connivance arises from the fact that in the past judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery . . ."

That decision was considered and applied in *Douglas v. Douglas* (6).

That, therefore, is the criterion to be applied in regard to this submission of connivance on the part of the husband. The first observation I make with regard to that submission is that it clearly must involve that the husband did believe in the wife's adultery. Indeed, the argument was that he had been believing in it for years past, and that he sat down and accepted the position, and had ceased to care. The husband's evidence shows that throughout the whole of the material time the wife had consistently protested her innocence. He taxed her with her association with P. on a number of occasions, and on each occasion she protested that there was nothing in it. While he was abroad from 1946 to 1948 the wife's mother wrote to him in the same strain, because he had written a letter based on information which he had received from somebody while he was abroad. The second point is this: he had no proof whatever. He had seen incidents of which he did not approve, which gave him cause for some doubt, but he had no proof of actual adultery.

[HIS LORDSHIP considered the evidence and continued:] On those facts it is, of course, impossible to deny that the husband might have taken a firmer stand than he did, and that he might have taken it long before, but mere negligence on his part, mere inactivity, weakness, or a failure to take such steps as perhaps a more strong-minded man might have taken fall far short of the requirements of connivance. One complaint that has been made against him is that he ought to have kept observation on them, or, if he could not do it himself, to have enlisted the services of some inquiry agent. Be that as it may, in my opinion nothing that he did or failed to do comes anywhere near justifying a court in finding that he was, to quote the passage ([1945] 2 All E.R. at p. 195) in *Churchman v. Churchman* (5),

" . . . guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery."

In my opinion there was no evidence of knowledge or privity to any adultery by the wife, and there was evidence which justified the justices in reaching the conclusion that the husband honestly drew the inference, induced by the conduct

A of the wife, that she had committed adultery. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lowe & Co.* (for the wife); *Cree, Godfrey & Wood*, agents for *Leather & Stevenson*, Aylesbury (for the husband).

B [Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

PILINSKI v. PILINSKA.

C [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), February 17, 18, 1955.]

Marriage—Foreign—Lex loci celebrationis—Invalid marriage—Retrospective validation—Requirement of registration not complied with.

D On Aug. 4, 1946, the parties, who were both Poles, went through a ceremony of marriage in a Roman Catholic church in the Hamburg area of Germany. There was never at any time a civil ceremony of marriage between them. In 1947 the parties came to England where they had since remained.

E At all material times by German law only a civil marriage before a registrar was valid, and non-civil marriages were void ab initio. On Nov. 18, 1947, notice of the marriage was entered in the register of Papenburg. On Aug. 13, 1948, a German decree was promulgated whereby a marriage such as the present would be validated retrospectively if duly registered at the register office at Hamburg not later than Dec. 31, 1950. According to expert evidence the registration on Nov. 18, 1947, merely recorded that there had been a religious marriage ceremony; it was not due registration under the decree of Aug. 13, 1948, and was not effective to validate the marriage in German law.

F **Held:** in English law the validity of a marriage abroad, unless it came within the ambit of the Foreign Marriage Acts, 1892 to 1947, was governed as to form and formalities by the *lex loci celebrationis*; as the requirement of the decree of Aug. 13, 1948, for registration was not complied with in time or at all the decree did not validate the invalid marriage in the present case.

G Observations of VISCOUNT DUNEDIN in *Berthiaume v. Dastous* ([1930] A.C. at p. 83) applied; *Starkowski (by his next friend) v. A.-G.* ([1953] 2 All E.R. 1272) distinguished.

[As to what law governs the Form of Marriages Abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 93, para. 168; and for cases on the subject, see 11 DIGEST (Repl.) 463, 966.]

H Cases referred to:

- (1) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; 11 Digest (Repl.) 462, 954.
- (2) *Starkowski (by his next friend) v. A.-G.*, [1953] 2 All E.R. 1272; [1954] A.C. 155; *affg.* C.A., sub nom. *Starkowski (otherwise Urbanski, otherwise Juszczkiewicz), by his next friend v. A.-G. (Starkowski and others cited)*, [1952] 2 All E.R. 616; [1952] P. 302; 11 Digest (Repl.) 463, 966.

I

Issue.

The facts appear in the judgment.

M. B. Smith for the husband.

John Latey for the wife.

Cur. adv. vult.

Feb. 18. MR. COMMISSIONER LATEY, Q.C., read the following judgment: On Mar. 18, 1953, the husband, who was formerly in the Polish

army serving with the Allied Forces in the late war, presented a petition for divorce against the wife, which petition was amended in May, 1954, by a plea that the marriage was a nullity. On that plea an issue was ordered to be joined with the husband as plaintiff and the wife as defendant. The husband was a Pole and was called to the Forces in 1939 when his country was invaded by the Nazis and like many of his compatriots experienced many vicissitudes before joining the British Forces during the war. In 1946 he was stationed in Germany and having already been on terms of close friendship with the wife in Poland he arranged for her to come to Germany. She came, and she was then suffering from consumption. He agreed to marry her so that she could go into hospital as a soldier's wife. They were both Roman Catholics and on Aug. 4, 1946, at the parish church of Tinnen in the Hamburg area of Germany, they went through a ceremony of marriage with the regimental priest officiating. There was never at any time a civil ceremony of marriage between them. On Aug. 8, 1946, she went into hospital. In May, 1947, he was transferred to England and in the autumn of that year she came to England also. She went into hospital and they never lived together again. Those are the essential facts.

In August, 1946, the German law was that only a civil marriage before a registrar was valid. That was the German law even before the war and it is still the law. Non-civil marriages are void ab initio (see Foreign Office Manual of German Law, 1950, vol. 1, para. 488). An expert in German law drew to my attention the fact that on Aug. 13, 1948, a German decree was promulgated under the authority of the Allied Control Commission, the effect of which was to validate such marriages as this retrospectively if duly registered at the register office at Hamburg not later than Dec. 31, 1950. The reference for that decree is Ordinance Gazette for the British Zone at p. 238. This proviso was peremptory and laid down the time limit for registration. The marriage certificate on the file purported to be a copy of the marriage entry in the register of Papenburg, bearing date Nov. 18, 1947. On this a question arose that this might be registration within the meaning of the decree of Aug. 13, 1948, but the expert in German law had taken pains to clear up this point himself. He received official communications from the marriage registrars at Papenburg and Hamburg, which, he assured me, would be admissible evidence in the German courts, to the effect (i) that this registration was merely a local and temporary arrangement between the district registrar and the then Polish regimental priest, placing on record that there had been a religious marriage ceremony; and (ii) that this registration was not effective to validate the marriage in German law. The Hamburg marriage registrar in his declaration also referred to similar decrees dated Mar. 17 and Dec. 2, 1950, regarding "the recognition" of emergency marriage ceremonies, applications for which could not be entertained after Dec. 31, 1951. I do not know if these decrees are relevant to the present case as I have not seen their terms, but clearly Dec. 31, 1951, was the last date for registration under those decrees. The Hamburg marriage registrar also said in this communication that there had been no such registration at Hamburg in regard to this ceremony in what was the main register office for the district in which the ceremony was performed.

In English law the validity of a marriage abroad, unless it comes within the ambit of the Foreign Marriage Acts, 1892 to 1947, is governed as to form and formalities by the *lex loci celebrationis* (*Berthiaume v. Dastous* (1), per VISCOUNT DUNEDIN [1930] A.C. at p. 83); and, therefore, as the peremptory proviso of registration was not complied with in time or at all the retrospective decree or decrees did not validate this invalid marriage. In *Starkowski (by his next friend) v. A.-G.* (2) there was a religious ceremony of marriage between two Poles in Austria. In that case there was a retrospective validating decree with a proviso as to registration which was complied with and, therefore, it validated the originally invalid marriage. Therefore, on the issue in the present case the

A husband succeeds. There was not a valid marriage, and on his petition I pronounce a decree nisi of nullity.

Decree nisi.

Solicitors: *How, Davey & Lewis* (for the husband); *Roche, Son & Neale*, agents for *Lucas, Butter, Williams & Goude*, Whitechurch, Salop (for the wife).

B [Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

GAHAN (INSPECTOR OF TAXES) v. CHLORIDE BATTERIES, LTD.

C [COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), February 17, 18, 1955.]

Income Tax—Deductions in computing profits—Profits tax—Subsidiary company's reimbursement of profits tax paid by principal—Principal company's notice that subsidiary's profits be treated as principal's—Whether amount payable "by virtue of the notice" was whole profits tax paid by principal—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 38 (3).

D Following a notice given to the Inland Revenue Commissioners under s. 22 (1) of the Finance Act, 1937, requiring the profits of a subsidiary company to be treated as its profits for profits tax purposes under s. 22 (2), a principal company was assessed to profits tax for both companies in the sum of £209,000. But for the notice, the principal company would have paid £131,000 and the subsidiary company £191,000, the difference in total being due to the different operation of non-distribution relief on the two companies. The subsidiary company reimbursed the whole £191,000 to the principal company and claimed that that sum was deductible from its profits for income tax purposes under s. 38 (3) (b) of the Finance Act, 1947, as being the "amount by way of reimbursement of profits tax which by virtue of the notice having been given was payable".

F **Held:** the profits tax payable by the principal company by virtue of the notice having been given was £77,000, the difference between the amount payable following the giving of the notice and the amount which would have been paid if it had not been given, and that sum only could be deducted from the subsidiary company's profits for income tax purposes.

Appeal allowed.

G [**Editorial Note.** Sub-section (3) of s. 38 of the Finance Act, 1947, is repealed as respects profits tax for chargeable accounting periods ending after 1951 by the Finance Act, 1952, s. 76 (8) and Sch. 14, Pt. 4.

For the Finance Act, 1947, s. 38 (3), see 12 HALSBURY'S STATUTES (2nd Edn.) 783.]

H **Appeal.**

I This was an appeal by the Crown from an order of UPJOHN, J., dated Oct. 22, 1954, dismissing an appeal by Case Stated from a decision of the Special Commissioners of Income Tax. The taxpayer company appealed against assessments to income tax under Case I of Sch. D to the Income Tax Act, 1918, in respect of the years 1949-50, 1950-51, and 1951-52 on the ground that a deduction of £191,420 was allowable in computing its profits and gains, this being a sum which it had purported to pay to its principal company, Chloride Electrical Storage Co., Ltd., by way of reimbursement of profits tax within the meaning of s. 38 (3) of the Finance Act, 1947. The taxpayer company was a manufacturer of storage batteries and a wholly owned subsidiary of the principal company. It commenced business on Jan. 1, 1950, and made up its first accounts for the calendar year to Dec. 31, 1950, which thus constituted or included the basis periods for the years of assessment under appeal. By notice to the Inland Revenue Commissioners under s. 22 (1) of the Finance Act, 1937, the principal company

required the provisions of s. 22 (2) to be applied to the taxpayer company and thereby became liable for profits tax in respect of that company's profits in addition to its own. But for the notice it would have paid £131,742 8s. in profits tax, and the taxpayer company would have paid £191,420. As a result of the notice the principal company paid £209,437 in profits tax, the difference from the total of the two sums being attributable to the different operation of non-distribution relief on the two companies. The taxpayer company paid the principal company the sum of £191,420 as purported reimbursement of profits tax payable by the principal company, and the principal company and the taxpayer company jointly elected by notice in writing to the Inland Revenue Commissioners under s. 38 (3) (c) of the Act of 1947 that this sum should be treated for all purposes of the Income Tax Acts as provided in s. 38 (3) (i) and (ii) of the Finance Act, 1947, i.e., as regards the taxpayer company, as an amount of profits tax payable in respect of the profits arising in the chargeable accounting period ending on Dec. 31, 1950. The taxpayer company contended that the £191,480 was properly allowable as a deduction under s. 25 of the Finance Act, 1937, in computing its profits and gains under Case I of Sch. D to the Income Tax Act, 1918, on the ground that it was the amount paid by it by way of reimbursement of profits tax payable by the principal company under s. 38 (3) (b) of the Act of 1947. The Crown contended that the amount deductible as such reimbursement was limited to £77,695 4s., being the difference between the amount of profits tax payable by the principal company if no notice had been given under s. 22 (1) of the Act of 1937, and the amount so payable following the giving of the notice. The commissioners upheld the taxpayer company's contention and *UPJOHN, J.*, dismissed the Crown's appeal against that decision. The Crown appealed to the Court of Appeal.

Millard Tucker, Q.C., Sir Reginald Hills and E. B. Stamp for the Crown.

Heyworth Talbot, Q.C., and H. M. Allen for the taxpayer company.

SIR RAYMOND EVERSHERD, M.R.: As *UPJOHN, J.*, observed, the question in this appeal is a short one. It turns on the meaning of parts of two sections relating to profits tax, although as will later appear the actual question between Crown and taxpayer relates to income tax. The two sections are s. 22 of the Finance Act, 1937, which imposed, sub nomine the national defence contribution, what is now called profits tax, and s. 38 of the Finance Act, 1947, which in many substantial (but for the purposes of this case not material) respects amended the Act as originally passed.

The brief effect of these two sections, so far as relevant (and I shall later have to refer more particularly to their language), is this. They related to what are called in the Acts principal and subsidiary companies. Trading companies are frequently controlled, sometimes wholly controlled, by what is generally called a parent company, and it is to that kind of case that the phrase "principal and subsidiary companies" relates. It is not in dispute that the taxpayer company is a subsidiary company within the meaning of those sections, the principal or parent company being Chloride Electrical Storage Co., Ltd.

The broad purpose of these two sections was, first, to enable a principal company, if it so chose, to serve a notice (the effect of which once it was served continued indefinitely, since it was not apparently capable of being recalled) on the Inland Revenue Commissioners, assuming to itself all the profits tax which might be properly leviable both on itself and on its subsidiary. Thereupon, the Inland Revenue Commissioners look exclusively to the principal or parent company, and for the purposes of assessment the profits from the trade or business of the subsidiary are treated as part of the profits of the trade or business of the principal; and, similarly, if the subsidiary suffers a trading loss, the loss is taken into account in computing the principal company's liability.

The effect was not limited, however, to such an assumption by the principal company of the profits tax liability for itself and the subsidiary. By s. 38 of the

A Finance Act, 1947, the subsidiary could make a payment "by way of reimbursement" to the principal company, and if it did so and the principal and the subsidiary jointly elected and communicated that election in writing to the commissioners, then for income tax purposes there was a consequential adjustment of the respective liabilities of principal and subsidiary. At that time (though I think it is not so now) profits tax paid by a company was a legitimate deduction for income tax purposes.

B The present case has arisen because all those "options" have in this case been exercised. The Chloride Electrical Storage Co., Ltd., sent the requisite notice under the Act of 1937, and thereby assumed to itself exclusively the profits tax liability both in respect of its own and in respect of the subsidiary's, the taxpayer company's, businesses. The taxpayer company then paid a series of sums (more than one accountable year is in question) to its principal company, and the question, which is now before the court, is of the resultant deduction which the taxpayer company claims to make for income tax purposes by virtue of having made those payments.

C If the contentions of the taxpayer company are right, it can obtain a considerable advantage by way of income tax relief, because it began its business on Jan. 1, 1950, and for income tax purposes, deductions of this kind serve a useful purpose, extending over more than two years of the company's infancy. The considerable financial benefit to the taxpayer company is plainly irrelevant for present purposes, but the figures for one year will illustrate the points in my judgment. For the first year of the taxpayer company's life, the total amount of profits tax which became leviable in respect of the joint enterprises of principal and subsidiary was £209,000. The profits tax which the principal company would have been liable to pay, had there not been what counsel for the taxpayer company called this amalgamation of profits for tax purposes, would have been £132,000, £77,000 less than the full total. But if no notice had been served and if the subsidiary taxpayer company had been left to pay profits tax in respect of its trading profits, it would have paid a good deal more than £77,000, because it would have had to pay at a much higher rate. The difference was due to variations in rate under the scheme of the profits tax, which was then designed to discourage distribution. In the case of an amalgamation, a distribution by the subsidiary to the principal did not count as a distribution. The subsidiary company would have paid £191,000 if left to its own devices, i.e., much more than £77,000.

E The taxpayer company alleges that the option given by the joint effect of these sections to the subsidiary, or to the subsidiary and the principal working in collaboration, is for the subsidiary to reimburse the entire sum of profits tax which the principal has been called on to pay, i.e., here £209,000, and that that sum can be brought into the subsidiary's accounts as an income tax deduction. On the other side the Crown say "No; on a proper interpretation of the relevant parts of the sections, all that the subsidiary can pay over by way of reimbursement is the amount of additional tax which fell on the shoulders of the principal company when and because it had assumed this liability, viz., £77,000". The sum which the taxpayer company paid over and claims to bring into its income tax account was not £209,000 but £191,000, as I understand it, because those responsible thought that the fairest sum as between parent and subsidiary and the commercially correct figure to pay over was a figure which represented what the subsidiary's liability would have been in respect of profits tax, had it not been for the notice served by the parent company. But the fact that they paid £191,000 and not £209,000 is for the purposes of argument irrelevant, and must not be allowed to affect it. Put another way, there is no case for saying that, if there be a limit on what the subsidiary can reimburse, the limit is represented, not by the added obligation imposed on the principal, but by the obligation from which the subsidiary was saved. Those are the essential facts in the case.

Referring now to the two sections, I omit parts used quite properly to illustrate the argument which reflect the more complicated provisions of profits tax, viz., those parts concerning differential rates, because, on the view I take, I do not think they really bear on the question we have to decide. Section 22 (1) of the Act of 1937 provides that a principal company, as there defined, may by notice in writing given to the Commissioners of Inland Revenue, before a certain date related to any chargeable accounting period of the subsidiary

" . . . require that the provisions of sub-s. (2) . . . shall apply to the subsidiary as respects that period and all subsequent chargeable accounting periods throughout which it continues to be a subsidiary of the principal company . . . (2) Where such a notice is given, the profits or losses arising in any chargeable accounting period to which the notice relates from the trade or business carried on by the subsidiary shall be treated . . . as if they were profits or losses arising in the corresponding chargeable accounting period from the trade or business carried on by the principal company."

If the matter stopped there, there would be no problem at all, at any rate in this case. The notice having been given, there would have been for profits tax purposes an amalgamation—I use again the word of counsel for the taxpayer company—of the profits or losses of both principal and subsidiary, and the charge for tax would be on the amalgam.

Section 38 of the Act of 1947, however, introduced this further option. Sub-section (3) reads:

" Where (a) such a notice as aforesaid [i.e., under s. 22 (1) of the Finance Act, 1937] is in force; and (b) the subsidiary to which the notice relates pays to the principal company an amount by way of reimbursement of profits tax which by virtue of the notice having been given is payable by that company for any chargeable accounting period "

ending after a known date;

" and (c) the principal company and the subsidiary jointly so elect by notice in writing given to the Commissioners of Inland Revenue " within a certain period, then (I read this to make the point that the notice, if given, is given once for all so long as the relationship continues),

" the amount so paid and any amount so paid in relation to a subsequent chargeable accounting period, by the subsidiary to the principal company shall for all the purposes of the Income Tax Acts be treated—(i) as regards the subsidiary, as an amount of profits tax payable in respect of its profits arising in the chargeable accounting period of the subsidiary corresponding to the chargeable accounting period to which the payment relates; and (ii) as regards the principal company, as reducing the amount of the profits tax payable by the principal company for the chargeable accounting period to which the payment relates."

The effect for present purposes of sub-paras. (i) and (ii) is that, as regards the subsidiary with which we are concerned, the amount so paid by way of reimbursement is treated for income tax purposes as a deduction.

The whole question turns on these few words:

" an amount by way of reimbursement of profits tax which by virtue of the notice having been given is payable by that company "

—not an involved formula; on the face of it simple enough; but it has given rise to a sharp difference between the views of the two sides. It is said by the taxpayer company that the phrase " profits tax which by virtue of the notice having been given is payable by that company " means the total resultant figure for which the principal company is liable since the notice has been given. I will try to use language which is clearly expressive of the point, but it can be most clearly stated by saying simply, in this case, £209,000. That, it is said, is the profits tax

- A payable by that company by virtue of the notice, because that is the sum which, the notice having been given, the principal company is now bound to pay; and, if the notice had not been given, some quite different and much smaller sum, namely, £132,000, would have been exigible. On the other side it is said for the Crown, "No; the profits tax which is payable by the principal company 'by virtue of the notice' means that part of the total obligation which is exclusively
- B referable to, and derives its force from, the notice as distinct from the obligations to which by virtue of the other sections of the Act the principal company in any event, notice or no notice, would have been liable."

- The Special Commissioners and UPJOHN, J., favoured the view for which counsel for the taxpayer company has contended. I feel diffident in expressing a contrary view, but the meaning which those words bear to me is the contrary
- C meaning, for which the Crown contends. As counsel said, this should not be regarded as a matter of first impression; but, after listening to argument for a day, the first impression has perhaps faded a little away. In the end the question is, what to the person reading them do those straightforward words mean? Presumably the draftsman had a clear idea of what he meant when he drafted the sub-paragraph. If anybody had suggested that they were equivocal, the
- D doubt could have been resolved in the simplest possible way. If he had wanted to make clear beyond any doubt that the intention was in conformity with the view of counsel for the taxpayer company, I should have thought that he would have said: "An amount by way of reimbursement of the *total* profits tax which," etc. If he wanted to make quite certain that it was the Crown's view which would be regarded as intended, he would have said something to the effect:
- E "By way of reimbursement of the *additional* profits tax", etc. But he has not said either of those things. I do not think that concluding in the Crown's favour involves reading in words any more than does adopting the view in favour of counsel for the taxpayer company. But the words are not there and we cannot supply them. We have to say what the words which are there do mean.

- F UPJOHN, J., at the end of his judgment said that he had agreed with the commissioners. He said:

"I think there can be only one answer to this question. *The profits tax payable by virtue of the notice having been given is the whole profits tax.*"

- I am sorry to say I cannot accept that view. I emphasised, when I read that sentence, that UPJOHN, J., had put in the definite article. Let me read the vital
- G words with the definite article in.

- "Where the subsidiary to which the notice relates pays to the principal company an amount by way of reimbursement of *the* profits tax which by virtue of the notice having been given is payable by that company,"
- H etc. I do not say that this is conclusive by any means, but I confess that, if the definite article had been in, I should have been at least more inclined to think that "*the* profits tax which by virtue of the notice" might have meant the whole, final, total sum. In sub-para. (ii), that phrase "the profits tax payable by the principal company" does mean the total sum so paid, and the words "by virtue of the notice" do not occur in that sub-paragraph. But in the paragraph which we have to construe the definite article is absent—"an amount by way of
- I reimbursement of profits tax which by virtue of the notice", etc. I follow the point that, since the subsidiary is not bound to reimburse the whole or indeed anything, it might have been desirable to have had the definite article in, or, if it had clearly been the total sum which was referred to in the vital sentence, instead of saying "by way of reimbursement", to have said "in or towards reimbursement". It is idle speculation to try to guess how this sentence was built up; but the fact is that the phrase "profits tax" is used without the definite article. That is a small point favourable to the view which I entertain. More substantial I think is this: as a matter of strict English, if the question be

asked: "what is the amount of profits tax payable by the principal company by virtue of the notice having been given?", surely the answer is "that amount of profits tax the obligation to pay which the notice, and only the notice, brought about". In the absence of the notice, the principal company would have been liable to pay £132,000. What the notice did as regards its liability to profits tax was to impose the additional obligation of £77,000. A

I asked counsel for the taxpayer company whether it was a fair paraphrase to say that the question which this vital sentence raises may be put thus: "how much of the obligation for profits tax is attributable to the giving of the notice?" He agreed that those words fairly posed the question. I asked then how much *was* attributable to the giving of the notice? I do not think it is true to say that the whole sum was so attributable. It is quite right to say that the final figure was arrived at because the notice had been given; and, had it not been for the notice, not that figure but some other figure would have been arrived at. But still, of the £209,000, £132,000 was an obligation wholly independent of the giving of the notice. To that view of the matter I think considerable support is lent by the use of the word "payable". The tax in question (that is, the subject-matter which may be reimbursed) is profits tax which is *payable* and not which has been paid. In other words, the use of the word "payable" introduces the conception of obligation and, as I think, justifies the formulation of the question I have just put—how much of the obligation is attributable to the giving of the notice? B C D

Finally, I think that, if one starts by having clearly in mind what is the notice, if in other words, instead of para. (a) one takes the necessary language from s. 22 of the Act of 1937, one is again assisted towards the conclusion which I have mentioned. What is the notice? How would it read? "Where a principal company has given a notice applicable to a subsidiary and requiring that the profits or losses arising in any accountable period from the trade or business of the subsidiary shall be treated as if they were profits or losses arising from the trade or business of the principal company, and the subsidiary to which the notice relates", and so on. The notice in form and character is a notice by a principal requiring that, for a limited purpose, namely, ascertaining profits tax, the business profits or losses of the subsidiary shall be treated as the principal's. The notice in this case has therefore increased for the purpose of profits tax, by the amount of the subsidiary's trading profit, the subject-matter to be taxed in the principal's hands. E F

It is against that background that the subsidiary pays to the principal a sum "by way of reimbursement of profits tax which by virtue of the notice" which I have just read is payable by the principal. I think the vital phrase in that context shows that the notice is one by virtue of which, for profits tax purposes, an added burden is imposed on the principal. What other purpose, indeed, have the words "which by virtue of the notice", etc., served? If the answer is otherwise, it seems to me rather strange. The principal is given power by notice to assume to itself the whole of the profits tax, both its own and its subsidiary's. There is no corresponding option which would entitle it to place on the subsidiary the whole profits tax of itself and the subsidiary. Yet, if the taxpayer's argument is right, the subsequent option has the oblique effect of transferring to the subsidiary for income tax purposes the higher profits tax obligation of both of them put together. That seems to me an effect out of keeping with the general tenor of the sections and the rights conferred. For those reasons, my reading of the vital words is not the reading which commended itself to the learned judge. G H I

If I am wrong, at the very least, as it seems to me, there is a real ambiguity. I do not mean an ambiguity which arises because counsel on one side and the other have contended for different meanings, but a real doubt of what the sentence does mean. If that is so, then the court is entitled to consider the

A general scope of the Act, and I have just given a reason for thinking that the view of counsel for the taxpayer company is out of keeping with my understanding of the scope of the section. It is legitimate also to consider the anomalous results to which I think his view would lead. When regard is had to the differential rates, to the ingenuity of mankind and the infinite variety of circumstances of life, I do not doubt that on any view of it peculiar results may sometimes arise, not the less so because these options once exercised cannot be recalled. But we have been dealing with the case of a parent with one child, and, as counsel for the Crown rightly pointed out, not only may a company commonly have more than one subsidiary but the sections themselves show that a plurality of subsidiaries is contemplated. I think counsel for the Crown is entitled to say this. If the view of counsel for the taxpayer company is right and notices have been given in respect of two or three subsidiary companies, then what are the rights inter se of each of them? Each *prima facie* is entitled to repay the whole joint profits tax for the whole group. The effect of that, of course, would be a greater benefit to the parent company than obviously it was entitled to receive. The answer of counsel for the taxpayer company was this: "The right to make payments is expressed to be 'by way of reimbursement', and, if I undertake to reimburse another for expenses he has incurred in some particular connection, then, once he has had from me the amount he has expended, he cannot be further 'reimbursed' in respect of those same expenses". I am not quite sure that that is necessarily so, but it is a great deal to get out of the four words "by way of reimbursement" if the general argument is right. On any view, it seems to me that, as the years roll by, it might create very difficult problems of priority between the subsidiaries as to which was to pay first, to reimburse the parent and gain the best advantage from the income tax provisions, assuming of course that the right to make the deduction has continued. I think counsel for the Crown has made good his point that the view contended for by the taxpayer company produces anomalies, and obviously does so in the case of a plurality of subsidiaries.

Counsel for the taxpayer company cited the case of a subsidiary company making a loss. To put it into figures makes it more simple. Assume that the parent company makes a profit of £1,000; and a subsidiary company a loss of £500. Notice has been given, with the result of reducing the business profits for the purpose of profits tax from £1,000 to £500. Assuming tax at the rate of ten per cent., the tax would be reduced from £100 to £50. Counsel for the taxpayer company asked what, on the Crown's view, would be the amount which, within the terms of the vital words "of profits tax which by virtue of the notice having been given", would be payable by the principal company? He contended that the answer must be in that case £50, and if that was so all else followed. I agree with counsel for the Crown that the answer in those circumstances is nil. The result of the notice produced no obligation to profits tax on the parent company. What it in fact did was to relieve the principal company of part of the obligation which it would otherwise have had to bear.

It has been said many times that, on matters of construction, over-elaboration may not be useful but that in the end it is a question of interpreting fairly and according to ordinary English sense the words used. I have tried to justify the view which I have clearly formed and for the reasons stated would allow the appeal.

I JENKINS, L.J. : I agree that this appeal should be allowed. I add a few observations because we are differing both from the Special Commissioners and from the learned judge. The case resolves itself into the question: what does s. 38 (3) (b) of the Finance Act, 1947, mean by "profits tax which by virtue of the notice having been given is payable by that company", i.e., the principal company. The expression is not simply "profits tax payable by that company", but it is "profits tax which by virtue of the notice having been given" is so payable. What profits tax can answer the description of being payable by the

principal company by virtue of the notice? Surely only such profits tax as is payable by the principal company by reason of the notice having been given, and which would not have been payable by the principal company if the notice had not been given. That seems to me to be the natural and inescapable meaning of the language used. A

I think that conclusion is reinforced if one reads into s. 38 (3) (b) of the Finance Act, 1947, the effect of the notice referred to in s. 22 of the Act of 1937. It is a notice, to put it shortly, that the profits or losses of the subsidiary are to be treated as profits or losses of the principal company. If the effect of the notice is thus read into sub-s. (3) (b), it seems to me to be reasonably plain that the profits tax in this context which answers the description of being payable by the principal company by virtue of the notice is so much of the total profits tax payable by the principal company as is payable by that company by virtue of the fact that the profits of the subsidiary company are added to its own profits for the purpose of ascertaining its liability to profits tax. Accordingly, in my view, the relevant payment for the purposes of s. 38 in this case must consist, as contended for the Crown, of the £77,000, representing the increase brought about by the s. 22 notice in the total amount of tax payable by the principal company. B C

The short point of construction admits of no great elaboration, but I would call attention to this. The argument for the taxpayer company is to the effect that the profits tax payable by virtue of the notice is the whole of the profits tax payable by the principal company on the combined profits of principal and subsidiary. For the reasons given, I think that is a wrong construction; but by way of reinforcement of this view it is not without significance that, whereas the reference in sub-s. (3) (b) is to "profits tax which by virtue of the notice having been given is payable by" the principal company and so on, when one comes to sub-para. (ii) of sub-s. (3) which states the effect on the tax position of the principal company of the payment by way of reimbursement, one finds this expression, D E

"as regards the principal company, as reducing the amount of the profits tax payable by the principal company for the chargeable accounting period to which the payment relates." F

That is the expression used in the section to denote the whole of the profits tax liability of the principal company. I venture to think that, when the different and qualified expression "profits tax which by virtue of the notice having been given is payable" and so on is used in sub-s. (3) (b), it is used because the reference is, not to the whole of the profits tax payable by the principal company, but only to that part of the total profits tax payable by the principal company which is payable by that company by virtue of the notice. Accordingly, in my view and as a matter of construction, after paying the best attention I can to the careful arguments presented, I think the Crown's contention is right. G

I will not pursue the arguments which were directed to the anomalies which it was said might arise one way or another whichever construction of the word is adopted. It seems to me that, on the whole, the possible anomalies instanced by counsel for the Crown were more surprising than those suggested on the other side. But I prefer to found myself on the construction of the relevant sections and, having construed them, I agree with my Lord that this appeal should be allowed. H I

MORRIS, L.J.: I am of the same opinion. The construction contended for by the taxpayer company is one which in my judgment might result if the words of s. 38 (3) (b) of the Finance Act, 1947, were "the subsidiary to which the notice relates pays to the principal company an amount by way of reimbursement of profits tax payable by that company". But the words which by such a reading are omitted, "which by virtue of the notice having been given is," are, in my judgment, words which have significance and meaning. With the inclusion

- A of those words an inquiry is denoted to determine what profits tax is payable by the principal company "by virtue of the notice having been given". This in turn suggests an inquiry as to what the position would have been if no notice had been given, and what the position is "the notice having been given". If no notice had been given, then on the figures in this case the profits tax payable by the principal company would have been £132,000. "The notice having been given", the profits tax payable was £209,000. What then is the profits tax which by virtue of the notice having been given was payable by the principal company? In my judgment it was the difference between the two. If there is to be payment of "an amount by way of reimbursement of profits tax" which is payable "by virtue of the notice having been given" the amount referred to is, in my judgment, the amount of any resulting additional tax.
- C The notion of paying "an amount by way of reimbursement" suggests to my mind a measure of responsibility for that which is to be reimbursed. The principal company would have had, unless a notice was given, a liability to pay £132,000 by way of profits tax. But, when a notice was given, liability to that extent did not owe its origin to the giving of the notice and was not payable by virtue of the notice having been given. But the amount of the resulting additional liability would be by virtue of the notice having been given.
- D

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Simpson, North, Harley & Co., agents for March, Pearson & Green, Manchester (for the taxpayer company).*

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

E

HEELEX INVESTMENTS, LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), February 18, 1955.]

F

Profits Tax—Exemption—Principal company subject to surtax direction—Notice requiring profits of subsidiary to be treated as profits of principal company—Exemption of subsidiary company—Finance Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 54), s. 22 (1), (2).

G

In 1948 a principal company gave notice to the Inland Revenue Commissioners under the Finance Act, 1937, s. 22 (1), requiring the profits or losses of a subsidiary company in respect of chargeable accounting periods for 1947-48 and 1948-49 to be treated for profits tax purposes under s. 22 (2) as profits or losses of the principal company in its corresponding chargeable accounting periods. Thereafter assessments to profits tax were made on the principal company in respect of both its own and the subsidiary company's profits. In 1952 the Special Commissioners of Income Tax by a notice under the Finance Act, 1922, directed that the income of the principal company from all sources for the years 1946-47, 1947-48 and 1948-49 should be deemed for surtax purposes to be the income of its members, all of whom at that time were individuals, and should be apportioned among them. Profits tax thereupon ceased to be chargeable on the principal company by virtue of the Finance Act, 1947, s. 31 (2), and the profits tax which it had paid for the three years was repaid to it by the commissioners. The Inland Revenue Commissioners assessed the subsidiary company to profits tax in respect of the chargeable accounting periods 1947-48 and 1948-49.

H

I

Held: the assessments of the subsidiary company to profits tax must be discharged, since, after the giving of the notice under s. 22 (1) of the Act of 1937, the profits or losses of the subsidiary company were required by s. 22 (2) to be treated as profits or losses of the principal company for the purpose of ascertaining what profits tax was exigible on the profits of both

companies and the principal company was exempt from charge to profits tax. Nothing in s. 22 (2) limited its application to cases where the income of the principal company was liable to profits tax.

Dictum of LORD BUCKMASTER in *Inland Revenue Comrs. v. Birmingham District Power & Traction Co., Ltd.* (1928) (141 L.T. at p. 3) considered.

Decision of UPJOHN, J. ([1954] 3 All E.R. 379) affirmed.

[For the Finance Act, 1922, s. 21 (1), the Finance Act, 1937, s. 22 (1), (2), and the Finance Act, 1947, s. 31 (2), see 12 HALSBURY'S STATUTES (2nd Edn.) 237, 377, 776; the Finance Act, 1922, s. 21 (1), has been repealed and replaced by the Finance Act, 1952, s. 245, see 31 HALSBURY'S STATUTES (2nd Edn.) 232.]

Case referred to:

- (1) *Inland Revenue Comrs. v. Birmingham District Power & Traction Co., Ltd.*, (1928), 141 L.T. 1.

Appeal.

This was an appeal by the Crown from an order of UPJOHN, J., dated Oct. 21, 1954, and reported [1954] 3 All E.R. 379, dismissing an appeal by Case Stated by the Special Commissioners of Income Tax. The taxpayer company appealed against assessments to profits tax for the accounting periods Feb. 1, 1947, to Jan. 31, 1948, and Feb. 1, 1948, to Jan. 31, 1949, in sums of £12,903 16s. and £7,130 4s. respectively, on the ground that it was not liable to profits tax. It was a subsidiary company of Sidcup Investments, Ltd., the principal company, who held all its ordinary share capital. On Sept. 28, 1948, the principal company gave a notice under s. 22 (1) of the Finance Act, 1937, requiring the provisions of s. 22 (2) to be applied to the taxpayer company for the two accounting periods. On Sept. 29, 1952, the Special Commissioners of Income Tax by notice to the principal company under s. 21 (1) of the Finance Act, 1922, directed that the income of that company from all sources for the years 1946-47, 1947-48 and 1948-49 be deemed to be the income of its members and be apportioned among them. The Special Commissioners were bound by s. 14 of the Finance Act, 1939, to make directions in respect of those years, the principal company being an investment company within s. 20 of the Finance Act, 1936. The Inland Revenue Commissioners repaid the principal company the profits tax already paid by them, and the Special Commissioners raised the new assessments on the taxpayer company. The taxpayer company contended that under s. 22 (2) of the Finance Act, 1937, in pursuance of the notice given under s. 22 (1), its profits were to be treated as profits of the principal company for the purposes of profits tax and that there were accordingly no profits in its hands assessable to profits tax. The Crown contended that, as a result of s. 31 (2) of the Finance Act, 1947, the principal company was not within the charge to profits tax for the periods for which directions had been given under s. 21 of the Finance Act, 1922, and that accordingly s. 22 (2) of the Finance Act, 1937, was inoperative for those periods, since a supposition that the principal company was liable to profits tax was inherent in that sub-section. The commissioners held that a condition was to be implied in the operation of s. 22 of the Act of 1937 that the company's trade was subject to profits tax, and that, therefore, the section was inoperative for the periods to which the directions related, and they dismissed the appeal and confirmed the assessments. UPJOHN, J., allowed the taxpayer company's appeal against that decision ([1954] 3 All E.R. 379), holding that no condition could be imported into s. 22 of the Act of 1937 and that, therefore, the assessments must be discharged. The Crown appealed.

L. C. Graham-Dixon, Q.C., and *J. L. Creese* for the taxpayer company.
Geoffrey Cross, Q.C., and *Sir Reginald Hills* for the Crown.

JENKINS, L.J.: This is an appeal by the Crown from a decision of UPJOHN, J., which reversed a decision of the Special Commissioners in a case concerning the liability to profits tax of Heelx Investments, Ltd., the taxpayer company.

A Heelix Investments, Ltd. is a wholly owned subsidiary of Sidecup Investments, Ltd., and accordingly the provisions of s. 22 of the Finance Act, 1937, apply to it. It has been assumed for the purposes of this case that all the shares in Sidecup Investments, Ltd., are held by individuals. Furthermore, it appears that Sidecup Investments, Ltd., is, and has at all material times been, a company in respect of which a direction could be given under s. 21 of the Finance Act, 1922.

B Section 31 (2) of the Finance Act, 1947, refers to s. 19 of the Finance Act, 1937, which imposed the charge to profits tax under its then name of national defence contribution, and is in these terms:

C "The said s. 19 shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of s. 21 of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

D It appears that on Sept. 28, 1948, the principal company (Sidecup Investments, Ltd.) gave a notice under s. 22 (1) of the Act of 1937. Under that sub-section a notice can be given by a body corporate resident in the United Kingdom in respect of any other body corporate resident in the United Kingdom when the latter body corporate is a subsidiary of the former, as in this case, requiring the provisions of s. 22 (2) to be put into operation. The effect of s. 22 (2) is that, during all relevant accounting periods while the notice is in force (and the notice is irrevocable once given) the profits or losses of the subsidiary are to be treated for the purpose of the provisions of the Act of 1937 relating to profits tax as if they were profits or losses arising in the corresponding chargeable accounting period from the trade or business carried on by the principal company.

E On Sept. 28, 1948, the principal company gave a notice under s. 22 (1) in respect of the taxpayer company, thereby bringing into operation as regards the profits of that subsidiary the provisions of s. 22 (2). It is not in dispute that this notice was a valid notice under the statutory provisions as they now stand, although apparently given out of time according to the provisions of s. 22 as originally framed. It was accepted as valid by the commissioners.

F On Sept. 29, 1952, some four years after the s. 22 notice, the Special Commissioners made a direction under s. 21 of the Finance Act, 1922, to the effect that the actual income from all sources of Sidecup Investments, Ltd., should be treated as income of its members, and apportioned amongst its members accordingly. On the assumption made by the learned judge, which for the purposes of this appeal can be adopted, that all the members of the principal company were individuals, that brought into play for the benefit of the principal company the exemption afforded by s. 31 (2) of the Act of 1947, *supra*. That concatenation of events produced a result unacceptable to the Revenue, inasmuch as the profits of the taxpayer company, which considered as a separate entity was liable to pay profits tax, were to be treated for the purposes of profits tax as though they were profits of the principal company, which were exempted from profits tax under s. 31 (2) of the Act of 1947, and so those profits were also exempted from profits tax altogether.

H Mr. Geoffrey Cross has said all that could be said in support of the appeal. I He admits very fairly, and rightly as I think, that, in view of the language of s. 22, any body corporate resident in the United Kingdom, which is a principal company in relation to a subsidiary which is also a corporate body so resident, can give the notice referred to in s. 22 irrespective of its own liability to profits tax. He therefore does not claim that the notice here given under s. 22, long before the exemption of the principal company from profits tax under s. 31 (2) of the Act of 1947 arose, was an invalid notice. He says, however, that words must by necessary implication be read into s. 22 (2) to the effect that the profits of the

subsidiary are only to be treated as profits of the principal if and so long as the income of the principal company is liable to profits tax. He spells that qualification out of the words "for the purpose of the provisions of this Act relating to" profits tax, and he invites us to construe those words as meaning "for the purpose of charging the profits of the subsidiary to profits tax". With respect to learned counsel, I cannot find that these words are capable of any such meaning. It seems to me that the words "for the purpose of the provisions of this Act relating to" profits tax mean "for the purpose of ascertaining what profits tax, if any, is exigible on the profits of principal and subsidiary companies respectively". I see no reason for construing these words as limited to cases where tax will in the result be exigible.

Counsel for the Crown invites us to construe the section in this way on the ground that anomalous results which could not have been intended by the legislature would otherwise ensue; but it is not open to us to rectify defects in the language of taxing statutes. The subject must bear tax only if, on a fair construction of the statute as it actually stands, he falls within the charge to tax. I cannot find on that principle any sufficient justification for holding the taxpayer company liable to profits tax on the ground that the exemption of the principal company by implication suspends or defeats the operation and effect of the notice given under s. 22.

UPJOHN, J., with whose judgment and the reasoning on which it is based I entirely concur, was referred to *Inland Revenue Comrs. v. Birmingham District Power & Traction Co., Ltd.* (1) in the House of Lords. That case was concerned with corporation profits tax, and it raised a comparable question, inasmuch as under s. 53 (3) of the Finance Act, 1920 (the Act imposing this tax), the profits of a subsidiary company as therein defined were on the appropriate application being made to be treated for the purposes of that Part of that Act, i.e., for the purposes of the provisions charging the corporation profits tax, as being the profits of its principal company. Birmingham District Power & Traction Co., Ltd. was exempt from the tax because the class of business which it carried on was one in respect of which exemption from tax could be claimed. It had subsidiary companies which were not themselves exempt, and it made under s. 53 (3) of the Act an application, which was accepted by the Inland Revenue Commissioners, for the profits of the subsidiaries to be treated as being profits of the principal company. Notwithstanding that application and its acceptance, assessments were made on the subsidiary companies. Those assessments were discharged on objection being taken to them and it was sought to charge the principal company notwithstanding that it was exempted from tax by the express terms of the Act. Their Lordships were unanimously of opinion that the principal company could not be so assessed in the face of the statutory exemption. In the course of their speeches some of their Lordships made observations bearing to some extent on the present question.

LORD BUCKMASTER, so far as his actual conclusion was concerned, held that, as the application for amalgamation of profits, if I may so describe it, had been in fact made by the principal company and accepted by the Inland Revenue Commissioners, and as the principal company was exempt from the tax, the assessments on the principal company could not stand. But he used language (141 L.T. at p. 3) which suggested that, had it not been for the fact that the application had been made and accepted he would have taken the view that the provisions of s. 53 (3) of the Act of 1920 did not apply at all in a case where the principal company was exempt from the tax. The language he used does not in so many words state that conclusion, but suggests that he would have arrived at that conclusion had the state of the case left it open for him to do so.

The other learned law lords who touched on this aspect of the question were both, as I think, of opinion that it was irrelevant that the principal company was exempt from tax, inasmuch as the provisions of the Act expressly enabled such a

A company to make an application under s. 53 (3). As the plain terms of the Act allowed that application to be made by such a company, the consequences of such application must be accepted whatever the result from the tax point of view might be. Accordingly, if a principal company entitled to make an application under s. 53 (3) did make such an application, it was no objection that on account of the exemption of the principal company the result might be that the profits of the subsidiary would escape tax.

B All the observations in the speeches of their Lordships in that case bearing on this aspect of the question were, strictly speaking, obiter, because, as I have said, the question actually in issue was whether the exempted principal company could itself be assessed to tax. That was the subject-matter of the decision. As regards the obiter dicta, it seems to me that on balance they tend to support the position of the taxpayer company in the present case rather than that of the Crown.

C Accordingly I find nothing in that authority to prevent me from following what I conceive to be the true construction of the relevant sections here. On the true construction of those sections, it seems to me to be plain that the notice given under s. 22 in the present case operated to amalgamate the profits of the taxpayer company with those of the principal company for the purposes of profits tax, with the consequence that as, for the time being at all events, the principal company was exempt from profits tax (on the assumption on which the case has proceeded that all its shares were held by individuals at the material time) the taxpayer company's profits were relieved from profits tax because they fell to be treated for the purposes of that tax as profits of the exempted principal company. In short, I entirely agree with UPJOHN, J.'s reasoning and conclusion, and I might have contented myself with adopting them without adding any reasons of my own. I am accordingly of opinion that this appeal fails and should be dismissed.

SIR RAYMOND EVERSHERD, M.R. : I agree. I cannot myself entertain any doubt that the learned judge was entirely right in his conclusion. I would like to associate myself with what JENKINS, L.J., has said about *Inland Revenue Comrs. v. Birmingham District Power & Traction Co., Ltd.* (1) because I am by no means satisfied that LORD BUCKMASTER went as far as counsel for the Crown would have it that he did. I doubt whether LORD BUCKMASTER was doing more than intimating his view that a company which was at the time exempt from corporation profits tax could not make a valid or effectual application under s. 53 of the Finance Act, 1920, or that, if it did, the commissioners were not bound to accept it. As they had done so, LORD BUCKMASTER took the view that it was then too late to challenge the result so far as the Birmingham company was concerned.

G In the present case, counsel for the Crown has conceded, rightly as I think, that the principal company was entitled to give a notice under the Finance Act, 1947, when it did, and in those circumstances I doubt whether LORD BUCKMASTER's language is really of any assistance at all to counsel's argument. I do, however, observe that, in regard to the Act there in question, LORD BUCKMASTER says (141 L.T. at p. 4):

"... but where the language is plain it cannot be altered by declaring it to be irrational or assuming that it is something that Parliament could not have intended. In the last resort Parliament intends what in the language of an Act of Parliament it says and it would indeed be dangerous to depart from this rule in the administration of the law."

I find that expression of a well-known principle peculiarly apt in the present case.

MORRIS, L.J. : I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Titmuss, Sainer & Webb* (for the taxpayer company); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NYALI, LTD. v. ATTORNEY-GENERAL.

[COURT OF APPEAL (Denning, Morris and Parker, L.J.J.), December 6, 7, 8, 9, 10, 1954, February 21, 1955.]

Crown—Prerogative in Kenya Protectorate—Franchise of pontage—Grant contained in agreement with bridge company—Exemption from tolls for “military on duty”—Whether exemption extended to all soldiers of the Queen—Army Act, s. 143—East Africa Order in Council, 1902, S.R. & O. 1902 No. 661, art. 15, as amended by S.R. & O. 1911 No. 243.

Protectorate—Crown prerogatives—Extent in Kenya Protectorate.

By an agreement dated Oct. 9, 1929, and made between the Government of Kenya Colony and Protectorate under its public seal of the one part and the plaintiff company under its common seal of the other part, it was provided that the government gave the company permission to erect a pontoon bridge connecting the island of Mombasa with the mainland of Kenya Protectorate on the terms therein contained. By cl. 12 it was provided that on completion and on permission being given by the government to the company to open the bridge, then “. . . subject to the payment of the tolls hereinafter laid down the bridge shall be kept open to every vehicle . . . and to all foot passengers and animals . . .” By cl. 13 responsibility for repairing the bridge rested with the company who were entitled to charge tolls. Clause 22 provided the maximum amount of tolls chargeable in respect of the following: (a) all passenger vehicles (persons limited to six); (b) motor bicycles and rickshaws; (c) push bicycles; (d) foot passengers or persons in excess of six in number travelling in any vehicle; (e) animals; (f) animals laden; (g) vehicles for commercial purposes loaded or empty not exceeding 1½ tons; and (h) vehicles between 1½ and 5 tons. By cl. 23 it was provided: “No tolls shall be levied in respect of police or military on duty or their equipment, baggage or transport.”

During and after the 1939-45 war, Imperial troops were sent to Kenya and in 1948 the military authorities refused to pay tolls in respect of military personnel and vehicles using the bridge. At and after that date the main traffic using the bridge consisted of military vehicles in charge of military drivers themselves on duty, carrying, under instructions of the military authorities, soldiers on leave, their families and friends and sometimes soldiers on duty. The company brought an action in England against the Crown for a declaration that Her Majesty's military forces and their vehicles other than the military forces and vehicles of the Kenya government, were not exempt from liability to pay tolls.

Held: (i) on the true construction of cl. 23 of the agreement of Oct. 9, 1929, the phrase “military on duty” included all soldiers of the Queen who were on duty and was not confined to the military forces of the Kenya government.

(ii) when a military driver in charge of a military vehicle had been instructed by the military authorities to drive across the bridge, toll was not chargeable in respect either of the driver or of the vehicle, or (DENNING, L.J., dissenting) of persons carried in the vehicle such as soldiers on leave, their wives, families and friends to a number (including the driver) not exceeding six, because there was no provision in the agreement whereby tolls were chargeable for them and accordingly, by virtue of cl. 12, no charge could be made.

Per CURIAM: (a) the royal prerogatives of the Crown were exercisable in the Protectorate of Kenya, as they were within “the substance of the common law” which by virtue of art. 15 of the East Africa Order in Council, 1902 (S.R. & O. 1902 No. 661) as amended by the East Africa Order in Council, 1911 (S.R. & O. 1911 No. 243) was applicable in the protectorate (see p. 652, letter I, p. 658, letter E, and p. 665, letter D, post).

A (b) the prerogative of the Crown to grant a franchise of pontage applied in the protectorate with qualifications by virtue of which the grant of franchise in this case need not be made by matter of record: and the permission to charge tolls given to the company by the agreement of Oct. 9, 1929, amounted to a grant in exercise of the prerogative (see p. 653, letter E, p. 658, letter G, and p. 665, letter E, post).

B (c) the Crown in the protectorate had no exemption for payment of toll in this case by virtue of any prerogative exemption but only such exemption as was expressly reserved to it by the agreement (see p. 654, letter B, p. 661, letter C, and p. 665, letter I, post).

C (d) the exemption under s. 143 of the Army Act from tolls demandable by virtue of "any Act, ordinance, order, or direction of any legislature or other authority" did not extend to tolls demandable by virtue of a prerogative grant of franchise and, therefore, did not extend to tolls demandable by virtue of the agreement (see p. 655, letter I to p. 656, letter A, p. 661, letter E, and p. 666, letter B, post).

Appeal allowed.

D [**Editorial Note.** Apart from the decision on exemption from tolls for the use of the bridge, which is stated in the headnote above, this case is of general interest for the passages in the judgments concerning the royal prerogative in a protectorate. The court in England will not mark out the limit of the Crown's jurisdiction in a protectorate, but will accept an Order in Council respecting the jurisdiction as valid, although the Foreign Jurisdiction Act, 1890, under which the Order in Council was made, did not enlarge the subsisting jurisdiction of the Crown (see per DENNING, L.J., at p. 652, letter C, post, and, as regards the competence of the Crown in protectorates, 5 HALSBURY'S LAWS (3rd Edn.) 551, 552). The particular Order in Council in the present case provided that civil jurisdiction should be exercised in conformity with the substance of the common law, and thus the royal prerogative to grant a franchise or right to take tolls applied in the protectorate (see (a) of the headnote); but the English common law was applied by the Order in Council subject to such qualifications as local circumstances permitted, and the qualifications relevant for the present case, so the COURT OF APPEAL found, were those indicated in (b) and (c) of the headnote. One of these, viz., that the Crown had no prerogative exemption is relevant in England, because it resulted from an affirmation by the COURT OF APPEAL of the distinction between toll-thorough and toll-traverse, and an acceptance of the view that the Crown had in England no exemption from toll-traverse, leading to the conclusion that as regards the protectorate (to which the refinement of distinction between toll-thorough and toll-traverse was, perhaps, inappropriate) the Crown should not have exemption.

E As to the Extent of the Royal Prerogative in Colonies, see 7 HALSBURY'S LAWS (3rd Edn.) 222, para. 466 and 5 HALSBURY'S LAWS (3rd Edn.) 550, para. 1189; and for cases on the subject, see 8 DIGEST (Repl.) 687, 18 et seq.

As to Protectorates, and English or Native Law in them, see 5 HALSBURY'S LAWS (3rd Edn.) 434, para. 990, p. 698, paras. 1484, 1485; and for cases on the subject, see 8 DIGEST (Repl.) 684, 2 et seq., 843, 918.

F As to Prerogative Grants of Pontage, see 7 HALSBURY'S LAWS (3rd Edn.) 325, para. 697; and as to Crown Exemption from Toll, see 7 HALSBURY'S LAWS (3rd Edn.) 224, para. 472 and 16 HALSBURY'S LAWS (2nd Edn.) 258, para. 312.

As to the Distinction between Toll-thorough and Toll-traverse, see 16 HALSBURY'S LAWS (2nd Edn.) 255, para. 307; and for cases on the nature and origin of tolls, see 26 DIGEST 336-339, 666-686.

As to the Exemption of the Armed Forces from Toll, see 28 HALSBURY'S LAWS (2nd Edn.) 682, para. 1406.

For the Army Act, s. 143, see 22 HALSBURY'S STATUTES (2nd Edn.) 363, 364.]

Cases referred to:

- (1) *Darcy v. Allin*, (1602), Noy. 173 (74 E.R. 1131); Moore, K.B. 671 (72 E.R. 829); sub nom. *Case of Monopolies*, 11 Co. Rep. 84 b; 36 Digest (Repl.) 700, 477.
- (2) *Simpson v. A.-G.*, [1904] A.C. 476; 74 L.J.Ch. 1; 91 L.T. 610; 69 J.P. 85; 11 Digest (Repl.) 661, 855.
- (3) *Hammerton v. Dysart (Earl)*, [1916] 1 A.C. 57; 85 L.J.Ch. 33; 113 L.T. 1032; 80 J.P. 97; 24 Digest 974, 66.
- (4) *Sobhuza II v. Miller*, [1926] A.C. 518; 95 L.J.P.C. 137; 135 L.T. 215; Digest Supp.
- (5) *Lord Berkeley's Case*, (1561), 1 Plowd. 236; 75 E.R. 339.
- (6) *Steinson v. Heath*, (1694), 3 Levin. 400; 83 E.R. 750.
- (7) *R. v. Salisbury*, (1838), 8 Ad. & El. 716; 7 L.J.M.C. 110; 112 E.R. 1009; 17 Digest (Repl.) 206, 47.
- (8) *Ward v. Gray*, (1865), 6 B. & S. 345; 34 L.J.M.C. 146; 12 L.T. 305; 29 J.P. 470; 122 E.R. 1223; 24 Digest 969, 18.
- (9) *Stamford Corpn. v. Pawlett*, (1830), 1 Cr. & J. 57; 148 E.R. 1334; 11 Digest (Repl.) 654, 786.
- (10) *Allnutt v. Inglis*, (1810), 12 East 527; 104 E.R. 206; 39 Digest 229, 80.
- (11) *R. v. Crewe (Earl), Ex p. Sekgome*, [1910] 2 K.B. 576; 79 L.J.K.B. 874; 102 L.T. 760; 24 Digest 890, 148.
- (12) *Re Southern Rhodesia*, [1919] A.C. 211; 88 L.J.P.C. 1; 119 L.T. 689; 8 Digest (Repl.) 685, 8.
- (13) *Westover v. Perkins*, (1859), 2 E. & E. 57; 28 L.J.M.C. 227; 33 L.T.O.S. 221; 23 J.P. 727; 121 E.R. 22; 26 Digest 343, 717.
- (14) *Weymouth Corpn. v. Nugent*, (1865), 6 B. & S. 22; 34 L.J.M.C. 81; 11 L.T. 672; 29 J.P. 451; 122 E.R. 1106; 41 Digest 964, 8569.
- (15) *A.-G. v. Selby Bridge Proprietors*, [1921] 1 K.B. 149; 89 L.J.K.B. 1054; 124 L.T. 247; *affd.* C.A., [1921] 3 K.B. 31; 90 L.J.K.B. 891; 125 L.T. 621; 39 Digest 340, 260.

Appeal.

The Crown, as defendant, appealed from an order of HILBERY, J., dated July 28, 1954, whereby he made in favour of the plaintiff company a declaration that Imperial troops other than the King's African Rifles, were not exempt from liability to pay tolls when using the Nyali Bridge built by the plaintiff company.

Since 1890 the island of Mombasa off the coast of East Africa together with that strip of mainland opposite to and to the north and south of it, had been a British Protectorate although forming part of the dominions of the Sultan of Zanzibar. Following the annexation of Kenya by the English Crown in 1920, the protectorate had been administered by the governor of Kenya Colony, in exercise on the Sovereign's behalf, of the powers and jurisdiction of the Sovereign (Kenya Protectorate Order in Council, 1920 (S.R. & O. 1920 No. 2343), art. 5). By 1929 the plaintiff company, then known as the Nyali Bridge and Development Company, had acquired a large estate for residential purposes on the mainland to the north of Mombasa and were desirous of erecting a bridge connecting the island with the mainland and leading to the estate. By an agreement dated Oct. 9, 1929, and made under the public seal of the protectorate, the Government of Kenya Colony and Protectorate granted permission to the company to erect a pontoon bridge connecting the island of Mombasa with the mainland on the terms therein contained. On completion, permission was to be obtained from the government to open the bridge and on such permission being given the company

"shall open the bridge to traffic and subject to the payment of the tolls hereinafter laid down the bridge shall be kept open to every vehicle the weight of which when laden is less than five tons and to all foot passengers and animals."

- A By cl. 13 the responsibility for the repair and maintenance of the bridge rested on the company who were entitled to charge tolls. By cl. 22 it was provided:

"Tolls payable by members of the public for crossing the bridge shall not exceed the following:

		Shillings	cents	
B	(a) All passenger vehicles (persons limited to six) ..	2	00	each
	(b) Motor bicycles and rickshaws		50	each
	(c) Push bicycles		25	each
	(d) Foot passengers or persons in excess of six in number travelling in any vehicle		10	each
	(e) Animals		10	each
C	(f) Animals laden		25	each
	(g) Vehicles for commercial purposes loaded or empty not exceeding $1\frac{1}{2}$ tons	2	50	each
	(h) Vehicles exceeding $1\frac{1}{2}$ tons but not exceeding 5 tons (limit 5 tons without permission . . .) ..	4	00	each

- "Note: The tolls payable under (a), (b), (c) and (d) shall cover all baggage, goods etc., conveyed."

- D By cl. 23 it was provided:

"No tolls shall be levied in respect of police or military on duty or their equipment baggage or transport."

Clause 24:

- E "Tolls payable by government or government servants on duty other than as provided under cl. 23 shall be those specified in cl. 22 less twenty-five per centum."

- F After the outbreak of war in 1939, Imperial troops were sent to Kenya and subsequently a transit and leave camp was established on the mainland on the company's estate with the result that civilian traffic using the bridge became negligible and receipts therefrom were insufficient to provide for the maintenance of the bridge. It was, however, agreed between the military authorities and the company that the military traffic would pay some toll although not the full toll. In 1948 the army authorities refused to pay further tolls for military traffic contending that they were exempted from payment under cl. 23 of the agreement.

- G The company argued that under the agreement only the King's African Rifles who were recruited by the Kenya government were exempt from tolls. At that date the bulk of traffic using the bridge consisted of military vehicles in charge of a military driver, himself on duty, carrying soldiers on leave and their wives, friends and families, this transport being officially provided by the military authorities. The company now brought an action against the Crown in England for a declaration that members of the military forces of H.M. Government and their vehicles (other than the military forces and vehicles of the Kenya government that is, the King's African Rifles), were not exempt from liability to tolls chargeable by the company, and for the tolls due from the Crown to the company in respect of the use of the bridge.

- I HILBERY, J., held that on the true construction of the agreement of Oct. 9, 1929, the exemption from tolls contained in cl. 23 did not extend to the armed forces of the Crown on duty, or their equipment baggage or transport, other than the King's African Rifles. He held further: (i) that the Crown as governor of Kenya Protectorate had not there the prerogatives of the Crown recognised by the common law in England; (ii) the agreement of Oct. 9, 1929, could not be regarded as a prerogative grant by the Crown of a franchise of pontage because it was not a grant made by a matter of record; (iii) if the Crown prerogative of exemption from tolls did exist in the protectorate, it was not limited by the express exemptions contained in cl. 23 of the agreement; (iv) the forces of the

Crown were not exempt from tolls in Kenya protectorate by virtue of s. 143 of the Army Act. A

K. Diplock, Q.C., and Rodger Winn for the Crown.

J. G. Foster, Q.C., and M. Littman for the plaintiff company.

Curr. adv. vult.

Feb. 21. The following judgments were read.

DENNING, L.J.: Mombasa is an island off the coast of Kenya. It is connected with the mainland by a pontoon bridge. This bridge was built by the plaintiff company, Nyali, Ltd., who are entitled to charge a toll to persons using the bridge. There is, however, an exemption from tolls for "military on duty" and "their transport". The question is: whom does this exemption cover? This question is of particular importance because the military authorities have set up an army leave centre and holiday camp on the mainland. The only way from it into Mombasa is across the toll bridge. British soldiers on leave and the wives and children of soldiers often cross the bridge. They do not walk across but ride in military vehicles. The drivers of these vehicles are on duty but the passengers are not. We were told that the vehicles regularly take the wives into Mombasa to do their shopping and charge them a fare for doing so. The Crown claims that all of them, soldiers on leave, wives and children, are exempt from tolls. B C D

The pontoon bridge was built under an agreement made on Oct. 9, 1929, by the company with the government of Kenya. The company owned an estate on the mainland at Nyali which they were anxious to develop as a residential area serving Mombasa. The bridge could not be built without the consent of the government because it had to cross the navigable waters of Mombasa harbour. After much negotiation an agreement was reached whereby the company built the bridge together with the approaches for a hundred feet on either side; and the government built the side roads to connect with the main roads on either side. The bridge was to be kept open for traffic and the company were to be at liberty to charge tolls up to certain specified amounts, but there was an exemption for military on duty. The agreement was sealed by both parties. The governor affixed the public seal and the company affixed its common seal. The bridge was opened for traffic about 1931 and no difficulties arose until the outbreak of the war on Sept. 3, 1939. Most of the lorries in Mombasa were then commandeered for military on duty and no tolls were payable by them. The holiday traffic to Nyali beach dropped to nothing. The receipts from tolls became so small that the company had not the money to maintain the bridge. The company made representations to the government of Kenya, and on Jan. 4, 1940, the government agreed that all government traffic, including police, should pay full public rates and that military traffic should pay half rates. Later on during the war the army authorities set up a transit camp at Nyali, and in 1943 they agreed to pay the company a lump sum of £600 a month to cover all tolls for military using the bridge. This continued until Jan. 1, 1947, after which they paid ordinary civilian rates for military traffic until Aug. 31, 1948. The army authorities then claimed that they were exempt from tolls and refused to pay anything. The company do not accept this position and have brought this action to test the position. E F G H

Strangely enough the case has involved the court in complex questions as to the exercise of the Crown prerogative within a protectorate. The Crown says that the right of the company to take tolls is derived from the Crown prerogative; and that, corresponding to this prerogative, there is a Crown exemption whereby all servants of the Crown are exempt from paying tolls; and that the agreement with the company must be construed so as to give effect to this exemption to its full extent. I

The right to charge tolls. In order to do justice to the argument of the Crown it is necessary to inquire by what right the company charge tolls to the persons

- A who use the bridge. If the bridge had been built in England the common law would have provided an answer. In former times there were many cases where a man set up a ferry or made a bridge to cross a river or an arm of the sea. It was usually done to connect two highways so as to save a long journey round. In such a case it is well settled that the owner of the ferry or the bridge cannot of his own head impose a toll on the people who use it. The reason is because
- B it is a thing of public benefit and use; and it ought, therefore, to be under public regulation. He must get lawful authority to levy a toll; and the only authority recognised for this purpose is a Crown grant of a franchise of tolls, or an Act of Parliament. The toll charged must not exceed the amount specified in the Crown grant or in the statute; and if none be specified, it must be reasonable and moderate. All this is to be collected from *Darcy v. Allin*
- C (the *Case of Monopolies*) (1), LORD HALE'S treatise "*DE JURE MARIS*", pp. 6, 7, and 77; LORD MACNAGHTEN'S opinion in *Simpson v. A.-G.* (2) ([1904] A.C. at pp. 482, 483), and the opinion of LORD PARKER OF WADDINGTON in *Hammerton v. Earl of Dysart* (3) ([1916] 1 A.C. at p. 78). There are no modern instances of a Crown grant of franchise, but it is one of the prerogatives of the Crown; and in order to be valid it must be made by matter of record, that is to say, by royal charter or by letters patent under the Great Seal: see CHITTY, PREROGATIVES OF THE CROWN (1820), p. 389.

Such being the position in England, how stands it in the Kenya Protectorate? The important thing to notice is that the Kenya Protectorate is not under the sovereignty of the Queen. It is under the sovereignty of the Sultan of Zanzibar; and it is said with much force that the royal prerogatives of the

- E Crown of England cannot run in a place where the Queen is not Sovereign.
- Before I consider this argument let me explain a little more what the Kenya Protectorate is. It is a strip of land along the East Coast of Africa about two hundred miles long and ten miles wide. It includes the island of Mombasa and the mainland adjacent to it. Inland behind this strip lies Kenya Colony stretching for hundreds of miles back to Uganda. The status of the Kenya
- F Protectorate is different from the status of Kenya Colony. The jurisdiction of the British Crown in the Kenya Protectorate is derived from an agreement made in 1895 between Great Britain and Zanzibar. By it the Sultan of Zanzibar entrusted the administration of the area to officers appointed by the British government who were responsible only to the British government and not to the Sultan. These officers were to have full powers in regard to executive and
- G judicial administration and the levy of taxes, duties and tolls; and they were to have control over all roads, waterways and other means of communication; and many other things; but it was expressly provided that the agreement should not affect the sovereignty of the Sultan in the above mentioned territories. In Kenya Colony, however, the position is different. The jurisdiction of the British Crown in Kenya Colony is derived from an act of annexation in 1920*
- H and the sovereignty of it is in the British Crown.

- The difference in law between the two territories is this: In Kenya Colony the jurisdiction of the British Crown is unlimited; but in the Kenya Protectorate it is only limited. It is limited to such jurisdiction as the Crown has acquired by treaty, capitulation, grant, usage, sufferance and other lawful means. It was suggested to us that the Foreign Jurisdiction Act, 1890, extended this
- I limited jurisdiction so as to make it unlimited. I do not agree. That Act does not extend the jurisdiction of the Crown at all. It only provides for the manner of exercising it. Section 1 says that the Crown can exercise its jurisdiction in the protectorate "in the same and as ample a manner" as it exercises its jurisdiction in a country which has been conquered or ceded. This means that the Crown can exercise its jurisdiction by means of Order in Council or other-

* See the Kenya (Annexation) Order in Council, 1920 (S.R. & O. 1920 No. 2342) and 5 HALSBURY'S LAWS (3rd Edn.) 603, 604.

wise, just as it can in a conquered or ceded country, but it does not enlarge the area of its jurisdiction. This was the view expressed by PROFESSOR W. E. HALL in his TREATISE ON THE FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN, pp. 11 and 12. It is supported by s. 4 of the Act of 1890 (which says that if any question arises as to the existence or extent of the jurisdiction of Her Majesty, a Secretary of State shall decide the question); and also by the East Africa Order in Council, 1902 (S.R. & O. 1902 No. 661), as amended by S.R. & O. 1911 No. 243, which applies English law in the protectorate so far as "the limits of His Majesty's jurisdiction permits".

Although the jurisdiction of the Crown in the protectorate is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan. The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus if an Order in Council is made affecting the protectorate, the courts will accept its validity without question: see *Sobhuza II v. Miller* (4). It follows, therefore, that in this case we must look not at the agreement with the Sultan, but at the Orders in Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction. I turn, therefore, to consider them.

In the first place there is the Kenya Protectorate Order in Council 1920 (S.R. & O. 1920 No. 2343) which has brought the Kenya Protectorate very much within the orbit of Kenya Colony. The governor of the colony is also the governor of the protectorate and is entitled to all the powers of the Crown therein. The executive council of the colony is also the executive council of the protectorate. The legislative council of the colony legislates, not only for the colony, but also for peace, order and good government of the protectorate. And so forth. None of those provisions can be challenged in the courts. In the second place there is an Order in Council which prescribes the law to be applied within the protectorate. Article 15 of this order, the 1902 Order in Council (S.R. & O. 1902 No. 661), as amended by the 1911 order (S.R. & O. 1911 No. 243) says the civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Indian Acts in force in East Africa and

"so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity, and the statutes of general application in force in England on Aug. 12, 1897 . . . Provided always that the said common law, doctrines of equity, and statutes of general application shall be in force in the protectorate so far only as the circumstances of the protectorate and its inhabitants and the limits of Her Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary."

Applying that Order in Council I think that the prerogatives of the Crown apply within the protectorate for they are within the very "substance of the common law". JOSEPH CHITTY in his classic work on the PREROGATIVES OF THE CROWN (1820), p. 4, says that these prerogatives

"form part of, and are generally speaking, as antient as the law itself."

There are, however, the provisos to be considered. The first says that the common law is only to be in force

- A "so far as the circumstances of the protectorate and its inhabitants and the limits of His Majesty's jurisdiction permit."

This proviso does not oust the prerogatives of the Crown. It is plain that the jurisdiction of the Crown in the protectorate has been extended so far as to include everything connected with the peace, order and good government of the area; and the Crown prerogatives certainly come within that description. Moreover if it were relevant I would add that the power to grant a franchise of tolls comes within the very words of the agreement with the Sultan for it confers on the officers of the British government "full powers in regard to the levy of tolls". The next proviso says, however, that the common law is to apply "subject to such qualifications as local circumstances render necessary". This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.

E So in this case, I think that the prerogative of the Crown to grant a franchise of tolls applies in the Kenya Protectorate, but with this qualification, that the grant need not be made by matter of record, such as a charter or letters patent, nor does it need any formal enrolment. By cutting out these technicalities we are left for the protectorate with the simple principle that if a person makes and maintains a bridge connecting two highways he cannot of his own head impose a toll on the persons using it: but the governor and the executive council (that is, the government) can grant him the right to take a toll. They can grant him this right by agreement in writing without any formalities. The tolls must not exceed those specified in the agreement, or, if none be specified, they must be reasonable and moderate. Applying this principle I am of opinion that the right of the company to charge tolls is derived from the agreement made with them by the government of Kenya; and this agreement in turn derives its authority from the common law as applied in the protectorate. If any person should use the bridge and not pay the toll permitted by law he is liable in an action of debt. The debt does not arise out of any contract by him. It is imposed by law.

H *Crown exemption.* The Crown claims that by the common law all the servants of the Crown are exempt from paying tolls for crossing a bridge. I do not think this contention is correct. It depends on whether the toll is a toll-thorough or a toll-traverse. The Crown was exempt from paying toll-thorough, but not from toll-traverse (see *Lord Berkeley's Case* (5)). If a man makes a new bridge where there was none before it is a toll-traverse; but if he only repairs an old bridge where the public have crossed from time immemorial, it is a toll-thorough (see per LORD PARKER OF WADDINGTON in *Hammerton v. Earl of Dysart* (3), [1916] 1 A.C. at pp. 78, 79). I should have thought that the toll for crossing this pontoon bridge together with its approaches, which are private property, would have been regarded by the common law as a toll-traverse. (It is interesting to notice that the toll for crossing the wooden bridge at Ware over the River Lee was a toll-traverse, see *Steinson v. Heath* (6), *R. v. Salisbury* (7); and so also is the toll for crossing the floating bridge at Southampton over the River Itchen, for the Crown has no exemption from it, see *Ward v. Gray* (8).) If the toll in

this case was a toll-traverse, then the Crown has no exemption. Even if it was a toll-thorough, I can see many difficulties in saying at the present day what is the extent of the Crown exemption, particularly to what servants it extends and for what purposes. I decline, however, to go into all these subtleties. They are quite unsuited to the Kenya Protectorate. Toll-thorough and toll-traverse have as little place there as they have in modern England. The East Africa Order in Council (S.R. & O. 1902 No. 661, as amended by S.R. & O. 1911 No. 243) authorises the courts to make the necessary qualifications to suit local circumstances. Making these qualifications, I am of opinion that in the Kenya Protectorate the Crown has no exemption from tolls except such as is expressly given to it by the agreement granting the right to tolls.

After all this long discussion, therefore, I have come to the conclusion that the issues in this case fall to be determined on the construction of the agreement and nothing else. To that I now turn.

The Agreement. The material clauses are these:

" Clause 12: . . . subject to the payment of the tolls hereinafter laid down the bridge shall be kept open to every vehicle the weight of which when laden is less than five tons and to all foot passengers and animals . . . The government by its fully authorised agents may for public purposes require the company to allow vehicles the weight of which when laden does not exceed ten tons to cross the bridge.

" Clause 22. Tolls payable by members of the public for crossing the bridge shall not exceed the following:

	Shillings	Cents	
(a) All passenger vehicles (persons limited to six) . .	2	00	each
(d) Foot passengers or persons in excess of six in number travelling in any vehicle		10	each
(g) Vehicles for commercial purposes loaded or empty not exceeding 1½ tons	2	50	each
(h) Vehicles exceeding 1½ tons but not exceeding 5 tons (limit 5 tons without permission as in cl. 12)	4	00	each

" Clause 23. No tolls shall be levied in respect of police or military on duty or their equipment baggage or transport.

" Clause 24. Tolls payable by government or government servants on duty other than as provided under cl. 23 shall be those specified in cl. 22 less twenty-five per centum."

The important clauses are cl. 22, which clearly imports that tolls shall be payable by members of the public for crossing the bridge, but says that they shall not exceed the specified maxima; and cl. 23 which exempts military on duty and their equipment, baggage or transport. I do not think the exemption in cl. 23 is confined to local troops such as the King's African Rifles. The word "military" when used by British folk includes all the soldiers of the Queen, whether raised locally or coming from the United Kingdom or any other part of Her Majesty's Dominions. But this does not mean that all the traffic to and from the leave camp is exempt from tolls. It must be noticed that the exemption only extends to military on duty. It does not, therefore, extend to soldiers off duty or to soldiers on leave, or to the wives and children, at any rate when going on foot. They rarely do go on foot. They nearly always ride in a military vehicle driven by a soldier who is detailed to drive them. The first question is whether in such a case the vehicle itself is exempt from tolls. If the vehicle is exempt the second question is whether the leave men in it are exempt.

(i) *Military vehicles.* In order to be exempt the vehicles must come within the "transport" named in cl. 22. The clause expressly extends not only to the soldiers themselves but also to their "transport". The word "transport" is

- A used as a noun denoting the physical means of conveying persons and things. It refers to the horses, wagons, lorries and vehicles which soldiers use to carry themselves, their equipment, baggage and so forth. But it is to be noticed that it is only "their" transport which is exempt, that is, the transport of military on duty. Do the vehicles in this case come within that description? I think they do. The driver is the person who gives the character to the vehicle.
- B If he is on duty, the vehicle is on duty. For instance, if he is driving a military vehicle containing stores for the leave camp, it is clearly exempt from tolls. So also when he is driving the troops from Mombasa station to the leave camp or back. Likewise if he is returning empty. The vehicle is, so to speak, on duty, and it is exempt, no matter whether it is carrying baggage, stores or men.
- (ii) *The leave men in the vehicles.* But what about the people in the vehicle?
- C What is the position of the leave men themselves and the wives and children? They are members of the public crossing the bridge and ought therefore to pay a toll unless they can point to some exemption: but there is no exemption covering them. They are not "military on duty": and they cannot shield themselves under the vehicle exemption. If the vehicle had itself paid toll, five men plus the driver would have been covered by the vehicle's toll; but
- D as the vehicle did not pay toll they are not covered by it. The agreement makes it clear that six persons go free in a vehicle when that vehicle has paid toll, but it does not say that they go free when the vehicle has not paid toll. The difficulty is to know what to charge them. The list of charges in cl. 22 (a) to (h) does not cover leave men in military vehicles, or the wives and children who ride in them. They are simply not provided for. But there are many
- E other persons and vehicles not provided for by cl. 22. Do they all cross free or not? The position can best be tested by taking some illustrations. Take vehicles over five tons and under ten tons which the government permit to cross the bridge for public purposes, such as the lorries of public works contractors carrying road materials, the refuse carts of local authorities, and so forth. Or take vehicles under one and a half tons (not being passenger vehicles
- F nor used for commercial purposes) such as tractors or mowing machines used by local authorities or educational institutions. None of these vehicles is provided for in the agreement. But I do not myself think that such vehicles are entitled to cross the bridge free of charge simply because they cannot be brought within any of the categories (a) to (h). These vehicles do not come within any of the exemptions. They are simply not provided for. In these
- G circumstances I think that the company are entitled to charge a reasonable amount. The reason is because the agreement is clearly a grant of a right to take tolls from all members of the public who cross the bridge; and it is a settled rule for construing such a grant that where no particular sum is specified a reasonable sum is chargeable; and what is reasonable is, in the absence of agreement, to be determined by the court (see *Stamford Corpn. v. Pawlett* (9)),
- H and compare *Alnutt v. Inglis* (10)). Apply this to soldiers on leave and their wives. If they travel in a military vehicle with a driver on duty the vehicle itself may be exempt and also the driver, but the men on leave and the wives and children are not exempt. They are members of the public crossing the bridge and the company are entitled to charge a reasonable amount in respect of them. I think, therefore, that a toll should be paid in respect of men and
- I the wives and children who cross the bridge in a vehicle.

The Army Act. Section 143 of the Army Act, exempts soldiers on duty from paying tolls when those tolls are demandable by virtue of any Act of Parliament or

"by virtue of any Act, ordinance, order, or direction of any legislature or other authority in a colony";

and "colony" is defined as including a British protectorate. I doubt whether the Crown can pay in aid this provision, because the toll here is demandable

not by reason of an "order" or "direction" of the government but by the grant of a franchise; but even if the grant of a franchise is regarded as equivalent to a direction, nevertheless the exemption only applies to officers and soldiers "on duty or on the march". It does not exempt men on leave. It also exempts

"all carriages and horses belonging to [Her] Majesty or employed in [her] military service, when conveying any such persons . . . or returning from conveying the same."

This exemption seems to have the same scope as the exemption in the agreement. The driver is a soldier on duty and the vehicle is exempt when conveying him: but the leave men in it and the wives and children are not exempt.

Conclusion. In the result I think that military vehicles driven by a driver on duty are exempt from tolls and so are soldiers in the vehicle who are on duty: but men on leave, wives and children must pay a reasonable toll. They would have to pay a toll if they walked across the bridge and I see no reason why they should not pay when they ride across. The Crown will no doubt pay on their behalf, and I hope that some arrangement may be made for a lump sum to cover them, just as it was in the war years.

MORRIS, L.J.: The claim for tolls which is made in this case is not made against a party to the "agreement" of Oct. 9, 1929, but by virtue of the right to claim tolls which is given by such agreement. On behalf of the Crown it is said that the real nature and effect of the agreement was to grant a franchise to take tolls: and that such grant was made by the Crown in the exercise of its prerogative rights in the Protectorate of Kenya. In the submission of the Crown it should have been held that the claim against the Crown failed for the reasons (a) that the terms of the "agreement" excluded liability, (b) that the Crown having a prerogative exemption from tolls was not liable to pay tolls for the use of the bridge and (c) that by an application of s. 143 of the Army Act a freedom from liability resulted.

The area of territory which comprises the Kenya Protectorate is under the sovereignty of the Sultan of Zanzibar. It is the fact of such sovereignty which leads to the result that the territory is not Crown territory: but within it the Crown is the protecting power. The circumstance that sovereignty is elsewhere does not prevent the Crown from exercising power in the protectorate. When the Crown, as the protecting power, exercises its power, the prerogatives of the Crown are employed and are brought into play. In 1895 there was an agreement between Great Britain and Zanzibar respecting the possessions of the Sultan of Zanzibar on the mainland and adjacent islands, exclusive of Zanzibar and Pemba. At earlier dates there had been commercial treaties and from 1890 the territories of the Sultan had been under the protection of the British Crown. In 1897 there was an Order in Council, the East Africa Order in Council, 1897 (S.R. & O. 1897 No. 575). Article 11 (a) begins with the words:

"Subject to the other provisions of this order and to any treaties for the time being in force relating to the protectorate Her Majesty's criminal and civil jurisdiction in the protectorate shall . . .".

In 1902 there was the East Africa Order in Council, 1902 (S.R. & O. 1902 No. 661). The opening words are:

"Whereas the territories of Africa situate within the limits of this order are under the protection of His Majesty The King, and are known as the East Africa Protectorate. And whereas by treaty, grant, usage, sufferance and other lawful means, His Majesty has power and jurisdiction within the said territories: Now, therefore, His Majesty, by virtue, and in exercise of the powers on this behalf by the Foreign Jurisdiction Act, 1890, or otherwise, in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows."

A The powers which the Crown proceeded to exercise were, therefore, those which resulted from treaty or from grant or from usage or from sufferance or from other lawful means.

In the East Africa Order in Council, 1902, there are no words such as the words:

B "Subject to . . . any treaties for the time being in force relating to the protectorate."

If in an Order in Council there is a reference to a treaty in such manner that it may become necessary to decide whether the terms of the treaty warrant some particular course of action, then the court may have to decide such a question. But in the ordinary course it is not for the court to accept an invitation to investigate whether the power and jurisdiction of the Crown results from treaty or from grant or from usage or from sufferance or from other lawful means: nor is it for the court to permit any challenge to the pronouncement of the Crown that it has power and jurisdiction within certain territories.

The preamble of the Foreign Jurisdiction Act, 1890, is in the following terms:

D "Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of Her dominions."

Section 1 of the Act provides that:

E "It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

The effect of this Act was described in the judgment of the Privy Council in *Sobhuza II v. Miller* (4). VISCOUNT HALDANE in delivering the opinion of the

F Board said ([1926] A.C. at p. 522):

"The question which at once presents itself is, what is the meaning of a protectorate? In the general case of a British protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its government cannot hold direct communication with any other foreign power, nor a foreign power with its government. This is the substance of the definition given by SIR HENRY JENKYNs at p. 165 of his book on BRITISH RULE AND JURISDICTION BEYOND THE SEAS. Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected state becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession . . . The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles."

Having referred to *R. v. Earl of Crewe, Ex p. Sekgome* (11), and *Re Southern Rhodesia* (12), LORD HALDANE said (*ibid.*, at p. 525):

"Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it,

is an act of state. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable."

The Crown therefore exercises its power, which owes its origin to treaty or grant or results from usage or sufferance or other lawful means, just as though the territory had been acquired by conquest or by cession.

Following on the East Africa Order in Council, 1902, there were other Orders in Council including one in 1911 (S.R. & O. 1911 No. 243) by which amendments of the order of 1902 were made. The provisions of art. 15 (1) and (2) of the East Africa Order in Council, 1902, as later amended, are of importance.

In the absence of any evidence suggesting that there are any provisions in the Indian law which was in force in East Africa which affect the present issues, the result appears to be that civil and criminal jurisdiction in the High Court of East Africa is to be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on Aug. 12, 1897. There is, however, the proviso that the common law, the doctrines of equity and statutes of general application are to be in force only so far

"as the circumstances of the protectorate and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances render necessary."

The reference to the limits of jurisdiction does not seem to me to be sufficiently explicit to be a reference to the treaty of 1895. If, however, the terms of that treaty are to be looked at, it is clear that the Crown is given power in the matter of tolls. The powers and prerogatives of the Crown must, I think, be comprehended within the phrase "the substance of the common law". Further, the common law does not exclude from the powers and prerogatives of the Crown the right to grant a franchise of pontage. In BACON'S ABRIDGMENT, vol. 6, p. 481, in reference to grants arising from the King's prerogative of power and which are inseparably annexed to the Crown it is said:

"So the king may grant pontage or murage to be taken by those who erect new bridges or walls: but the payment thereof shall continue no longer than the bridge remains useful, or the wall necessary for the defence of the subject."

A consideration of the law which the Crown has ordered to be applicable in the protectorate leads therefore to the conclusion that no relinquishment from the plenitude of its power debarred the Crown from granting a franchise to demand tolls and from making a grant in such manner, having regard to local circumstances, as should be appropriate. The necessity of making the grant in any special manner is therefore obviated.

In 1920 there was the Kenya Protectorate Order in Council, 1920 (S.R. & O. 1920 No. 2343). Its fifth recital was that it was

"expedient to make further and other provision for the peace, order and good government of the territories formerly comprised in the East Africa Protectorate other than those now included in the Colony of Kenya."

This followed a recital that the Kenya (Annexation) Order in Council, 1920 (S.R. & O. 1920 No. 2342) provided

"that the territories comprised in the East Africa Protectorate save and excepting only such territories therein included as form part of the dominions of His Highness the Sultan of Zanzibar shall, from and after the coming into operation of the said order be annexed to and form part of His Majesty's Dominions and shall be known as the Colony of Kenya."

By art. 5 of the Kenya Protectorate Order in Council, 1920, the Governor of Kenya Colony was to be Governor of Kenya Protectorate and he was empowered

A to exercise on His Majesty's behalf the powers and jurisdiction of His Majesty in the territories of the protectorate. Article 12 dealt with the jurisdiction of the courts.

The "agreement" of Oct. 9, 1929, was made between the company and "the Government of Kenya Colony and Protectorate". The public seal of the colony was affixed. That seal was by the Order in Council deemed to be also the public seal of the protectorate. When the "agreement" was made the effect in my judgment was to grant to the company a right to construct and maintain the bridge and to charge tolls for the use of it: the grant was made by the governor in the delegated exercise of the prerogative powers of the Crown, no relinquishment or abandonment of those powers having withdrawn from the Crown that attribute of power which entitled the Crown to grant a franchise of pontage. By cl. 23 of the agreement it is provided that no tolls are to be levied in respect of police or military on duty or their equipment, baggage or transport. The term "military" is one that is in frequent use and that is well understood. If there is occasion for the presence in Kenya Protectorate of military forces of the Crown it does not seem to me that they would fail to be denoted by the phrase "military on duty" because they were not recruited from Kenya Colony or Kenya Protectorate. I do not accede to the view that the phrase "military on duty" is a reference to the East African Rifles. It may well be that in 1929 the contemplation would have been that the only military on duty who would be likely to cross the Nyali bridge would be the troops of the East African Rifles. But the agreement did not specify any limitation. In 1912 there was an ordinance (the King's African Rifles Ordinance, Laws of Kenya, c. 40) dealing with the establishment of the King's African Rifles. By art. 4 it is provided:

"There shall be established and maintained in the colony one or more battalion or battalions of troops forming part of a regiment of His Majesty's forces styled the King's African Rifles hereinafter called 'the regiment'."

By art. 5 it is provided:

F "The regiment shall be charged with the defence of Kenya Colony, and of the Kenya, Uganda, Nyasaland and Somaliland Protectorates, with the maintenance of order and with such other duties as may be from time to time defined by the governor or commissioner of the colony or protectorate within which any portion of the regiment may from time to time be stationed."

G Article 8 (1) deals with employment beyond the colony. A consideration of this ordinance reinforces the view which I would have formed apart from it that military forces are the forces of the Crown and that it would be inapposite and incorrect to regard the troops of the East Africa regiment as being "servants" of the Government of Kenya Colony and Protectorate.

H It was submitted that the words in cl. 24 of the agreement

"Tolls payable by government or government servants on duty other than as provided under cl. 23"

I showed that the "police or military on duty" referred to in cl. 23 were government servants and it was argued that the exclusion must have been of police who were government servants and of military who were government servants and that the latter must have been the East African Rifles. But sufficient substance is found for the words "other than as provided under cl. 23" if they denote, as in my judgment they do, the police in the protectorate. It is provided by para. 10 of the Police Ordinance (Laws of Kenya, c. 36) that

"Superior police officers and inspectors shall from time to time be appointed in such manner as a secretary of state may direct, and in the absence of any special directions on this behalf they shall be appointed in a similar manner to other officers in the service of the colony."

In the exemption from tolls of military on duty there is therefore no confinement A
to the military in the East African Rifles.

If this view is correct the question arises as to the position when a military
vehicle is detailed to convey military personnel. Owing to events in Kenya
there are many troops there. A leave camp has been established in Kenya
Protectorate near where the bridge from Mombasa joins the mainland. It is
recognised by the military authorities that troops at the leave camp will have
occasion to go into Mombasa and transport for them is arranged. It happens, B
therefore, that drivers of military vehicles are ordered to drive to Mombasa
and to carry military personnel. There may be occasions when relatives or
friends are permitted to accompany such personnel. When a vehicle uses the
bridge a toll will be demanded of its driver. If the driver qualifies to be within
the words "military on duty" it seems to me to follow that no toll can be
exacteD either in respect of him or of his vehicle. What then is the position if
he carries passengers? In all normal circumstances his only passengers would
be those whom he is authorised to convey. If the passengers are military on
duty—then there is clear exemption from tolls. If the passengers are military
who are not on duty or any relatives or friends who are permitted to be with
them, then they will be chargeable for tolls to the extent that there is authority D
to charge. A reference to cl. 22 (d) of the agreement shows that a specified
charge may be made for each one of the "persons in excess of six in number
travelling in any vehicle". This I think is the basis on which the right to demand
tolls from military not on duty should be founded. If military not on duty
walk across the bridge a toll of ten cents per person may be demanded: if
military not on duty are conveyed in a military vehicle on an authorised journey E
driven by a military driver on duty then for each person in excess of six in number
travelling in the vehicle a toll of ten cents per person may be demanded. I
consider therefore that because of the provisions of the agreement there was no
liability to pay the tolls demanded. No exemption can be claimed or has been
claimed in respect of private vehicles used by members of the military forces
when on leave or otherwise not on duty. F

It was further submitted that liability could be resisted because the Crown
enjoys a prerogative exemption from the payment of tolls: in support of this
submission the decision in *Westover v. Perkins* (13) was cited as an illustration
of exemption. I do not find it necessary to express an opinion how far the
immunity of the Crown extends, for the reason that I consider that the Crown
can by apt words in a grant provide for a liability in respect of tolls which might G
not otherwise arise. Questions often arise as to whether some particular Act of
Parliament binds the Crown. No such questions arise here. We were referred to
the decision in *Weymouth Corp'n. v. Nugent* (14) where notwithstanding that in
an Act of Parliament certain specific exemptions from wharfage duties were
provided for in favour of the Crown yet a general Crown exemption was upheld. H
COCKBURN, C.J., said (6 B. & S. at p. 34):

"The question here is, whether the Crown, acting through one of its
servants, is liable in respect of stone brought into the harbour of Weymouth,
for the use of the government works, to the duties imposed by stat. 6 Geo. 4,
c. 116. The doctrine as to the immunity enjoyed by the Crown from the
payment of tolls arose in the times when tolls were leviable by virtue of a
grant from the Crown, or by prescription from which a grant from the Crown
was presumed; and it may well be assumed that when tolls were so granted
the Crown did not intend to include itself in the liability to pay them. But
whether or not that be the origin of the immunity, it has obtained from the
earliest times, and we cannot suppose that the legislature took upon itself
to make the Crown liable to the payment of these duties without mentioning
the Crown in the statute. Even supposing that those who represent the I

- A Crown could not succeed upon the first principle, I think the second concludes the case. The rule that the Crown is not bound by an Act of Parliament unless specially named in it, applies in such a case as the present, where tolls and duties are taken under a local Act; so that this is not within the exceptional cases in which the Crown, though not named, is bound. Mr. Lush relies on s. 23, which contains exemptions in favour of the Crown, and he insists upon the doctrine that the expression in a statute of certain exemptions leads to the inference that it was intended by the legislature that there should be no others. But the case falls within the principle laid down in BACON'S ABRIDGMENT, PREROGATIVE (E), p. 5, referred to in the argument, and we must suppose that the exemptions were inserted *ex majori cautela*, with the view of pointing out to those charged with the collection of the duties the cases most likely to arise, in which they were to abstain from demanding them. I am fortified in this opinion by the judgment of LORD CAMPBELL in *Westover v. Perkins* (13)."

In the present case, however, the Crown has by its grant provided for certain exemptions from and certain liabilities for tolls and has done so by arrangements which seem to me to be comprehensive and to exclude immunity beyond the extent prescribed.

- D By the Army Act, as amended by subsequent Acts, certain exemptions from tolls are given which apply in a protectorate. All officers and soldiers of the regular forces on duty or on the march and all carriages (meaning vehicles for carriage or haulage other than those specially constructed for use on rails) belonging to Her Majesty or employed in her military service when conveying
E any such persons or returning from conveying them are exempted from payment of any tolls, in passing over any bridge, otherwise demandable by virtue of any Act, ordinance, order or direction of any legislature or other authority in a protectorate. (See s. 143 of the Army Act as amended.) The tolls in the present case do not seem to be

- F "demandable . . . by virtue of any Act, ordinance, order or direction of any legislature of other authority"
in the Kenya Protectorate. If they were, then any statutory exemption would only apply to officers and soldiers of the regular forces "on duty or on the march". Officers and soldiers on leave would not therefore qualify for exemption even if the statutory provision had applied.

- G For the reasons which I have given I consider, therefore, that the appeal succeeds. It seems manifest that recent events in Kenya have caused a very different state of affairs from that contemplated in the year 1929. At all times, both during the period when sums of money were by agreement paid for the use by the military of the bridge and since that period, the expenses of the maintenance of the bridge have had to be undertaken by the company. It
H may be that increased user necessitates additional burdens of maintenance. The only duty of the court is to decide the legal position: but the proceedings may serve to clarify certain considerations which would seem to be important if discussions take place as to granting a new basis of demanding tolls.

- I PARKER, L.J. : Interesting and important questions as to the exercise of the prerogative in a protectorate and as to the application therein of the Army Act, have been debated in this appeal but there is one short point which in my opinion is decisive in the Crown's favour—namely, that on its true construction the word "military" in the phrase

"military on duty or their equipment baggage or transport"

in cl. 23 of the agreement of Oct. 9, 1929, includes all soldiers of the Queen.

The matter arises in this way. Ever since 1890 the island of Mombasa off the coast of East Africa together with the strip of mainland opposite and to the north and south of it, all of which form part of the dominions of the Sultan

of Zanzibar, has been a British protectorate. Since 1920, following the annexation of Kenya, the protectorate has been administered by the Governor of Kenya Colony and the legislature of that colony. By 1929, the company, then known as the Nyali Bridge and Development Company, had acquired a large estate for residential purposes on the mainland to the north of the island of Mombasa and desired to erect a bridge connecting the island with the mainland leading to this estate. On Oct. 9, 1929, the Government of Kenya Colony and Protectorate entered into an agreement with the company under the public seal permitting the company to erect a pontoon bridge connecting the island with the mainland on the terms therein contained. The bridge was to be constructed according to drawings, calculations, plans and specifications approved by the director of public works and the government were to construct roads to connect the approaches at each end with existing highways. On completion, permission was to be obtained from the government to open the bridge and on such permission being given the company

"shall open the bridge to traffic and subject to the payment of the tolls hereinafter laid down the bridge shall be kept open to every vehicle the weight of which when laden is less than five tons and to all foot passengers and animals "

(see cl. 12). By cl. 13, the bridge was to be kept open for traffic as aforesaid continuously except when closed for repairs or by order of the director of public works. The responsibility for repair rested with the company who were entitled to charge tolls. Clauses 22, 23 and 24 deal with tolls.

"Clause 22: Tolls payable by members of the public for crossing the bridge shall not exceed the following:

	Shillings cents		
(a) All passenger vehicles (persons limited to six)	2	00	each
(b) Motor bicycles and rickshaws		50	each
(c) Push bicycles		25	each
(d) Foot passengers or persons in excess of six in number travelling in any vehicle		10	each
(e) Animals		10	each
(f) Animals laden		25	each
(g) Vehicles for commercial purposes loaded or empty not exceeding 1½ tons	2	50	each
(h) Vehicles exceeding 1½ tons but not exceeding 5 tons (limit 5 tons without permission as in cl. 12)	4	00	each

Note: The tolls payable under (a), (b), (c) and (d) shall cover all baggage goods etc. conveyed.

"Clause 23. No tolls shall be levied in respect of police or military on duty or their equipment baggage or transport.

"Clause 24. Tolls payable by government or government servants on duty other than as provided under cl. 23 shall be those specified in cl. 22 less twenty-five per centum."

After the outbreak of war, Imperial troops were sent to Kenya and after a time a transit and leave camp was established on the mainland on the company's estate with the result that civilian traffic over the bridge became negligible and receipts therefrom were insufficient to provide for the maintenance of the bridge. It was, however, agreed between the military authorities and the company that the military traffic would pay something, albeit not a full rate. By 1948, however, Imperial troops were still stationed in Kenya and the army authorities in that year stood on what they conceived to be their strict rights and refused to pay tolls for military traffic. The company for their part took up the attitude that under the agreement only the King's African Rifles were exempt from tolls and ultimately these proceedings were brought, not, be it observed, against the other

A party to the agreement but against Her Majesty's Attorney-General as representing the Crown in this country for a declaration that, in effect, Imperial troops were liable to pay tolls.

Speaking for myself, I cannot construe "military" in cl. 23 as meaning anything less than the soldiers of the Queen. Save that the privates, non-commissioned officers and native officers of the King's African Rifles are recruited locally in East Africa, are paid by the Government of Kenya Colony and that the regiment is charged primarily with the defence of Kenya Colony and the Protectorate, I can see nothing to distinguish them from other soldiers of the Queen. The regiment's officers, other than native officers, are appointed by the Secretary of State and all ranks take, on enlistment, the usual declaration of allegiance to Her Majesty. In treating "military" as confined to the King's African Rifles the learned judge was, I think, largely influenced by the wording of cl. 24 which provided that government servants on duty other than as provided under cl. 23 should only pay seventy-five per cent. of the tolls prescribed by cl. 22. This, so the argument runs, shows that the "military" in cl. 23 were being treated as servants of the Government of Kenya Colony and Protectorate and no military other than the King's African Rifles could be described, however inaptly, as servants of that government as opposed to servants of the Queen. The fallacy of this argument, as it seems to me, is that cl. 23 also exempts police which in Kenya Colony and Protectorate are servants of that government and, accordingly, the expression in cl. 24, "other than as provided under cl. 23" was necessary. The argument, based on cl. 24, could, as it seems to me, only be valid if it were possible to read cl. 23 as itself a proviso to cl. 24. To do so, however, would be to rewrite the clauses and not to ascertain the intention of the parties from the language used.

The matter does not end there, however, since the main traffic over the bridge now consists of military vehicles in charge of a military driver, himself on duty, carrying soldiers on leave or the families and friends of soldiers at the camp. Such passengers are not persons who have "thumbed" a lift but persons for whom the military authorities choose to provide transport. Sometimes no one but the driver is on duty, sometimes some of those carried are also on duty. The Crown contends: (1) that where a military vehicle has been detailed by the military authorities to cross the bridge in charge of a military driver on duty neither the driver nor the vehicle is chargeable; and (2) that by reason of paras. (a) and (d) of cl. 22 the first six persons (including the driver) are exempt from tolls whether they are on duty or not and that only any excess over six if not on duty are chargeable.

As to the first contention I agree with the learned judge who said:

"I think that the right way to read it here is that it is an exemption, as it says, of military on duty or that which is going with the military on duty, the transport, and that the transport in such a case is going with a driver on military duty, and I think in those circumstances it would be exempt."

When one or more (apart from the driver) of those carried are on duty, then the vehicle is clearly "their transport" notwithstanding that others in the vehicle may be on leave. Further, where the only person on duty is the driver I should have thought that the vehicle was transporting him notwithstanding that he was the driver and that accordingly the vehicle could properly be described as his transport. In this connection it is to be observed that, under the somewhat similar words of s. 143 of the Army Act, it has been assumed that an officer's private car which he was authorised to use for journeys on duty was exempt from tolls though carrying no one but the officer who was the driver (c.f. the first of the two cases dealt with in *A.-G. v. Selby Bridge Proprietors* (15)). And this was so despite the fact that on the particular wording of that section which deals specifically not only with vehicles carrying soldiers on duty but vehicles returning from carrying the same, it was arguable that the driver was not a person conveyed.

As to the second contention, it would be an odd result that military not on duty should not be chargeable if carried in a military vehicle but chargeable if they were on foot. Yet, where is the power to charge such a person if he is one of six passengers in the vehicle? It would have been possible to provide that such a person should be chargeable, but nowhere are there to be found words apt to charge him. He is indeed a *casus omissus* and one can think of others in going through cl. 22. It was suggested that there was power nevertheless to lay down fresh classes of person liable to tolls, but in my opinion, cl. 12 affords a conclusive answer to the existence of such a power. As I have already indicated, cl. 12 provides that the bridge is to be kept open to all traffic subject only to the payment of the tolls actually prescribed in the agreement. It seems to me, therefore, that the Crown is right also in this contention.

That is sufficient to decide this case, but since the other points have been fully argued and have been dealt with by the learned judge it is only right that I should express my views shortly on them.

The prerogative. The Crown contends that the permission to charge tolls given by the agreement was given in the exercise of the prerogative right to grant a franchise of pontage and that whatever the agreement says all Crown servants are exempt from paying such tolls. So far as this country is concerned, it is clear that no man can lawfully charge a toll unless authorised so to do by Act of Parliament or by a grant of franchise from the Crown and such a grant to be valid must be by royal charter or by letters patent under the Great Seal. It is said, however, that the prerogative does not run in Kenya Protectorate, first, because the sovereignty of the territory is still in the Sultan of Zanzibar and, secondly, because in any event the local law does not incorporate the common law in so far as such prerogative rights are concerned.

The position in the protectorate is, shortly, as follows: As I have said, the territory in question, together with the other dominions of the Sultan, became in 1890 a protectorate. By an agreement made in 1895 the administration of the territory was handed over by the Sultan to officers appointed by the British government who were to be responsible solely to that government. They were to have full power in regard, in particular, to the executive and judicial administration and the levy of taxes, duties and tolls and were to have control over roads, waterways and other means of communication. The agreement, however, expressly provided that the sovereignty of the territory was to remain in the Sultan. It seems to me that at that point of time Her Majesty's prerogative powers in regard to this territory cannot be described as a residue of powers legally left in the hands of the Crown but are in truth the plenitude of the Sovereign's powers in regard to the matters handed over to her by the agreement. It is by virtue of this plenitude of powers that Her Majesty can thereafter set up legislative and executive authority for the territory and can lay down the law to be applied therein. Unless and until her powers are curtailed by the constitution set up for the territory or by the law made applicable therein, Her Majesty governs by virtue of the prerogative. In truth and in fact the sovereignty remaining in the Sultan is but a residue of sovereignty. But even if I am wrong in this it is, I think, clear that these courts will not consider the limits of the jurisdiction granted by treaty or otherwise to Her Majesty. Such limits may be extended by sufferance and usage and the courts will and must assume that the legislative or other acts in question are within the jurisdiction granted. All that they can do is to look at the instrument manifesting the exercise of the jurisdiction to see whether it has been lawfully exercised, according to the law in force (cf. *Sobhuza II v. Miller* (4)).

I turn, therefore, to the relevant legislation in force in 1929. By art. 5 of the Kenya Protectorate Order in Council, 1920 (S.R. & O. 1920 No. 2343), the Governor of Kenya Colony was authorised, empowered and commanded to exercise on His Majesty's behalf all such powers and jurisdiction as His Majesty

- A before or after the passing of the order had or might have in the territories and to that end to do or cause to be taken all such measures and to do or cause to be done all such matters and things therein as were lawful. It is clear, therefore, that if the local law has not curtailed the prerogative power to grant a franchise of pontage the governor had the power to make such a grant. By art. 15 of the East Africa Order in Council, 1902 (S.R. & O. 1902 No. 661), as amended in 1911
- B by S.R. & O. 1911 No. 243, it was provided that civil and criminal jurisdiction should, so far as circumstances admit, be exercised in conformity with the Indian law in force in East Africa and subject thereto

“in conformity with the substance of the common law the doctrines of equity and the statutes of general application in force in England on Aug. 12, 1897.”

- C To this there was a proviso in these terms:

“Provided always that the said common law doctrines of equity and statutes of general application shall be in force in the protectorate so far only as the circumstances of the protectorate and its inhabitants and the limits of His Majesty’s jurisdiction permit, and subject to such qualification as local circumstances render necessary.”

- D I should have thought that it was quite impossible to suggest that the prerogatives of the Crown were not within the substance of the common law. Nor, in my view, can it be said that the proviso cuts down or ousts the right to grant a franchise of pontage. Indeed, by applying the common law “subject to such qualifications as local circumstances render necessary” the necessity for the
- E grant being made by matter of record is obviated and it is sufficient if the grant is made under the public seal. Nor do I think that the words “and the limits of His Majesty’s jurisdiction permit” are intended to open the door to an investigation of the jurisdiction acquired by treaty, usage or sufferance, but in any event, as I have already said, the agreement of 1895 gives ample power.

- F In my opinion, therefore, the permission to charge tolls given to the company by the agreement of 1929 amounted to a prerogative grant of a franchise of pontage and the question of Crown exemption then arises. As I understand it, the Crown is exempt from payment of tolls-thorough, but is not exempt from payment of tolls-traverse, and this whether the tolls are in respect of highways, bridges or ferries. In *Hammerton v. Earl of Dysart* (3), LORD PARKER OF WADDINGTON said ([1916] 1 A.C. at p. 78):

- G “Tolls are generally classified as tolls-traverse and tolls-thorough. If, apart from the franchise, no one would have had a right to do that for which the toll is charged, the toll is a toll-traverse. If, apart from the franchise, anyone would have had the right to do that for which the toll is charged, the toll is a toll-thorough. In the former case the consideration moving to the public may be found in the right conferred on the public by the franchise. For example, if before the creation of the franchise the road for the use of which toll is charged was a private road, the consideration may be the dedication of the road to the public. In the latter case the consideration moving to the public cannot be the dedication of the road, for the road was ex hypothesi at the time of creation of the franchise already a public road. It must be found elsewhere, for example, in an obligation to
- H keep the road in repair.”
- I

Applying this test I should have thought that the tolls in the present case were tolls-traverse and, accordingly, that there was no Crown exemption except, of course, in so far as it is expressly provided for in the grant. But quite apart from this I am not satisfied that the principle in *Weymouth Corpn. v. Nugent* (14), applies in the circumstances of the present case.

The Army Act, s. 143. This provision is applicable, since 1932, in a protectorate (see the definition of colony and court of summary jurisdiction in

s. 190). Accordingly it runs in the protectorate and the only question is whether the tolls demandable by virtue of the agreement of 1929 are A

"demandable . . . by virtue of any Act, ordinance, order or direction of any legislature or other authority."

In my opinion these words are not wide enough to embrace the agreement. The words "order or direction of any . . . other authority" contemplate delegated legislation. Indeed it is to be observed that so far as this country is concerned the exemption does not apply unless the tolls are demandable by virtue of an Act of Parliament. In my opinion the exemption was not intended to apply anywhere to tolls demandable by virtue of a royal grant of franchise. However, therefore, the matter is approached, this case, as it seems to me, falls to be determined on a true construction of cl. 23 of the agreement of 1929 which I dealt with at the outset. I would only add this: this agreement falls to be applied in circumstances quite different from those which the parties could have envisaged in 1929. I have in mind in particular the presence of this leave camp. Once, however, the legal position has been ascertained, I have no doubt that the Crown will be prepared to negotiate an agreement to meet these altered circumstances. I would allow this appeal. B
C
D

Appeal allowed.

Solicitors: *Treasury Solicitor; Travers Smith, Braithwaite & Co.* (for the plaintiff company).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

M. W. HARDY & CO., INCORPORATED *v.* A. W. POUND & CO., LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Romer, L.JJ.), February 10, 11, 25, 1955.] E

Sale of Goods—Licence necessary for export—Whether buyers' or sellers' duty to obtain—English contract—Export licences granted only to Portuguese suppliers. F

Conflict of Laws—Contract—Sale of goods f.a.s.—Proper law of contract English—Goods to be shipped from foreign port—Licence necessary for export—Whether sellers' duty to obtain licence having regard to foreign law. G

By a contract made in London in April, 1951, the sellers, an English company, agreed to sell to the buyers, an American company, for United States dollars, a quantity of Portuguese turpentine f.a.s. buyers' tank steamer at Lisbon during the second half of May, 1951, payment by confirmed irrevocable credit in sellers' name in Lisbon. At the time when the contract was made, the sellers knew that the buyers required the goods for shipment to Eastern Germany. The sellers then entered into a contract to purchase the goods from suppliers in Portugal. Under Portuguese law, at all material times, the export of turpentine was prohibited except under licence, export licences were granted only to Portuguese suppliers, and goods could not be delivered f.a.s. at Lisbon until they had been cleared through the Portuguese Custom House where the licence had to be produced. There was no mention of an export licence in the contract between the buyers and sellers, and at the date of the contract the buyers, apparently, did not know that a licence was necessary; but the contract between the sellers and their Portuguese suppliers was subject to the licence being granted. On May 4, 1951, the buyers wrote to the sellers giving them the name of the tanker which they had chartered and enclosing a copy of the charterparty which showed that the goods were to be carried to Rostock, and, subsequently, the buyers opened a letter of credit in the sellers' name H
I

- A in Lisbon. On May 22 the suppliers applied to the Portuguese authorities for a licence to export the turpentine to Rostock but the application was refused, and, in consequence, the goods could not be delivered f.a.s. the buyers' tanker at Lisbon since they could not be cleared through the customs. The buyers were not prepared to give shipping instructions for any port other than Rostock. On the question whether it was the duty of the buyers to have obtained the export licence,

Held: although the proper law of the contract was English, the performance of the contract, so far as it was to be carried out in Portugal, was to be regulated by the law of Portugal, and, as the only persons to whom the Portuguese authorities would grant an export licence were the Portuguese suppliers, the duty of obtaining the licence was on the sellers, because they alone were in touch with the Portuguese suppliers; and, therefore, the buyers were not in default.

Brandt (H. O.) & Co. v. Morris (H. N.) & Co., Ltd. ([1917] 2 K.B. 784) distinguished.

Appeal allowed.

[As to F.A.S. Contracts, see 29 HALSBURY'S LAWS (2nd Edn.) 228, para. 308.

- D As to the Party on whom the Duty to Obtain a Licence falls, see 8 HALSBURY'S LAWS (3rd Edn.) 182, para. 315; and for cases on the subject, see 12 DIGEST (Repl.) 451, 3395, 3398; 39 DIGEST, 3rd Supp., 895a, 2562b.

As to Contracts being Governed by the Law where they are to be Performed, see 7 HALSBURY'S LAWS (3rd Edn.) 74, para. 139; and for cases on the subject, see 11 DIGEST (Repl.) 427, 743 et seq.]

- E Cases referred to:

(1) *Brandt (H. O.) & Co. v. Morris (H. N.) & Co., Ltd.*, [1917] 2 K.B. 784; 87 L.J.K.B. 101; 117 L.T. 196; 39 Digest 666, 2555.

(2) *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London)*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 12 Digest (Repl.) 451, 3395.

- F **Appeal.**

The buyers, M. W. Hardy & Co., Incorporated, appealed from an order of McNair, J., dated Nov. 12, 1954, whereby he gave judgment for the sellers, A. W. Pound & Co., Ltd., on a Special Case stated by the Board of Appeal of the London Oil and Tallow Trades Association (Incorporated).

- G The dispute arose out of a contract made in England whereby the sellers agreed to sell to the buyers a quantity of Portuguese turpentine f.a.s. buyers' tanker in Lisbon. The buyers intended to ship the turpentine to East Germany and chartered a tanker to sail to Rostock. By Portuguese law the export of turpentine was prohibited except under licence, and an application by the sellers' Portuguese suppliers for a licence to export the turpentine, the subject-matter of the contract, to Rostock was refused by the Portuguese authorities.
- H The sellers thereupon asked the buyers for new instructions for shipment of the goods but the buyers refused to give shipping instructions for any port other than Rostock and treated the contract as at an end. The parties having submitted the dispute to arbitration, the arbitrators awarded that the buyers were in default in respect of failure to accept delivery. The buyers appealed from the arbitrators' award to the Board of Appeal of the London Oil and Tallow Trades Association, asking them to state their award in the form of a Special Case for the decision of the court. The questions of law for the opinion of the court were:
- I (i) Did the refusal by the Portuguese authorities of a licence for the export of the contract goods to Eastern Germany operate to discharge the contract between the sellers and the buyers? (ii) Did the refusal of the export licence (a) excuse the sellers from making delivery, or (b) excuse the buyers from taking delivery? (iii) Did the sellers' failure to obtain a licence for the export of the goods to Rostock constitute a breach of contract by the sellers? (iv) Was there a duty

to obtain an export licence from Portugal in respect of the contract goods (a) on the sellers or (b) on the buyers? (v) Were the obligations of the parties as to obtaining export licences governed by English or Portuguese law? (vi) Was either and which party liable to the other in respect of the failure to make or take delivery of the contract goods? (vii) Did the buyers' failure to order the goods to be placed alongside a vessel by which the goods might lawfully be exported from Portugal constitute a breach of contract by the buyers? (viii) Did a letter dated May 29, 1951, from the buyers to the sellers constitute a wrongful repudiation of the contract by the buyers? The board held, subject to the opinion of the court, that the refusal by the Portuguese authorities of a licence for the export of the contract goods to Eastern Germany operated to discharge the contract between the sellers and the buyers, and they reversed the award of the arbitrators. McNAIR, J., held that the buyers were in default, and restored the award of the arbitrators.

Leonard Caplan, Q.C., and N. Lawson for the buyers.

T. G. Roche for the sellers.

Cur. adv. vult.

Feb. 25. LORD GODDARD, C.J.: I will ask SINGLETON, L.J., to read the first judgment.

SINGLETON, L.J.: This appeal arises out of an agreement for the sale of a quantity of turpentine. The agreement was made in London. The goods to which the contract related were in Portugal. McNAIR, J., held that the buyers were in default and that they were liable in damages for breach of contract. The buyers appeal against that judgment. M. W. Hardy & Co., Incorporated, which is an American company and is hereinafter referred to as "the buyers", entered into an oral contract with A. V. Pound & Co., Ltd. (hereinafter called "the sellers") under which the former agreed to buy from the latter three hundred metric tons of Portuguese gum spirits of turpentine of good merchantable quality at a price in U.S. dollars equivalent to 11,000 escudos per one thousand kilos net, f.a.s. buyers' tank steamer at Lisbon during the second half of May, 1951, payment by confirmed irrevocable credit in sellers' name in Lisbon. The contract was confirmed in writing, and its terms are set out in a letter from the sellers to the buyers dated Apr. 20, 1951. The buyers required the goods for shipment from Lisbon to Rostock in Eastern Germany. The sellers, at the time when they entered into the contract, knew that the buyers contemplated Eastern Germany as the destination for the goods. On Apr. 20 they wrote to their suppliers: "we have now been told definitely that the destination of this material is Germany." On May 4, 1951, the buyers advised the sellers that in connection with the contract they had chartered the tanker Elizabeth B. with lay days May 20-30, 1951, and they enclosed a copy of the charterparty, which shows that the goods were to be carried from Lisbon to Rostock. On May 8, 1951, the sellers wrote to the buyers:

"We thank you for your letter of yesterday advising us that the owners of the tanker Elizabeth B have given notice of readiness to load the three hundred tons Portuguese turpentine, covered by the above contract, on [May 24/25]. We also confirm our telephone conversation of yesterday evening when we requested you to arrange for the opening of a transferable credit, in dollars, in our name with the Banco Burnay in Lisbon. The credit should be opened for the equivalent of about 3,300,000 escudos—converted at the official rate ruling in Lisbon at the time of opening the credit. It would be as well to allow for a margin on this sum as the shipping weight may be slightly under or above three hundred metric tons."

The buyers opened a letter of credit in accordance with the terms of the contract. The tanker Elizabeth B. arrived at Lisbon in due time and was there ready to receive the contract goods. The goods were in Lisbon waiting to be

- A brought forward to the customs. Under Portuguese law turpentine cannot be exported without an export licence. On May 22 the sellers' suppliers applied to the Junta* for an export licence to export the turpentine to Rostock, and on May 24 the Junta refused the application. Again, under Portuguese law goods cannot be delivered f.a.s. at Lisbon until they have been cleared through the Portuguese Custom House, where the necessary export licence must be produced.
- B The result of this was that the sellers were unable to deliver the goods f.a.s. Various telephone conversations took place between the parties, and the letters of May 29, which I must read, passed. The sellers wrote to the buyers as follows:

- C "Dear Sirs, We refer to our recent telephone conversations with regard to the three hundred tons Portuguese turpentine sold to you for account of your New York office on [Apr. 20], and covered by our contract of that date. In our opinion the refusal of the Portuguese authorities to grant an export licence for Rostock does not invalidate the contract which calls for delivery 'f.a.s. buyer's tank steamer in Lisbon.' The turpentine is available for immediate delivery and we must ask you to let us have today new instructions for shipment of the goods. Yours faithfully, A. V. Pound & Co. Ltd. (Sgd.) A. V. Pound, director."

- D The reply from the buyers was:

- E "Dear Sirs, Re: three hundred tons Portuguese turpentine for Eastern Germany. We are in receipt of your letter of today's date and would like to inform you that under no circumstances are we prepared to give you shipping instructions for any other port than Rostock. The goods were bought for that port and confirmed by you for shipment to Eastern Germany. Your inability to ship the goods to Eastern Germany constitutes a breach of contract and we must hold you fully responsible for any damages suffered by us in consequence of such default. We have not been able to complete negotiations with our customer regarding a replacement of the parcel and we must reserve the right to substantiate our claim at a later date. We are also holding you responsible for any damages sustained by us through cancelling the charter of the steamer Elizabeth B. We would like to add that your letter of [May 29] constitutes a complete change of attitude on your part and we can only gather from this that you do not wish to continue the amicable and informal negotiations which have taken place so far and under the circumstances and in order to safeguard our interest, we propose to continue this correspondence through our legal advisers. Yours faithfully, M. W. Hardy & Co., Ltd."

- G Those letters set out the main contentions of the parties.

- H There is an arbitration clause in the contract. Arbitration was claimed, and arbitrators who were appointed awarded that the buyers were in default, and they assessed the damages payable by the buyers to the sellers at the sum of 300,000 escudos. The buyers appealed to the Board of Appeal of the London Oil and Tallow Trades Association, whose award was stated in the form of a Special Case. The board held, subject to the opinion of the court, that the refusal by the Portuguese authorities of a licence for the export of the contract goods to Eastern Germany operated to discharge the contract between the sellers and the buyers, and, accordingly, they reversed the award of the arbitrators. On Nov. 12, 1954, McNair, J., having heard argument on the Special Case, decided in favour of the sellers and restored, in effect, the award of the arbitrators with the result set out in para. 23 of the Case†.

- I * Junta Nacional dos Resinosos, which controlled all sales of turpentine within and from Portugal.

† By para. 23 of the Special Case, on the basis that the buyers were liable in damages but that the sellers should have mitigated their damages in the manner in which they in fact did, the board awarded that the buyers should pay to the sellers the sum of 300,000 escudos.

The judgment of the learned judge appears to be based mainly on the decision A of the Court of Appeal in *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (1). In that case the buyers [*H. O. Brandt & Co.*] were a business house in Manchester, and *Morris & Co., Ltd.*, the sellers, were manufacturers of aniline oil in the neighbourhood of Manchester. On Sept. 3, 1914, the buyers agreed to buy from the sellers sixty tons of pure aniline oil with deliveries spread over the period from September, 1914, to January, 1915, mode of delivery f.o.b. Manchester. B After the contract was made the export of aniline oil was prohibited by an Order in Council, but licences to export were granted in certain cases. No deliveries were made in December, 1914, or January, 1915. It appeared from the correspondence that during the time when the prohibition was in force the buyers left it to the sellers to apply for a licence to export. The sellers, accordingly, applied in September to the Board of Trade for a licence, which was C refused, but on an application in December a licence was granted for a shipment in January, 1915, but the licence arrived too late for shipment during that month. The evidence also showed that in time of war the name and address of the person to whom goods intended for export were to be sent must be stated. The buyers claimed damages for non-delivery of the balance of the sixty tons of aniline oil. The sellers contended that the buyers were not entitled to sue on the contract*; that during the time when the prohibition against export was in D existence they were "prevented" from making deliveries within the meaning of condition 1 of the contract; and that, as to the period from Sept. 25 to Dec. 11, the prohibition was removed on an undertaking given by them and the only two other manufacturers of aniline oil in this country to supply the home demand first before exporting any oil, that after supplying the home demand there was E no oil or hardly any left for export, and that this amounted to a "prevention". *LAWRENCE, J.*, held that the buyers were parties to the contract and were entitled to sue on it; that during September, notwithstanding the prohibition, the sellers had in fact exported twenty tons of aniline oil; that as to the period from Sept. 25 to Dec. 11, during which there was no prohibition, the undertaking to the Board of Trade did not amount to a prevention; that in respect of the F period after Dec. 11 the sellers, who had taken on themselves the obligation of obtaining a licence, did not make sufficient applications for a licence; and that therefore the sellers had no defence to the action. On appeal it was held by the Court of Appeal that the obligation of applying for a licence lay on the buyers and not on the sellers, and the judgment which had been given in favour of the buyers was set aside.

VISCOUNT READING, C.J., said ([1917] 2 K.B. at p. 795): G

"As regards the December and January deliveries, the learned judge held that there was a duty on the defendants to use their best endeavours to obtain a licence to export the oil, and he was not satisfied that they had done so; and that, even if the duty was not imposed on them by the contract, H they had taken upon themselves the duty. I am unable to agree with the learned judge that the duty of applying for the licence was upon the defendants. They had contracted to sell f.o.b. They had therefore contracted to put the oil on board a vessel selected, not by them, but by the plaintiffs. It was the duty of the plaintiffs to find the ship, and the facts which it was necessary to state when a licence had to be applied for were known to them I and not to the defendants. All that the sellers know in such a case is that they have sold the goods to their buyers. I have therefore come to the conclusion that there was no such duty on the defendants as the learned judge has found, and the result is that the defendants have not committed a breach of the contract in not delivering in December and January."

* This contention was based on the fact that, in the bought and sold notes between the parties, "For and on behalf of" an American firm appeared under the plaintiffs' name.

A SCRUTTON, L.J., said (*ibid.*, at p. 798):

“The next point is this: This is a contract to sell sixty tons of aniline oil f.o.b. Manchester. At the date of the contract there was no prohibition against the export of aniline oil. In *Re Anglo-Russian Merchant Traders & John Batt & Co. (London)* (2), the contract was a c. and f. contract, and at the date thereof there was an existing prohibition against export except under a licence. A question arose as to whose duty it was to obtain a licence. BAILHACHE, J., held that the person who had contracted to sell undertook to obtain the licence or to pay damages. This court held that, as there was a finding of fact that the seller had done all in his power to get a licence, at any rate his obligation was not higher than that, and that therefore he was not liable. In this case it becomes necessary to go further and to decide whether in this f.o.b. contract the obligation to obtain a licence, in case there should after the making of the contract be a prohibition against export, lies upon the sellers or the buyers. In my opinion it lies upon the buyers. The buyers must provide an effective ship, that is to say, a ship which can legally carry the goods. When the buyers have done that the sellers have to put the goods on board the ship. If that is so, the obtaining of a licence to export is the buyers' concern. It is their concern to have the ship sent out of the country after the goods have been put on board, and the fact that under s. 8 of the Customs and Inland Revenue Act, 1879, as amended by s. 1 of the Customs (Exportation Prohibition) Act, 1914, a prohibition against export includes a prohibition against bringing the goods on to any quay or other place to be shipped for exportation does not cast the duty of obtaining the licence on the sellers. Bringing the goods on to the quay is merely subsidiary to the export which is the gist of the licence. In my view, therefore, in a contract of this kind it is for the buyer to get the licence. It is further said that, if the duty *prima facie* was on the buyers to get the licence, in this case the correspondence shows that the sellers took upon themselves the burden of getting it. Having carefully considered the correspondence I have come to the conclusion that there is nothing in it from which I can say that legally any such burden is placed on the sellers.”

There is no doubt that, if the decision in *Brandt's* case (1) covers the case now under appeal, the sellers are entitled to succeed. The question for determination is whether, on the contract which the court is now asked to consider, the duty on the buyers is the same as it was held to be in *Brandt's* case (1). There are differences. In the one case the contract was a f.o.b. contract; in the other it is a f.a.s. contract. I do not think that that of itself is of much help. Of more importance are the facts that in *Brandt's* case (1) both contracting parties were Manchester business people and that they were contracting with regard to something produced in this country and which the buyers wished to export. There was no need for a licence to export at the time the contract was made. The buyers alone knew where they wished the goods to go and to whom they wished them to go, so that they alone could supply the necessary information when a licence to export the goods was required (see the judgment of VISCOUNT READING, C.J., quoted at p. 670, letter G, ante). In the case which we are considering an export licence from Portugal was necessary at the date when the contract was made. That does not appear to have been within the knowledge of the buyers, but it was known to the sellers. The confirmation note of their contract with their suppliers, which is dated Apr. 23, 1951, contains the words “Subject to usual agreement of the Junta Nacional Dos Resinosos being granted.”

I take these findings from the Case Stated by the board:

“20 (a) The buyers required the said goods for shipment from Lisbon to Rostock in Eastern Germany. The sellers knew at the time they entered into the contract that the buyers contemplated Eastern Germany as the

destination for the said goods. (b) The sellers did not disclose to the suppliers at the time of entering into the contract with the suppliers [on Apr. 23, 1951] that the destination of the said goods was Eastern Germany. (c) At all material times it was unlawful by Portuguese law to export turpentine from Portugal without an export licence. The Junta Nacional Dos Resinosos (hereinafter called 'the Junta') was the body in Portugal delegated by the Portuguese government with the power of granting export licences for the export of turpentine from Portugal. (d) The Junta controlled all sales of turpentine both within and from Portugal. By Portuguese law sales of turpentine within Portugal did not require a licence, but could only be transacted between a registered supplier (of whom the suppliers in this case were one) and a registered retailer. No sale of turpentine in Portugal could be transacted between a registered supplier and a person other than a registered retailer unless the sale were for export. (e) By Portuguese law in a sale for the export of turpentine the duty of obtaining the necessary export licence was cast upon the Portuguese supplier, who had to be registered with the Junta. The Junta would only entertain applications for export licences from suppliers registered with them. Neither the sellers nor the buyers were registered with the Junta, either as suppliers or as retailers. (f) By Portuguese law goods cannot be delivered f.a.s. at Lisbon until they have been cleared through the Portuguese Custom House, where the necessary export licence must be produced."

Paragraph 11 of the Case Stated reads:

"On May 22, 1951, the suppliers applied to the Junta for an export licence to export the said turpentine to Rostock, and on May 24, 1951, the Junta refused the application."

The learned judge held that the duty of obtaining an export licence was on the buyers, or that, at any rate, the risk of failure to obtain the export licence was on them, and that they were responsible in damages. On behalf of the buyers it was submitted to this court that that conclusion was wrong, and that, on the facts of this case, there was no such duty on the buyers. Counsel for the sellers relied on the decision of this court in *Brandt's* case (1).

I am unable to see that, in the case now under appeal, the duty of obtaining an export licence was on the buyers. I suppose that they got into touch with the sellers because of the sellers' connection with Portugal; the correspondence which is exhibited shows something of the friendly relationship which existed between the sellers and their suppliers. The buyers could not obtain a licence. It does not appear that they were given the name of the suppliers, though the sellers had written to their suppliers on May 8, 1951, that they had given the suppliers' name to the buyers. I do not know when the buyers first knew that a licence to export turpentine from Portugal was necessary. The letter from the sellers to the buyers dated May 29, 1951, shows that there had been telephone conversations and refers to the refusal of the Portuguese authorities to grant an export licence for Rostock. The Portuguese suppliers had written to the sellers on May 25:

"As advised, we did everything possible to obtain the export licence, so that the goods in question could be shipped to Rostock. However, for political reasons, this was not possible as already explained to Mr. Pound over the telephone."

No one appears to have suggested until the trouble arose that the buyers ought to do anything in regard to a licence. The commodity was in Portugal. Both parties seem to have assumed that the suppliers would arrange for a licence. The suppliers and the sellers knew at an early stage that the buyers intended to ship the goods to Rostock, and apparently no difficulty was foreseen. It had been arranged that payment should be made in a way fit for a consignment destined

A for Germany. How, then, can it be said that the buyers were in default? The sellers say that the goods were ready in Lisbon and could have been put alongside the ship if she had been bound for any place other than Rostock, and that it was for the buyers to obtain an export licence. In other words, they are saying that they would have put the goods alongside if the buyers would undertake not to ship them to Rostock. Is this not seeking to introduce a new term into the contract, to wit, a proviso that the goods are not to be sent to, or put on a ship bound for, Rostock? If the difficulty as to Rostock had been met, a like question might have been raised in regard to some other port in Eastern Germany, or elsewhere. And on any change there must arise the expense of another letter of credit and of chartering a ship. Normally in such a case the buyer has entered into a contract of re-sale, and forthwith arranges the ship.

C The question to be determined depends on the construction of the contract and on the facts of this particular case. It is not a case in which both parties are in this country and one (the buyer) wishes to export goods from this country. In my view, the duty of the buyers under this contract was to open confirmed irrevocable transferable credit in the sellers' name in Lisbon and to produce an effective ship at the right time. The buyers complied with both those requirements, and so fulfilled their duty. They cannot be made to pay damages unless they have broken the contract. It was the duty of the sellers to place the goods alongside the ship. They could not do that unless an export licence had been obtained. The buyers knew nothing as to this. One cannot determine the duties of the parties to a contract of this nature without regard to the facts, and among the facts of importance are the place at which the contract is made, the situation of the parties, and the place at which the goods are at the time when the contract is made.

In the course of his judgment McNAIR, J., said:

F "Of course, it must be borne in mind that, even on a finding that the proper law of the contract is English, it may still be the fact that in so far as the performance is to be carried out in Portugal that part of the contract has to be regulated by Portuguese law."

With that I respectfully agree. I would add that, though both parties must be assumed to know the law of this country, no such assumption arises in the case of the law of Portugal. The sellers were in a better position to deal with any question as to a licence than were the buyers, for they, in turn, were contracting with Portuguese suppliers. In the circumstances I consider that the duty of obtaining the licence was on the sellers rather than on the buyers; the sellers were in touch with their suppliers, through whom alone a licence to export could be obtained. It is not necessary to say more than that I cannot see that there was any such duty on the buyers, who do not ask for damages against the sellers.

G It may be that the question of licence was overlooked on both sides or that neither realised that in the absence of an export licence the contract could not be fulfilled. The judgment of SCRUTTON, L.J., in *Brandt's* case (1) does not cover every f.o.b. contract, still less every f.a.s. contract. From the business point of view, it appears to me that it was more convenient, to say the least, that the sellers should deal with any question as to export licence from Portugal through their suppliers—and that seems to have been the intention. I know of no principle of law which prevents the court having regard to those matters. On the facts of this case I am unable to see that the buyers were in default, and in my opinion the judgment of McNAIR, J., to that effect cannot stand.

I Counsel for the sellers raised a further point to the effect that, by their letter of May 29, 1951, the buyers repudiated the contract before time for its performance had expired. I do not think that there is any substance in this. The letter was in reply to a letter of the same date from the sellers in which they set up their case and asked for further instructions to which, on the view which I

have expressed, they were not entitled. I would allow the appeal and order A that the judgment in favour of the sellers be set aside.

LORD GODDARD, C.J.: I need not reiterate the facts which are all stated in the judgment of SINGLETON, L.J. I confess to finding this a difficult case, and while I am reluctant to differ from McNAIR, J., in a case of this nature, I have come to the conclusion that the award of the board of appeal of the association is right. McNAIR, J., has based his judgment on that of this court in *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (1), but, in my opinion, there are very material differences between that case and the present. In *Brandt's* case (1) the contract was between two English companies for the sale of goods in England f.o.b. and was made at a time when an export licence was not required. Subsequent legislation required a licence to be obtained. As the buyers knew to what country they wanted the goods shipped, it was for them to obtain a licence. That the contract in the present case was f.a.s. and not f.o.b. is, in my opinion, immaterial. What is material is that in this case the contract was made in England for shipment of goods from Portugal, where, at the time when the contract was made, Portuguese law required an export licence before the goods could be put alongside. A further requirement of Portuguese law was that the only persons who could get a licence were the persons who supplied the goods to the sellers, and it was to the suppliers and not to the sellers that any licence would be granted. B

I agree with McNAIR, J., that the proper law of the contract is English, but that its performance must be regulated by the law of Portugal. The buyers would not know the suppliers, nor would the sellers be likely to disclose their names to the buyers, and, at any rate, they never did. What I may, perhaps, call the impact of Portuguese law on the contract makes the vital distinction between this case and *Brandt's* case (1), and, in my opinion, it was for the sellers here, and not the buyers, to obtain, or, at least, to do their best to obtain, a licence which would enable the goods to be put alongside. Then it is said that the sellers were always ready, willing and able to obtain a licence which would have enabled the goods to be put alongside a ship for any destination other than Rostock. The contract is silent as to the destination of the goods, and no assistance is given, in my opinion, to either party by the price being payable in U.S.A. dollars equivalent to an amount of Portuguese currency. The buyers sent a ship, and the contract did not restrict them from sending one bound for Rostock; on the other hand, the sellers had not promised to supply goods that could be sent there. The law of the place of performance, however, prevented them, in the absence of a licence, from putting the goods alongside the ship that was sent, and a licence could not be obtained for export to the port for which the ship was chartered. I cannot see that there was any obligation on the buyers to send another ship or to have the charter of the ship which they had sent altered. In the circumstances of this case, it was, in my opinion, for the sellers to get a licence, and, if it was impossible for them to get one for a particular port, it was for them to have made a provision in the contract barring shipment to that port. C

With regard to the second point raised by counsel for the sellers as to what he contended was the premature cancellation of the contract by the buyers, I have nothing to add to what SINGLETON, L.J., has said. It is abundantly clear that no licence for Rostock could have been obtained. For these reasons I am of opinion that the loss must lie where it falls, and I would allow this appeal and restore the award of the board of appeal. D

ROMER, L.J. (read by LORD GODDARD, C.J.): In my opinion this is by no means an easy case, and one of the main difficulties, as it appears to me, is whether the line of reasoning which led this court in *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (1) to decide against the buyers is, or is not, applicable E

A to the present case. That reasoning appears from the following passages from the judgments of VISCOUNT READING, C.J., and SCRUTTON, L.J., respectively. VISCOUNT READING, C.J., said ([1917] 2 K.B. at p. 795):

B "I am unable to agree with the learned judge that the duty of applying for the licence was upon the defendants [the sellers]. They had contracted to sell f.o.b. They had therefore contracted to put the oil on board a vessel selected, not by them, but by the plaintiffs [the buyers]. It was the duty of the plaintiffs to find the ship, and the facts which it was necessary to state when a licence had to be applied for were known to them and not to the defendants. All that the sellers know in such a case is that they have sold the goods to their buyers."

C SCRUTTON, L.J., after observing that in his opinion the obligation to obtain the export licence which was there in question lay on the buyers, proceeded (*ibid.*, at p. 798):

D "The buyers must provide an effective ship, that is to say, a ship which can legally carry the goods. When the buyers have done that the sellers have to put the goods on board the ship. If that is so, the obtaining of a licence to export is the buyers' concern. It is their concern to have the ship sent out of the country after the goods have been put on board, and the fact that . . . a prohibition against export includes a prohibition against bringing the goods on to any quay or other place to be shipped for exportation does not cast the duty of obtaining the licence on the sellers. Bringing the goods on to the quay is merely subsidiary to the export which is the gist of the licence."

Founding themselves on these observations of VISCOUNT READING, C.J., and SCRUTTON, L.J., the sellers say that in the present case it was the buyers alone who knew where they wanted to send the goods when they contracted to buy them; that under the contract they could nominate any destination they pleased; that the destination was their concern and not the concern of the sellers; and that, accordingly, it was for them and not for the sellers to procure the licence which was necessary to enable the goods to be sent to the port of their selection. This incorporation in the sellers' argument of the reasoning in *Brandt's* case (1) is not, I think, without considerable attraction. I have, however, come to the conclusion, on the whole, that that reasoning is not applicable to the present case, which differs in important respects from the facts to which the court was addressing its mind in *Brandt's* case (1). My Lords have drawn attention to those differences in the judgments which they have delivered, and I do not propose to repeat them. The most important element of difference, as I see it, is that in the present case the sellers knew and were in touch with the proper, if not the only, persons in Portugal (namely, their suppliers) by whose efforts an export licence could be obtained, whereas the buyers not only did not know who the suppliers were, but would have had no means of compelling them to apply for a licence even if they had known. This and other considerations to which my brethren have referred displace, in my opinion, the application of the judgments in *Brandt's* case (1) which have, of course, to be read in relation to the particular contract which was then before the court and to the circumstances relevant to its construction. When one adds to the above considerations the undoubted fact that the sellers were told by the buyers on Apr. 20, 1951, which was the date on which the oral agreement of the previous day was confirmed in writing, of the intended destination of the goods, there is sufficient ground, in my judgment, for implying that the sellers assumed the obligation of obtaining, or of trying to obtain, the necessary licence; or, at the least, that this obligation was not intended to be imposed on the buyers. Notwithstanding,

therefore, the attractiveness of the sellers' argument, I think, on the whole, that it ought not to prevail, and that this appeal should be allowed. A

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Crawley & de Reya* (for the buyers); *Thomas Cooper & Co.* (for the sellers).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] B

THE MARINERO.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 25, 1955.] C

Conflict of Laws—Admiralty action and arrest of ship in England—Previous action in rem proceeding abroad—Arrest abroad of another ship belonging to defendants—Guarantee accepted by plaintiffs in foreign action—Second guarantee in English proceedings—Order staying proceedings in England.

On July 27, 1954, the plaintiffs' ship, the *Cressington Court*, collided with the defendants' ship, the *Marinero*, in the River Plate. On Oct. 2, 1954, the plaintiffs arrested in Amsterdam the *Arriero*, a sister ship of the *Marinero* which was also owned by the defendants. On Aug. 11, 1954, a bank guarantee was provided on behalf of the defendants and accepted by the plaintiffs, and on Aug. 12, 1954, the *Arriero* was released. The guarantee was expressed to be subject to the Dutch court having jurisdiction in the matter. On Nov. 26, 1954, the plaintiffs issued a writ in England and arrested the *Marinero* in Liverpool. On Dec. 8, 1954, the plaintiffs filed their claim in the Dutch proceedings and the defendants filed their defence. On Dec. 9, 1954, the defendants entered a conditional appearance in the English proceedings. A further bank guarantee, dated Dec. 9, 1954, was provided on behalf of the defendants and accepted by the plaintiffs, whereupon the *Marinero* was released. This guarantee was expressed to be subject to the English court exercising jurisdiction. In the Dutch proceedings the defendants pleaded that the court had no jurisdiction as the collision took place in Argentine waters, but there was no evidence before the English court of Dutch law on this point. On the motion to set aside the writ of Nov. 26, 1954, or to stay all proceedings in England, D

Held: by arresting the *Arriero* in Holland and obtaining security for her release the plaintiffs had obtained security in respect of the collision none the less because they obtained it by the arrest of a ship other than the *Marinero*; the security must be regarded as in effect unconditional because, although the guarantee of Aug. 11, 1954, was conditional on the Dutch court having jurisdiction the condition was illusory (since in the absence of evidence to the contrary Dutch law must be presumed to be the same as English law); in the circumstances, therefore, the proceedings in England were vexatious and contrary to good faith, having regard to the plaintiffs' own voluntary act in first obtaining security in Holland by the arrest of the *Arriero* (*The Christiansborg* (1885) (10 P.D. 141) applied; *The Reinbeck* (1889) (60 L.T. 209) distinguished) and the proper order would be to stay proceedings in England and to relieve the defendants from the guarantee given on their behalf on Dec. 9, 1954 (*The Christiansborg* (1885) (10 P.D. 141) followed; *The Golaa* ([1926] P. 103) not followed). E F G

[As to Restraint of Admiralty Actions on account of a *lis alibi pendens*, see 7 HALSBURY'S LAWS (3rd Edn.) 174, para. 311, notes (k) (o); and for cases on the subject, see 11 DIGEST (Repl.) 551, 552, 1585-1589.] H

As to the Presumption that Foreign Law is the same as English Law, see 7 HALSBURY'S LAWS (3rd Edn.) 176, para. 315.] I

A Cases referred to:

- (1) *The Christiansborg*, (1885), 10 P.D. 141; 54 L.J.P. 84; 53 L.T. 612; 11 Digest (Repl.) 551, 1587.
- (2) *The Reinbeck*, (1889), 60 L.T. 209; 6 Asp. M.L.C. 366; 11 Digest (Repl.) 552, 1589.
- (3) *The Golaa*, [1926] P. 103; 95 L.J.P. 60; 135 L.T. 208; 11 Digest (Repl.) 551, 1586.

B**Motion.**

The defendants, the owners of the s.s. *Marinero*, moved the court for an order that the writ of summons dated Nov. 26, 1954, whereby the plaintiffs, the owners of the s.s. *Cressington Court*, claimed damages sustained as a result of a collision between the two ships at Buenos Aires on July 27, 1954, and all further proceedings be set aside, or that all further proceedings be stayed; and that in either event the guarantee on behalf of the defendants dated Dec. 9, 1954, given by way of security for a sum not exceeding £65,000 be discharged on the ground that proceedings for damages had been commenced by the plaintiffs against the defendants and were proceeding (i) in the courts of the kingdom of Holland in which the defendants had been compelled to provide security to the plaintiffs to the sum of £75,000 in return for the release from arrest of the *Arriero*, a sister ship of the *Marinero*, and (ii) in the courts of the republic of Argentina in which security to the sum of £50,000 had been provided by the plaintiffs, and in consequence that the continuance by the plaintiffs of the proceedings in England was oppressive and/or vexatious to the defendants and should not be permitted.

D

- E** *A. A. Mocatta, Q.C.*, and *S. K. Cunningham* for the defendants.
J. V. Naisby, Q.C., and *P. T. Bucknill* for the plaintiffs.

WILLMER, J.: The collision which is the subject of the action took place in the River Plate on July 27, 1954. On July 29, 1954, the defendants instituted an action in the Argentine and arrested the plaintiffs' ship, the *Cressington Court*.

- F** On Aug. 6 security was given by the plaintiffs and their ship was released. Neither then, nor at any time since, have the plaintiffs put in, or even adumbrated any counterclaim in the Argentine proceedings. Instead, the plaintiffs did their best to persuade the defendants' representatives by letter to consent to either Dutch or English jurisdiction; but the defendants were unwilling to consent. On Oct. 2, 1954, the plaintiffs arrested in Holland the *Arriero*, a sister ship of the *Marinero* and owned by the defendants. On Oct. 9, in accordance with Dutch procedure, the plaintiffs served a writ. In order to secure the release of the *Arriero* the defendants furnished a bank guarantee, dated Aug. 11, 1954, satisfactory to the plaintiffs, and on Aug. 12, 1954, the *Arriero* was released. Although it is not material to the present case, the guarantee originally furnished by a Dutch bank has since, by consent, been replaced by a guarantee given by an English bank. Both these guarantees were stated to be subject to the Dutch court being held to have jurisdiction. It should be stated that apparently it is possible to do in Holland what cannot be done here (at present at any rate), namely, arrest another ship belonging to the same owner in order to found jurisdiction in a cause of damage. At any rate, no objection appears to have been taken to the arrest of the *Arriero* in respect of damage alleged to have been occasioned by the *Marinero*. Before any further material steps had been taken in the Dutch action, the plaintiffs ascertained that, contrary to their original information, the *Marinero* herself was proceeding to this country. They then decided, more particularly in view of the condition which had been attached to the guarantee given in the Dutch proceedings, that they would like after all to pursue their rights in this country. Accordingly, on her arrival in Liverpool on Nov. 26, 1954, the plaintiffs instituted the present proceedings and arrested the *Marinero* on the same day at Liverpool. To secure her release the defendants had to give a further guarantee, dated Dec. 9, 1954, which was accepted by the

I

plaintiffs, but it is to be noted that the guarantee given was again conditional on the court exercising jurisdiction. It should be said that the guarantee given to secure the release of the *Marinero* in this country was for a smaller figure than that which had been given to secure the release of the *Arriero* in Holland, the reason for that being, as I understand, that owing to slightly different rules of procedure the limit of liability in this country would be rather lower than it would be in Holland. I was further informed that both in Holland and in this country the limit is considerably lower than it would be in the Republic of Argentine. From Nov. 26 onwards, accordingly, we have suits proceeding at the suit of the plaintiffs in two different countries, one in Holland and one in England, both arising out of the same collision. It is not unimportant that twelve days after the issue of the writ in the present action, namely, on Dec. 8, the plaintiffs took an active step in the prosecution of their Dutch action in that they did whatever corresponds to delivery of the statement of claim, and on the same day the defendants filed their defence.

It is in those circumstances that I am asked, if not to set aside the present writ, at least to stay all proceedings, on the ground that these proceedings are vexatious having regard to the previous proceedings already commenced by the plaintiffs in Holland. I am also invited to take into consideration the action in the Argentine which the defendants have started. But in argument counsel for the defendants did not press that on me; he recognised that, standing by itself, it was not likely to be held a sufficient reason for staying the plaintiffs' proceedings here, and he only relied on it as part of the background of the case, so as to be able to say that there are actually three actions proceeding at the moment in three different countries arising out of the same collision. I think that counsel was right in not attempting to press that secondary point which is advanced by the notice of motion, and I agree with him that by itself the existence of the defendants' suit in the Argentine would not have been a sufficient reason for staying the present proceedings by the plaintiffs. I can, therefore, leave that point and deal with what I conceive to be the real point of the motion, a point which, I confess, is formidable and important.

The argument for the defendants is that the present case is on all fours with *The Christiansborg* (1), which was decided by the Court of Appeal in 1885. It is said that the fact that in the present case it was not the *Marinero*, but a sister ship the *Arriero*, that was arrested is a distinction without a difference, for in the present case, as in *The Christiansborg* (1), the effect of what was done in Holland was to purchase the further immunity of the *Marinero* from arrest in respect of this collision. In those circumstances it is said that precisely the same considerations as led the majority of the Court of Appeal in *The Christiansborg* (1) to say that what was there done was vexatious should apply to the facts of the present case. On the other side, counsel for the plaintiffs pointed out, as is perfectly true, that neither *The Christiansborg* (1) nor any subsequent authority dealt with the unusual position arising where the ship arrested in the foreign proceedings is another ship belonging to the same owners, and not the ship which has been in collision and which is sued here. He pressed on me that the maritime lien attaching at the moment of the collision is a right against the particular ship and, as far as this court is concerned, a right which cannot be extinguished except by the giving of bail to secure the release of the particular ship. Certainly there is no authority for the proposition that the maritime lien attaching to the *Marinero* can be extinguished by the arrest elsewhere of another ship belonging to the same owners. To that argument, however, counsel for the defendants replies that he is not contending that the maritime lien attaching to the *Marinero* is extinguished; all he is asking me to do is to say that in the circumstances it is vexatious to proceed with what would otherwise have been a perfectly proper action to pursue. Counsel for the plaintiffs further relies on the fact that the guarantee given by the defendants in the Dutch proceedings was given subject to

A the condition to which I have already referred. Furthermore, he says weight is added to that point by the fact that by their defence in the Dutch proceedings the defendants have expressly pleaded that the Dutch court has no jurisdiction, because the case concerns a collision in Argentine waters, and under the law of Argentine a claim can only be lodged before the Argentine court. Counsel's argument is that if I were to stay these proceedings it would deprive him of the security which has been obtained in this country, and if thereafter it turned out that the point which the defendants have pleaded in the Dutch proceedings was good, then the guarantee given in the Dutch proceedings would equally be of no avail and the plaintiffs would find themselves without any security whatever.

On the face of it I think the point made by counsel for the plaintiffs, that the guarantee given in the Dutch proceedings is conditional, is attractive. I think, however, one must examine the condition because, as has been stressed over and over again in all the authorities to which I have been referred, one must look at all the circumstances of the case. The point taken by the defendants in the Dutch proceedings, as is agreed by counsel on both sides, is a point which could not possibly have been taken in this country; it is not a defence which would be open to the defendants by English law. Although I have affidavits from Dutch lawyers on both sides, neither of them has expressed any opinion as to the merit of the point taken by the defendants with regard to the jurisdiction of the Dutch court. Indeed, there is no evidence at all before me as to what the Dutch law is. In those circumstances, in spite of the protests of counsel for the plaintiffs, I think I can do no other than follow the ordinary rule and presume that, in the absence of evidence to the contrary, Dutch law is the same as English law. In those circumstances, it immediately appears that the condition attached to the guarantee which was given in the Dutch proceedings is illusory, and that there is no substance in it. As counsel for the defendants put it, it is merely an instance of a business man seeking to protect himself by careful wording of the guarantee to which he puts his signature, and he has reminded me that similar protective wording has been used in connection with the guarantee given in the proceedings in this country. I do not think, therefore, that the fact of a condition being attached to the giving of the guarantee in the Dutch proceedings, so far as the evidence in the present case goes, does anything to deprive the guarantee of its value, or to limit its value in any way.

The question then arises whether I am to extend what I may call the principle of *The Christiansborg* (1) to a case in which it is not the offending ship, but another ship belonging to the same owners, which has been the subject of arrest in the foreign proceedings. It seems to me that the effect of what was done in Holland in the present case was to purchase the future immunity from arrest of the *Marinero*. It seems to me that the giving of the guarantee in the Dutch proceedings had that effect, just as much as if it had been the *Marinero* herself that had been arrested. I apprehend that if the *Marinero* were to proceed to Holland the Dutch court would refuse to sanction her arrest in respect of the same collision. The upshot is that the plaintiffs have their security in respect of this collision none the less because they got it by the arrest of another ship rather than the *Marinero*. The decision of the majority of the Court of Appeal in *The Christiansborg* (1) makes it clear, I think, that the exact form in which the security is given, and the exact method by which it is extracted, does not matter, provided that the substance of it is that, in order to secure the future immunity of the ship and her future ability to continue trading, the defendants are forced to give security. That in effect is what they have been forced to do in the present case. In those circumstances I think that I ought to follow the course taken by the Court of Appeal in *The Christiansborg* (1). To continue to harass the defendants by arresting their ship in this country, notwithstanding the provision of security in the Dutch proceedings, is in all the circumstances vexatious and contrary to good faith, just as much as was the action that was taken in *The Christiansborg* (1).

Counsel for the plaintiffs cited another and later decision of the Court of Appeal, namely, *The Reinbeck* (2), but it seems to me that that case is readily distinguishable both from *The Christiansborg* (1) and from the present case, in that the security that had been provided abroad in that case was provided voluntarily and without the opposite party being in a position to exercise compulsion. In the present case, however, the security obtained by the plaintiffs in the Dutch proceedings was security obtained by compulsion, in the sense that the defendants had to furnish it if they wanted their ship to be released. That distinguishes the present case from *The Reinbeck* (2). I notice that in *The Reinbeck* (2) *The Christiansborg* (1) was cited and distinguished, and BOWEN, L.J., was careful to say (60 L.T. at p. 211):

"It may well be that in actions in rem there may be circumstances which make it an abuse of the process of the court to proceed with the case, but it is material in each case to see whether it is in fact an abuse of the process of the court or contrary to good faith."

It is precisely that which I have tried to do in the present case. On the facts of the present case, and bearing in mind that, as far as has been proved before me, the plaintiffs have perfectly good security in Holland, which was the forum to which they chose to go in the first instance, I think it would be vexatious and an abuse of the process of this court to allow the present proceedings to continue. The other cases cited by counsel for the plaintiffs can be dismissed summarily, if he will forgive my doing so, by saying that they would have been highly relevant if counsel for the defendants had taken his stand on the Argentine proceedings. That point, however, was not seriously argued by counsel, and, as I am not founding any part of my judgment on the existence of the Argentine proceedings, I do not think it is necessary to deal in detail with those other authorities.

I put my decision on the basis that these proceedings are vexatious and contrary to good faith having regard to the plaintiffs' own voluntary act in going first to the court in Holland and there obtaining security by arrest of the sister ship of the *Marinero*. In those circumstances, I think the defendants are entitled to relief, and the only question is as to the form of the order. I notice that in *The Christiansborg* (1) the order made by the Court of Appeal was that the proceedings should be stayed. Notwithstanding that a different order was made by BATESON, J., in *The Golaa* (3), to which I was also referred, I think the proper order is one staying the proceedings, with the additional provision that the defendants be relieved from the guarantee which has been given on their behalf.

Order accordingly.

Solicitors: *Ince & Co.* (for the defendants); *Holman, Fenwick & Willan* (for the plaintiffs).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A R. v. BLANDFORD. R. v. FREESTONE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Gorman, JJ.),
February 28, March 7, 1955.]

Criminal Law—Trial—Place of trial—Receiving stolen goods—Goods stolen in county where trial took place but received in a different county—Jurisdiction of magistrates to issue summons outside their county—Criminal Justice Act, 1925 (15 & 16 Geo. 5 c. 86), s. 11 (1)—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 1 (2) (b).

Justices—Summons—Issuing outside their county—Exercise of their discretion.

B The appellants were charged with receiving stolen goods, the acts of receiving having been committed in the county borough of Southampton and in the county of Stafford. The goods had been stolen in the county of Montgomery. Two other persons, resident in that county, were being proceeded against for receiving property stolen from the same owners and some of the witnesses for the prosecution were common to all the cases. **C** Summonses having been issued in the county of Montgomery requiring the appellants to appear before examining justices there, the appellants appeared before justices in that county and, having been committed for trial at quarter sessions for that county, were tried and convicted. On appeal it was contended that the summonses were not lawfully issued and that quarter sessions had no jurisdiction.

Held: as the offences for which the appellants were summoned to appear before the justices in the county of Montgomery had a sufficient connection with other offences for which other persons were to be charged within the county there was a discretion under s. 1 (2) (b) of the Magistrates' Courts Act, 1952, to issue summonses directed to the appellants outside the county, and in the circumstances the summonses were lawfully issued; accordingly quarter sessions for the county of Montgomery had jurisdiction under s. 11 (1) of the Criminal Justice Act, 1925, to try the appellants for the offences charged.

F Per CURIAM: the High Court could only interfere by means of prohibition or certiorari if there were no ground on which the justice could exercise his discretion under s. 1 (2) (b) of the Act of 1952 (see p. 683, letter I, post).

Observations on factors which may guide the exercise of the discretion conferred by s. 1 (2) (b) of the Act of 1952 (see pp. 683, 684, post).

G Appeals dismissed.

[For the Criminal Justice Act, 1925, s. 11 (1), see 14 HALSBURY'S STATUTES (2nd Edn.) 935.

For the Magistrates' Courts Act, 1952, s. 1, s. 2, see 32 HALSBURY'S STATUTES (2nd Edn.) 421, 424.]

H Appeals against conviction.

The appellants were separately indicted and convicted at the county of Montgomery Quarter Sessions on charges of receiving stolen goods. The goods in question were stolen from a factory at Newtown, Montgomeryshire, but the acts of receiving in respect of which the appellants were summoned and indicted were committed in the county borough of Southampton in the case of the first appellant and in the county of Stafford in the case of the second appellant. **I** Summonses were issued under s. 1 (2) (b) of the Magistrates' Courts Act, 1952, by a justice of the peace in Montgomeryshire requiring the appellants to appear before a magistrates' court for the petty sessional division of Newton Upper in the county of Montgomery. The appellants were not resident in that county. They appeared before the magistrates' court, sitting as examining justices, were committed for trial at quarter sessions for the county of Montgomery under s. 9 (2) of the Act of 1952, were tried and were convicted. Each appealed against his conviction on the ground that he was not lawfully summoned to appear

before the magistrates' court at Newton Upper in the county of Montgomery and that quarter sessions for the county had no jurisdiction to try him for the offence of which he had been convicted. The appellants also appealed against sentence, but this report is confined to the appeals against conviction. A

P. L. W. Owen for the first appellant.

H. G. Talbot for the second appellant.

H. E. Hooson for the Crown. B

LORD GODDARD, C.J., read the judgment of the court: These two appellants were separately indicted and convicted before the quarter sessions for the county of Montgomery for receiving stolen goods. Freestone was sentenced to five years' imprisonment and Blandford to eighteen months and both appealed against sentence. On the case coming before the court it did not appear from such information as we had how the quarter sessions of Montgomery had jurisdiction to deal with the offences as, though the property was stolen in that county, the goods the subject of the charge against Freestone were received by him in the county of Stafford and the receipt by Blandford was in the county borough of Southampton. We accordingly directed that the appeals should be treated as appeals against conviction as well as against sentence and directed that the prosecution should be represented in order that we might hear on what grounds it was suggested there was jurisdiction in the quarter sessions. C

Before 1925 venue in cases of receiving was governed by s. 39 (3) of the Larceny Act, 1916, and that sub-section only enabled a receiver to be indicted, tried and punished in that part of the United Kingdom where he received the property in the same manner as if it had been originally stolen or taken in that part. The law relating to venue in indictable offences was altered and extended by s. 11 (1) of the Criminal Justice Act, 1925, which provided: D

"A person charged with any indictable offence may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence . . ." E

These two men appeared before the justices sitting as examining justices on a summons issued on Oct. 20, 1954, the thieves concerned having been convicted at the quarter sessions on Sept. 23. It seems, therefore, that we have to consider whether the summons on which they appeared was lawfully issued. F

On the hearing of the appeals, counsel for the prosecution informed the court that the reason why these appellants were summoned to Montgomeryshire was because other persons resident in that county were summoned to appear at the same court also charged with receiving in Montgomeryshire similar property stolen from the same prosecutors and he contended that the provisions of the Magistrates' Courts Act, 1952, authorised in these circumstances proceedings being taken in that county. Counsel for both appellants agreed that the facts were as stated by counsel for the prosecution and, as both of them had full knowledge of the facts, having represented the appellants below, we did not think it necessary to call for formal evidence on the point. G

We have now, therefore, to consider the provisions of the Magistrates' Courts Act, 1952, which, as the long title shows, is a consolidation Act relating to the jurisdiction of, and the practice and procedure before, magistrates' courts. H

The Act in effect deals with the practice and procedure both where the magistrates are sitting as a court of summary jurisdiction and where they are sitting as examining magistrates. By s. 1 (2) (b) it is provided that a justice may issue a summons or warrant I

"if it appears to the justice necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with

- A an offence, and who is in custody, or is being or is to be proceeded against, within the county or borough . . .”

By s. 2 (3):

- B “A magistrates’ court . . . shall have jurisdiction as examining justices over any offence committed by a person who appears or is brought before the court, whether or not the offence was committed within the county or borough.”

In our opinion the words “who appears” refer to a person appearing on a summons and the words “is brought before the court” refer to a person brought before the court in custody as the result of an arrest with or without a warrant. So far as this case is concerned we are dealing with a summons and in our opinion

C the words “who appears” must mean “appears on a summons lawfully issued”. If the person has appeared on a summons lawfully issued, then s. 9 directs the magistrates, if they commit for trial, to commit him to quarter sessions or assizes, as the case may be, for the place where he is to be tried. Section 9 (2) of the Magistrates’ Courts Act, 1952, provides that

- D “If a magistrates’ court proposes to commit a person for trial before a court of assize or quarter sessions that has jurisdiction to deal with the offence by virtue only of sub-s. (1) of s. 11 of the Criminal Justice Act, 1925 . . . then—(a) if it appears to the magistrates’ court that the accused would suffer hardship if he were tried in the county or place [in which he has appeared in answer to a summons] the court shall not commit him for trial before the said court of assize or quarter sessions . . .”

- E Provision is also made by the sub-section for appeal to the High Court if the accused applies to the magistrates’ court not to commit him to that court of assize or quarter sessions on the ground that he would thereby suffer hardship and the magistrates’ court refuses his application. As the magistrates did commit under this section to the Montgomeryshire Quarter Sessions we are
- F thrown back again to s. 11 (1) of the Act of 1925 and must consider whether the summons was lawfully issued.

- It is quite clear that but for the fact that two other people were being summoned or being brought up in custody at the same time and place the justices would not in our opinion have had jurisdiction to issue a summons returnable before them for offences committed in Staffordshire and Southampton. The
- G facts of which we have now been apprised, however, appear to bring the case within s. 1 (2) (b) of the Act of 1952. That section operates although the persons are not to be tried jointly. It is enough if some other person is charged with an offence, that is to say, an offence connected with the offence in which the summons has been issued against the other defendant. The justice has to consider whether or not it is necessary or expedient with a view to the better
- H administration of justice that the defendants should be summoned to what may be called a foreign jurisdiction. The fact that persons resident within that jurisdiction are being charged with offences so similar or closely connected that the witnesses for the prosecution or some of them will be the same in both cases may, we think, be a good reason for the justice exercising the discretion vested in him by the section. Further, it is a matter which can properly be considered
- I that, where there are offences which are so similar or closely connected, uniformity in treatment of the accused persons may be desirable. The High Court could only interfere by means of prohibition or certiorari if there were no ground on which the justice could exercise his discretion, and if there had been no such ground, no doubt this court could have quashed the conviction because of the lack of jurisdiction. We cannot limit the words “an offence” so that in this case it would be confined to the theft of the goods, but there must be some nexus between the offence charged against the other person and that in respect of which the summons under consideration was issued.

We desire, however, to emphasise that a justice acting under this sub-section should bear in mind that it is not only the interests of the prosecution that are at stake but also the interests of the defendants. While it may be very convenient and economical from the point of view of the prosecution that the prosecution should be able to proceed in a particular county, it must be remembered that to bring a man, as in this case, from Hampshire to North Wales is a very serious matter. It will necessarily cause him considerable expense and may put very great difficulties in the way of the preparation and presentment of his defence and the calling of witnesses. We are not saying that any injustice or any undue hardship was caused in this case and as the section empowered the justice to issue the summons and we find it impossible to say there were not grounds on which he could exercise his discretion, it follows that the defendants could be lawfully committed to the Montgomeryshire Quarter Sessions and accordingly these appeals fail.

Appeals against conviction dismissed.

Solicitors: *Churchill, Clapham & Co.*, agents for *Richard George & Jenkins*, Newtown (for the first appellant); *Kingsford, Dorman & Co.*, agents for *Argyle & Sons*, Tamworth (for the second appellant); *Milwyn Jenkins & Jenkins*, Newtown (for the Crown).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

MEARNS v. MEARNS AND BULLEN.

[COURT OF APPEAL (Jenkins and Morris, L.JJ.), February 7, 28, 1955.]

Divorce—Costs—Party cited—Adultery admitted—Liability of party cited for issues not connected with adultery.

The wife filed a petition dated July 9, 1952, for divorce on the ground of the husband's cruelty. By his answer the husband denied the allegations of cruelty and cross-prayed for a decree on the ground of the wife's adultery with the party cited. By her reply the wife admitted the adultery, but claimed that the husband had condoned the adultery and had condoned to it by his cruelty. In her discretion statement dated Dec. 14, 1953, the wife admitted adultery with the party cited on two occasions in addition to the occasion alleged in the answer. The party cited did not dispute the adultery alleged against him, entered no appearance and was not present or represented at the hearing of the suit. On Dec. 16, 1953, the wife's petition was dismissed, her pleas of condonation and conduct conducing were rejected, and a decree nisi was granted in favour of the husband on his cross-prayer. The party cited was ordered to pay the husband's costs and the husband was ordered to pay the wife's costs, such costs to be recoverable by the husband from the party cited as costs in the cause. The matters relied on by the wife as constituting cruelty were in no way caused or contributed to by the party cited. On appeal by the party cited against the order as to costs,

Held: it was wrong in principle to saddle a party cited whose adultery with the wife was proved or admitted with the costs of the issue of cruelty alleged by the wife against the husband with which the association and adultery of the wife with the party cited were not closely connected; in the

A circumstances the proper order was to the effect that (i) the husband should bear and pay so much of his own and his wife's costs as would have been incurred if the answer had been confined to contesting the charges of cruelty without raising the issue of adultery; (ii) the party cited should pay the balance of the husband's costs; and (iii) the husband should pay the balance of the wife's costs but should be entitled to recover that balance from the party cited.

B *Kara v. Kara & Holman* ([1948] 2 All E.R. 16) distinguished.
Appeal allowed.

[As to Liability for Costs of Co-respondent in case of cross-charges by Wife, see 10 HALSBURY'S LAWS (2nd Edn.) 764, para. 1206; and for cases on the subject, see 27 DIGEST (Repl.) 573, 5288, 5292.]

C For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (h), s. 50 (1), see 5 HALSBURY'S LAWS (2nd Edn.) 359 and 18 HALSBURY'S LAWS (2nd Edn.) 486.]

Cases referred to:

D (1) *Kara v. Kara & Holman*, [1948] 2 All E.R. 16; [1948] P. 287; 27 Digest (Repl.) 516, 4602.

(2) *Darnborough v. Darnborough & Smith*, (1926), 96 L.J.P. 24; 136 L.T. 384; 27 Digest (Repl.) 573, 5288.

Appeal.

E The party cited appealed against an order of Commissioner SIR HARRY TRUSTED, dated Dec. 16, 1953, ordering him in effect to pay the husband's costs of the whole proceedings, such costs to include the wife's costs. The husband's own costs were taxed at £383 19s. 3d. and the wife's costs, not yet taxed, would reach approximately the same amount. As the adultery was admitted by the party cited and the wife, the party cited had been advised that his liability for costs, if any, would be between £45 and £90, and there was little point in his incurring further costs by being represented at the hearing. He, therefore, took no further steps in the matter and neither attended nor was represented at the hearing of the suit. The order complained of was made by the commissioner without argument whether the party cited should pay the whole costs. The party cited obtained leave to appeal against the order for costs out of time.

F *K. B. Campbell* for the party cited.

G *J. G. K. Sheldon* for the husband.

Cur. adv. vult.

H Feb. 28. JENKINS, L.J., read the judgment of the court: The suit in which this appeal arises began with a petition by the wife, dated July 9, 1952, for dissolution of her marriage to the husband, a naval officer, on the grounds of cruelty. By his answer dated Oct. 29, 1952, the husband denied the wife's allegations of cruelty, alleged that the wife had in or about June, 1950, committed adultery with the party cited at a place in Cornwall, and prayed dissolution of the marriage on this ground with costs against the party cited. The wife put in a reply to the husband's answer whereby she admitted the adultery therein alleged, but claimed that the husband had condoned such adultery and further that he had condoned to it by his cruelty. By her discretion statement dated I Dec. 14, 1953, the wife admitted adultery with the party cited on two occasions in 1950 at hotels in London in addition to the occasion mentioned in the answer. At the hearing of the suit the husband with leave amended his answer by adding an allegation of the wife's adultery with the party cited on the two occasions in London admitted in her discretion statement. The party cited, who did not dispute the adultery alleged against him, entered no appearance and was not present or represented at the hearing.

The case was tried by Commissioner SIR HARRY TRUSTED on Dec. 14, 15 and 16, 1953. The wife's charges of cruelty against the husband were fully investigated

and on Dec. 16 the learned commissioner delivered a careful and detailed judgment in which he reached the conclusion that "on the whole" the wife had not made out a case of cruelty which would justify the granting to her of a divorce. He added that had he thought otherwise he would have had very grave doubt whether or not it would be right to exercise discretion in her favour. As to the prayer in the answer, he held that there was no doubt at all that the wife had committed adultery with the party cited. That was, of course, obvious as the wife admitted it and the party cited did not dispute it. As to the wife's plea of condonation, the learned commissioner rejected it, on the ground that the forgiveness relied on by the wife as condonation took place when the husband was only aware of the one act of adultery in Cornwall originally alleged in his answer, his knowledge of which depended on an admission made to him by the wife as to that one occasion only, without any reference to the two other occasions in London. As to the wife's plea that the husband had condoned to the adultery, the learned commissioner again rejected it, holding

"that there was no possible conduct of his which could conduce to her behaviour, and there was clearly no excuse for her behaviour."

Accordingly, the learned commissioner rejected the prayer in the wife's petition and granted a decree nisi on the cross-prayer in the husband's answer. The delivery of the judgment was followed by a discussion as to costs which resulted in an order to the effect that the party cited was to pay the husband's costs, and that the husband was to pay the wife's costs, such costs to be recoverable by the husband from the party cited as costs in the cause. On Dec. 21, 1954, the party cited obtained the leave of the learned commissioner to appeal out of time from this order as to costs, and pursuant to such leave he now appeals to this court. [HIS LORDSHIP dealt with the evidence explaining the delay in applying for leave to appeal and continued:] In all the circumstances we do not think the appeal should be rejected merely on account of the party cited's delay, which cannot be said to have prejudiced the husband in any way.

We pass, therefore, to consideration of the question whether the present case is one in which the Court of Appeal can properly interfere with the order as to costs made by the learned commissioner. The order here made does, no doubt, bear heavily on the party cited, inasmuch as it makes him liable not merely for the husband's and the wife's costs of the issue of adultery, which he must clearly bear, as the costs which the husband has incurred on his own behalf or must defray on his wife's behalf in proceedings justly brought by him on account of the admitted adultery of the party cited with the wife, but also for the costs of both spouses on the issue of cruelty, although that issue was wholly concerned with charges made by the wife against the husband with which prima facie the party cited had nothing to do. Counsel for the husband referred us to some of the numerous cases which establish the well-known proposition that the power of a trial judge, under s. 50 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and R.S.C., Ord. 65, r. 1, to determine by whom and to what extent the costs are to be paid being by the express terms of the section and rule a discretionary power, his exercise of such discretion by making some particular order as to costs in any given case should not be interfered with by this court, even though he has given the necessary leave to appeal under s. 31 (1) (h) of the Act, unless the circumstances are such as to warrant the conclusion that in making the order under appeal the learned judge took into consideration some irrelevant matter, or excluded from consideration some relevant matter, or proceeded on some wrong principle, so that the order made was not the product of a proper exercise of the discretion reposed in him.

We need not refer to the authorities cited by counsel for the husband in support of this unassailable proposition, which of course we fully accept, and from which it follows that in the present case this court should not interfere with

A the learned commissioner's order as to costs merely on the ground that if it had rested with us to exercise the discretion we would for our part have exercised it in a different manner. It must, however, in our view be wrong in principle to saddle a party cited, whose adultery with the wife is proved or admitted, with the costs of other issues raised between the husband and the wife with which the party cited is in no way concerned, and neither arising out of nor connected

B with the misconduct of which he is proved or admitted to be guilty. Thus in the present case if the facts had been that the last act of cruelty relied on by the wife had taken place before the wife even became acquainted with the party cited, and that she had at some later date admittedly committed adultery with him, it would in our view clearly be wrong in principle to make the party cited liable for the costs of the issue of cruelty raised by the wife's petition. In *Kara v. Kara & Holman* (1) HOBSON, J., sitting in the Court of Appeal in a case in which a co-respondent was held liable for the costs of cross-charges of cruelty made by the wife against the husband, and delivering the judgment of the court on the question of costs, explained in these words the court's reason for holding the co-respondent liable for the costs of these cross-charges ([1948] 2 All E.R. at p. 18):

C

D "We condemned the co-respondent in the costs of the allegations of cruelty on the ground that the history of the case showed that his association and eventual adultery with the wife were bound up with the matrimonial disputes from which the allegations of cruelty arose. In particular, he was closely concerned with the final act of cruelty relied on and was a discredited witness called to support the wife in respect of this final act. In this connection the court was referred to a decision of HILL, J., in *Darnborough v. Darnborough & Smith* (2) in which considerations of this kind actuated the learned judge to make a like order."

E

In the present case the learned commissioner gave no reasons for making the order as to costs appealed from by the party cited. Counsel for the husband

F urged that we should assume that the learned commissioner, having heard all the evidence, came to the conclusion that, as in *Kara v. Kara & Holman* (1), the association and adultery of the wife and the party cited were bound up with the disputes out of which the allegations of cruelty arose, and that, accordingly, the party cited should be saddled with the whole of the costs. Having read the learned commissioner's judgment, we can make no such assumption. The sequence

G of events as narrated in his judgment is plainly against it. The behaviour of the husband relied on by the wife as amounting to cruelty arose, according to her, out of the husband's excessive sexual demands and his rough, not to say brutal, conduct in forcing such demands on her at times when she was unwilling to comply with them. The parties were married on Oct. 6, 1945. The first specific instance of cruelty relied on by the wife took place in December,

H 1946. At this time the spouses were at Lossiemouth where the husband was stationed. The party cited was also stationed there, and, we gather, on friendly terms with both spouses, but there is nothing in the judgment to suggest that the unsatisfactory relations obtaining between the husband and the wife at that period had anything to do with the party cited. The adultery did not take place until the first half of 1950, when the husband was on service abroad, the

I last of the three occasions being in June, 1950. The husband returned in November, 1950. There is no doubt that the wife's brief association with the party cited was by then a thing of the past. He was in fact married in December, 1950. The wife's admission to the husband of one of three acts of adultery took place in December, 1950, when, knowing only of this one incident, he seems to have forgiven her. He did not know of the other two occasions until they were disclosed by her discretion statement. The last two incidents of cruelty relied on by the wife were of precisely the same character as the incident of

December, 1946, and the inference seems irresistible that they were recrudescant symptoms of the same sexual maladjustment as had caused the earlier trouble. We have been unable to discern in the learned commissioner's judgment any finding, express or implied, to the effect that any of the episodes relied on by the wife as cruelty were caused or contributed to by the party cited. On the contrary, he seems to us to treat the husband's allegedly cruel conduct on the one hand and the wife's brief adulterous association with the party cited on the other hand as entirely distinct and separate matters, and we think this must be taken to have been his view of the facts. In the brief discussion as to costs which followed the judgment no one was concerned to argue that the party cited should not bear all the costs. In substance, the only question debated was whether the wife should be given her costs against the party cited or the husband should pay the wife's costs with a right to recoupment against the party cited, and the learned commissioner adopted the latter alternative.

For the reasons we have endeavoured to state we think the order made was wrong in principle so far as it made the party cited liable for the costs of the husband and the wife on the issue of cruelty. In our judgment, therefore, this court is free to vary the order in accordance with our own view of the justice of the case. We think the proper order to be made in the circumstances is an order to the effect that: (i) The husband should bear and pay so much of his own and the wife's costs as would have been incurred if the answer had been confined to contesting the charges of cruelty without raising the issue of adultery. (ii) The party cited should pay the balance of the husband's costs, and (iii) The husband should pay the balance of the wife's costs, but should be entitled to recover such balance from the party cited. The effect of an order in this form should be to make the party cited liable for the costs of the issue of adultery, including the costs of the pleas of condonation and conduct conducive raised by the wife, so far as the raising of those pleas occasioned any addition to the costs which would have been incurred on the hypothesis mentioned in (i) above. Accordingly, we would allow this appeal and vary the learned commissioner's order as to costs in the way we have indicated. We were told that under the arrangement to which we have referred the party cited has already paid a total of some £320 on account of the husband's costs. Any excess of this amount over and above the total sum payable by the party cited under the order now to be made should be repaid to him.

Appeal allowed.

Solicitors: *Bircham & Co.* (for the party cited); *Wedlake, Letts & Birds* (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A Re HUTCHINSON (*deceased*). HOLT v. HUTCHINSON AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), February 25, 1955.]

B *Intestacy—Rights of surviving spouse—“Personal chattels”—Horses used for racing—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 46 (1) (i), s. 55 (1) (x).*

C The estate of an intestate who died on Apr. 30, 1950, included twelve racehorses which, during the intestate's life, had been trained for him by his private trainer for flat racing under the rules of the Jockey Club. The racing of the horses had been a recreation of the intestate. The intestate's widow claimed to be entitled to the horses by virtue of the Administration of Estates Act, 1925, s. 46 (1) (i).

D **Held:** the racehorses, not being used for business purposes, were horses within the meaning of that term as used in the definition of “personal chattels” in s. 55 (1) (x) of the Act of 1925, and, therefore, they formed part of the property to which the widow became absolutely entitled under s. 46 (1) (i).

E [**Editorial Note.** An essential fact on which the decision in this case depended was that the use of the horses for racing was purely recreational. In this respect the present case stands with *Sharkey v. Wernher* ([1954] 2 All E.R. 753) where, on an income tax question, it was accepted that the use of horses for racing was purely recreational. In applying the decision in the present case to determine entitlement where the intestate died after 1952 regard must be had to the amendments to the law of intestate succession introduced by the Intestates' Estates Act, 1952, as a result of which it is immaterial to consider entitlement to personal chattels unless the intestate left issue or, e.g., a parent, because otherwise the surviving spouse will take the whole residuary estate (see *ibid.*, s. 4 and Sch. 1, 32 HALSBURY'S STATUTES (2nd Edn.) 121, 123).

F For the Administration of Estates Act, 1925, s. 46 (1) (i), s. 55 (1) (x), see 9 HALSBURY'S STATUTES (2nd Edn.) 751, 762.

For the Intestates' Estates Act, 1952, s. 1, see 32 HALSBURY'S STATUTES (2nd Edn.) 116.]

Cases referred to:

- G (1) *Re Whitby*, [1944] 1 All E.R. 299; [1944] Ch. 210; 113 L.J.Ch. 170; 170 L.T. 176; 2nd Digest Supp.
 (2) *Re Hall*, [1912] W.N. 175; 107 L.T. 196; 44 Digest 736, 5905.
 (3) *Re White*, [1916] 1 Ch. 172; 85 L.J.Ch. 368; 114 L.T. 353; 44 Digest 714, 5625.
 (4) *Re Ogilby*, [1942] 1 All E.R. 524; [1942] Ch. 288; 111 L.J.Ch. 169; 167 L.T. 65; 2nd Digest Supp.

H **Adjourned Summons.**

I One of the two administrators of the estate of an intestate, Walter Victor Hutchinson, deceased, applied by originating summons for the determination of the question whether the twelve racehorses belonging to the deceased at the date of his death and located at Hazely Down Stables near Winchester, and which were at that date being kept in training for racing purposes, were or were not “personal chattels” of the deceased as defined by the Administration of Estates Act, 1925, s. 55 (1) (x).

G. F. Dearbergh for the plaintiff, one of the administrators of the estate.

T. A. C. Burgess for the first defendant, the widow of the deceased, who was also the second administrator.

A. F. M. Berkeley for the second and third defendants, infant children of the deceased, interested in the residuary estate.

DANCKWERTS, J.: The deceased died on Apr. 30, 1950, intestate, and letters of administration of his estate were granted to the plaintiff and the first defendant, who is the deceased's widow, on July 5, 1950. The question which I have to decide concerns twelve racehorses which belonged to the testator at the date of his death. It arises by reason of the fact that the Administration of Estates Act, 1925, s. 46 (1) (i), gives to a surviving widow the personal chattels of the deceased, as defined in the Act, absolutely. By s. 55 (1) (x) the personal chattels are defined as follows:

“ ‘ Personal chattels ’ mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money.”

Of the intestate's twelve horses, eleven were sold after the date of the intestate's death for £5,717 5s. in aggregate. The remaining horse, the twelfth, broke a leg after the death of the intestate and was destroyed, but the administrators received £1,500 in respect of that horse under the policies of insurance.

At the date of the death of the intestate, these twelve racehorses were in stables known as Hazely Down Stables near Winchester in the county of Hampshire, and were being trained on behalf of the deceased by Mr. J. J. Murphy to race under Jockey Club Rules on the flat. Mr. Murphy trained no other horses except those of the deceased, and would be known as a private trainer. The deceased ran also a stud farm known as the Coombe Park Stud of which he was the owner. It seems that the stud farm was run as a distinct and separate business by the deceased. He trained horses there and sold them, and did not run the stud farm merely for the purpose of providing himself with racehorses. It seems plain that the deceased's racing activities were not connected in any way with the stud farm business except that some of his racehorses may have been obtained from time to time from his stud farm. Separate accounts were kept of the stud farm business and income tax was paid on the profits arising therefrom. It is, therefore, plain that the stud farm was a business and that any horses on the stud farm were business assets of the deceased and were so treated. It is also clear from the evidence that the racehorses were in an entirely different category. One of them was ridden sometimes by the deceased, but otherwise the deceased did not ride any of the racehorses, merely using them for what I think was plainly recreation, i.e., racing them.

In those circumstances, it is contended on behalf of the widow that the racehorses fall within the definition of “ personal chattels ” contained in the Administration of Estates Act, 1925, s. 55 (1) (x), and consequently passed to her absolutely under s. 46 (1) (i) and did not pass into residue.

I have been referred to a number of cases: *Re Whitby* (1), *Re Hall* (2), *Re White* (3) and *Re Ogilby* (4). *Re Ogilby* (4) is perhaps of some interest as it dealt with a farm which was carried on by the testatrix, but none of these cases is directly in point. Counsel for the widow relied on *Re Whitby* (1) as indicating that undue limitations should not be placed on the words which are found in s. 55 (1) (x). That particular case concerned cut but unmounted jewels. On the other hand, counsel for those interested in residue relied on the other cases as showing that some restrictive meaning may be placed on words, which otherwise have a comparatively plain meaning, by reason of their juxtaposition to other words such as “ carriages, stable furniture and effects ”. The cases of *Re Hall* (2) and *Re White* (3) were not decisions on s. 55 (1) (x), but were decisions on terms contained in wills relating to a gift of carriages and were cases decided in days when motor cars (which had been exchanged for carriages) were

A comparatively uncommon. In those cases a meaning of a restrictive nature was given to the word "carriages" so as to exclude a motor car.

I do not find that any of those cases really gives me a great deal of assistance. I have to deal with the words contained in the definition in s. 55 (1) (x) as I find them. Racehorses are horses, and, therefore, *prima facie* it is plain that they must be so treated, unless I am to find some restriction arising from words to

B be found in juxtaposition to the word "horses".

It has been argued on behalf of the persons who are interested more particularly in the residuary estate that horses being used in conjunction with the words "carriages, stable furniture and effects" must be confined to horses about the premises in which the deceased resided, or something of that sort. But, on the whole, I do not see why I should so restrict the meaning of a word which appears

C to me to be perfectly plain. It is clear, and is expressly stated in s. 55 (1) (x), that horses used for business purposes are not included in the term "personal chattels" as there defined, but I do not see why horses which were kept by the deceased purely for the purpose of recreation should not be included in that term, and I accordingly hold that they pass under s. 46 (1) (i) to the widow.

Order accordingly.

D Solicitors: *Birkbeck, Julius, Coburn & Broad* (for all parties except the first defendant); *Wm. Easton & Sons* (for the first defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

E
R. v. PADDINGTON SOUTH RENT TRIBUNAL,
Ex parte MILLARD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Gorman, JJ.),
March 2, 1955.]

F *Rent Control—Security of tenure—Extension of period—Application for further extension adjourned—Extended period expired—Jurisdiction of tribunal to grant further extension—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6 c. 40), s. 11 (2) (a), (b).*

In October, 1950, the tenant rented a furnished room from the landlord. On July 23, 1952, the tenant referred her contract of tenancy to the rent tribunal under the Furnished Houses (Rent Control) Act, 1946, s. 2 (1) and on Oct. 9, 1952, the tribunal reduced the rent. On Aug. 21, 1953, the landlord served on the tenant a notice to quit the premises. On the same date the tenant applied to the rent tribunal for an extension of security of tenure under the Landlord and Tenant (Rent Control) Act, 1949, s. 11 (1). On Aug. 30, 1953, the tribunal directed that the notice to quit should not take effect until Nov. 30, 1953. On Nov. 12, 1953, the tenant made a second application for extension of security of tenure and on Dec. 10, 1953, the tribunal gave a further extension until Mar. 10, 1954. On Feb. 25, 1954, the tenant made a third application for an extension of security of tenure and on Mar. 10, 1954, the hearing of the application was adjourned as the landlord had commenced proceedings for possession in the county court. On Oct. 11, 1954, the landlord's claim before the county court was dismissed on the ground that the notice to quit had not expired. On Oct. 25, 1954, the adjourned application came before the tribunal who refused to hear it on the ground that they had no jurisdiction because the notice to quit had expired. On application for mandamus,

I **Held:** the third application for extension of security of tenure having been made before the extension granted on the second application had expired, and the second application having been made during the currency of the first extension, the notice to quit had not become effective and the

tribunal had jurisdiction to grant, if they thought fit, a further extension; accordingly an order of mandamus would be granted.

[Editorial Note.] The periods of extensions of security of tenure and the fact that successive applications were made within the currency of preceding periods appear clearly. There is, however, a short interval between Nov. 30, 1953, when the first extension expired and Dec. 10, 1953, when the tribunal granted the second extension. By virtue of s. 11 (2) (a) of the Landlord and Tenant (Rent Control) Act, 1949, the notice to quit was not effective in this interval and accordingly the second application, on which an extension of security of tenure for three months was granted, in fact resulted in the tenant's obtaining effective security for a period of three months and ten days. A similar result of considerably longer duration followed the adjournment of the third application on Mar. 10, 1954.

With regard to the jurisdiction to give extensions of security of tenure reference may be made to *Preston & Area Rent Tribunal v. Pickavance* ([1953] 2 All E.R. 438).

For the Landlord and Tenant (Rent Control) Act, 1949, s. 11, see 13 HALSBURY'S STATUTES (2nd Edn.) 1107; and for cases on the subject, see 3rd Digest Supp. to Vol. 31 (Repl.) 8126a-8126d.]

Motion for mandamus.

The tenant moved the court for an order of mandamus directed to the Paddington South Rent Tribunal to hear and determine according to law an application for an extension of security of tenure made under s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949. The facts are summarised in the headnote.

Miss S. F. Norwood for the tenant.

Rodger Winn for the rent tribunal.

ORMEROD, J., stated the facts and that the tribunal came to the conclusion that they must decline to determine the third application of the tenant for extension of security of tenure for want of jurisdiction because the notice to quit had expired, and continued: The ground on which the tribunal came to their decision is set out in s. 11 of the Landlord and Tenant (Rent Control) Act, 1949. Section 11 (1) gives the tribunal power in certain circumstances to extend the period at the end of which a notice to quit shall have effect. Section 11 (2) reads as follows:

"On an application being made under this section—(a) the notice to quit to which the application relates shall not, unless the application is withdrawn, have effect before the determination of the application; (b) the tribunal, after making such inquiry as they think fit, and giving to each party an opportunity of being heard, or, at his option, of submitting representations in writing, may direct that the notice to quit shall not have effect until the end of such period, not exceeding three months from the date at which the notice to quit would have effect apart from the direction, as may be specified in the direction."

The tribunal formed the opinion that as the original time for extension of the notice had expired before the county court proceedings, and before the present proceedings, were heard, they had no option but to refuse the application on the ground that the longest period of extension they could give was a period of three months, which was bound to run from the expiry of the original period of three months, which, of course, had expired long before the last hearing before the tribunal. That, I think, is the wrong view to take of the sub-section. The true position, I think, is this: that under s. 11 (1) (a) the period is, as it were, frozen. Until the tribunal have come to their determination, there may be still a period to run either of the original period of notice or of an extended

- A period of notice. Under sub-s. (2) the maximum amount which the tribunal are entitled to award in addition to whatever period remains is a period of three months. In those circumstances, the tenant would be entitled, if the tribunal thought it proper, to a further period of three months on anything that remained of the extended period which was still available to her when her original application before the tribunal was adjourned. In those circumstances, there must be an order of mandamus for the tribunal to consider the matter on that basis.

LORD GODDARD, C.J.: I agree.

GORMAN, J.: I agree.

- LORD GODDARD, C.J.: It does not matter to the tenant (who is legally aided) whether her costs come out of one fund or another, but so that we should not be making a precedent I do not think we should give costs against the tribunal. We never give costs unless they act improperly.

Mandamus granted.

Solicitors: *Peter Kingshill* (for the tenant); *Solicitor, Ministry of Health* (for the rent tribunal).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

D

ANSPATCH v. CHARLTON STEAM SHIPPING CO., LTD.

[COURT OF APPEAL (Denning, Birkett and Parker, L.J.J.), January 28, 1955.]

- E *Rent Restrictions—Standard rent—Application to ascertain—Flat let unfurnished during currency of furnished letting—Subsequent unfurnished letting at increased rent—Whether standard rent to be ascertained in relation to first or second unfurnished letting—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 12 (1) (a).*

- F A flat to which the Rent Restrictions Acts applied was let furnished in 1936 by the then freeholders of the building, K. & Co., at a rent of £125 per annum. Subsequently the flat was let furnished at a rent of £3 13s. 6d. per week and whilst so let K. & Co. granted a lease (the "lease of 1940") of the flat unfurnished to C.W.B., Ltd. at a rent of £110 per annum plus £5 in respect of electricity, for a term of five years from Sept. 29, 1940. C.W.B., Ltd. also purchased the furniture in the flat and took the benefit of the current furnished letting which came to an end some time after 1940. K. & Co. and C.W.B., Ltd. were companies having common directors and were both controlled by one family. There was a further furnished letting of the flat at £6 per week in 1944, and in 1945 K. & Co. sold the freehold of the building to the respondent company (the present landlords), who purchased the furniture, took the benefit of the furnished letting of the flat, and continued to let the flat furnished. In September, 1951, the landlords let the flat unfurnished at a rent of £275 per annum. The appellant, who was the present tenant under that letting, applied to the court to determine the standard rent of the flat.

- H **Held:** as the lease of 1940 was not a sham, the standard rent of the flat should be fixed by reference to the rent reserved by that lease, notwithstanding that at the date of the lease there was a furnished tenancy of the flat (*Edgware Estates, Ltd. v. Coblenz*, [1949] 2 All E.R. 526, and dictum of TUCKER, L.J., in *Insall v. Nottingham Corpn.*, [1948] 2 All E.R. at p. 235, considered) and notwithstanding that the lease of 1940 was in favour of a limited company, associated in business with the freeholders, which could occupy only by servants, agents or sub-tenants (dicta of BAILHACHE, J., in *Prout v. Hunter*, [1924] 2 K.B. at p. 370, and of CHARLES, J., in *Ebner v. Lascelles*, [1928] 2 K.B. at p. 501, adopted).

Appeal dismissed.

I

[For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (a), see 13 HALSBURY'S STATUTES (2nd Edn.) 998; and for the Rent and Mortgage Interest Restrictions Act, 1939, Sch. 1, see *ibid.*, 1082.]

Cases referred to:

- (1) *Conqueror Property Trust, Ltd. v. Barnes Corpn.*, [1944] 1 All E.R. 34; [1944] K.B. 96; 113 L.J.K.B. 30; 170 L.T. 54; 108 J.P. 28; 31 Digest (Repl.) 667, 7656.
- (2) *Signy v. Abbey National Building Society*, [1944] 1 All E.R. 448; [1944] K.B. 449; 113 L.J.K.B. 486; 170 L.T. 238; 31 Digest (Repl.) 641, 7479.
- (3) *Macmillan & Co., Ltd. v. Rees*, [1946] 1 All E.R. 675; 175 L.T. 86; 31 Digest (Repl.) 656, 7585.
- (4) *Roberts v. Jones*, [1946] 2 All E.R. 678; [1947] K.B. 221; [1947] L.J.R. 606; 176 L.T. 33; 31 Digest (Repl.) 669, 7668.
- (5) *Edgware Estates, Ltd. v. Coblenz*, [1949] 2 All E.R. 526; [1949] 2 K.B. 717; 31 Digest (Repl.) 671, 7681.
- (6) *Prout v. Hunter*, [1924] 2 K.B. 365; *affd.* C.A., [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest (Repl.) 639, 7467.
- (7) *Glossop v. Ashley*, [1922] 1 K.B. 1; 90 L.J.K.B. 1237; 125 L.T. 842; 85 J.P. 234; 31 Digest (Repl.) 673, 7687.
- (8) *Ebner v. Lascelles*, [1928] 2 K.B. 486; 97 L.J.K.B. 497; 139 L.T. 140; 92 J.P. 114; 31 Digest (Repl.) 649, 7531.
- (9) *Carter v. S.U. Carburettor Co.*, [1942] 2 All E.R. 228; [1942] 2 K.B. 288; 111 L.J.K.B. 714; 167 L.T. 248; 31 Digest (Repl.) 635, 7429.
- (10) *Insall v. Nottingham Corpn.*, [1948] 2 All E.R. 232; [1949] 1 K.B. 261; [1949] L.J.R. 156; 31 Digest (Repl.) 669, 7670.
- (11) *Chamberlain v. Farr*, [1942] 2 All E.R. 567; 112 L.J.K.B. 206; 31 Digest (Repl.) 671, 7679.

Appeal.

The respondents, the landlords, appealed from an order of His Honour JUDGE BENSLEY-WELLS, at Marylebone County Court, dated Oct. 28, 1954, whereby he granted the application of the tenant to determine the standard rent of a flat known as No. 71, Ivor Court, Gloucester Place, N.W.1, at £110 per annum.

No. 71, Ivor Court, Gloucester Place, N.W.1, was a flat in a block built in 1936 and then owned by Knight & Co., Ltd. The flat was first let furnished at £125 per annum. It was subsequently let furnished at a weekly rent of £3 13s. 6d. and while it was so let, Knight & Co., Ltd. granted a lease of the flat unfurnished at a rent of £110 per annum, plus £5 per annum in respect of electricity, for a term of five years from Sept. 29, 1940, to C.W.B., Ltd. The lease was made with the benefit of the existing furnished letting, C.W.B., Ltd. purchasing the furniture for £150. C.W.B., Ltd. and Knight & Co., Ltd. were closely associated companies, a family named Black being in control of both, and the companies having common directors. At some time after 1940 the furnished letting at £3 13s. 6d. per week ceased, for in June, 1944, there was a furnished letting by C.W.B., Ltd. at £6 per week. In 1945 Knight & Co., Ltd. sold the freehold of the premises to the landlords, the Charlton Steam Shipping Co., Ltd. who purchased the furniture, took the benefit of the furnished letting and continued to let the flat furnished until 1951. On Sept. 29, 1951, they let the flat unfurnished to a Mr. Noble at a rent of £275 per annum. Subsequently Mr. Anspach, the respondent to this appeal, became tenant of the flat and he applied to the court to determine the standard rent of the premises. The county court registrar and the county court judge held that the standard rent was that fixed by the lease to C.W.B., Ltd., in September, 1940, namely, £110.

L. A. Blundell for the landlords.

J. G. Wilmers for the tenant.

A DENNING, L.J., stated the facts and continued: It is much to the tenant's advantage to have the standard rent held to be £115, because he would have a large claim for over-payment for two years. I have no doubt that many other tenants in this block of flats would also have claims for over-payments. Hence the importance of the case.

B The definition of standard rent in s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and Sch. 1, is:

C "The expression 'standard rent' means the rent at which the dwelling-house was let on Sept. 1, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Sept. 1, the rent at which it was first let."

Sub-section (2) provides: "This Act shall apply to a house or a part of a house let as a separate dwelling". There is a definition of "dwelling-house" in s. 16 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which reads:

D "'Dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

E The first point is this: counsel for the landlords says that the lease made in September, 1940, was not a letting of a kind which is material for ascertaining the standard rent. He recognises that it was a real letting, and that it was acted on by lessor and lessee for years. The books of the companies show that. It is not like the letting in *Conqueror Property Trust, Ltd. v. Barnes Corpn.* (1) which was a sham. But counsel says that it was not a transaction of a kind contemplated by the Rent Acts, that it was a transaction of a financial nature between two associated companies and is no guide to the rental value of the flat. He points out that a furnished letting is not material for the purposes of the standard rent (*Signy v. Abbey National Building Society* (2)) nor is a business letting (*Macmillan & Co., Ltd. v. Rees* (3)). Further, a letting under the Housing (Rural Workers) Act, 1926, is not material (*Roberts v. Jones* (4)) nor, indeed, is an unlawful letting (*Edgware Estates, Ltd. v. Coblentz* (5)). Counsel says that by these decisions the courts have written a gloss on the Act. The test is not merely to ascertain whether the house has been "let" as a dwelling; but in order to determine the standard rent one must look at the nature of the letting and see whether it is of the kind contemplated by the Act. It must, he says, be a letting for the purposes of the Act.

G At one time in the argument I was inclined to think that the only letting which is material for fixing the standard rent is a letting to a tenant in actual occupation. There are observations in *Prout v. Hunter* (6) by SCRUTTON, L.J., and SARGANT, J., which support that view. But on reflection I do not think that it is correct. Undoubtedly in the vast majority of cases the courts consider only the letting to the tenant in actual occupation, and the rent at which it is let to him unfurnished becomes the standard rent. Indeed, where there are two competing tenancies, a head-lease and a sub-lease, both unfurnished, the standard rent is fixed by the rent payable by the tenant in occupation (*Glossop v. Ashley* (7)). But I do not think that the standard rent is always to be fixed by reference to the tenant in occupation. In *Edgware Estates, Ltd. v. Coblentz* (5) the standard rent was not so fixed. The unlawful sub-letting at £225 a year was ignored: so was the previous lawful sub-letting at £225 a year. The standard rent was fixed by the £300 a year payable in 1939 under the head-lease. So here the furnished sub-letting at £3 13s. 6d. must be ignored; and we are left with a head-lease made to C.W.B., Ltd. in 1940 at £115 a year unfurnished. This letting comes within the very words of s. 12 (1) (a) and I do not think we should

write a further gloss on the Act so as to ignore it. Let me test it in this way: A
 suppose that these premises had not been sold by Knight & Co., Ltd. to the
 landlords, and that Knight & Co., Ltd. were the respondents to this application.
 I cannot imagine any court allowing Knight & Co., Ltd. to say that the £115
 was not the standard rent fixed by their letting. I may add that the £115 seems
 to have been genuinely fixed in 1940 in accordance with the market values
 at the time. The rateable value of the flat was £38 and its rent when furnished B
 was £190. £115 falls fairly in between these values.

Counsel's second point was this. Inasmuch as the dwelling-house in 1940
 was let furnished to an occupying tenant it was by that very fact taken out of the
 Act for all purposes, and the superior lease to C.W.B., Ltd. could not therefore
 give the standard rent. It seems to me, however, that whilst the furnished
 letting takes the flat out of the Act so far as eviction is concerned (*Prout v.* C
Hunter (6)), it does not take it out of the Act so far as standard rent is concerned.
 The furnished letting does not give the standard rent, but a superior letting
 unfurnished may do so.

Counsel's third point was that the lease in 1940 was in its nature a letting for
 business purposes, it was a business transaction not within the Acts. I cannot
 agree. The lease was a letting of a dwelling-house as a separate dwelling, and
 it is not deprived of that character simply because the lessee was a limited D
 company who could only occupy by servants or agents or by sub-tenants. This
 is in accord with the view expressed by BAILHACHE, J., in *Prout v. Hunter* (6)
 ([1924] 2 K.B. at p. 370), by CHARLES, J., in *Ebner v. Lascelles* (8) ([1928] 2 K.B.
 at p. 501) and it is implicit in *Carter v. S.U. Carbutretter Co.* (9).

In my judgment, therefore, counsel's three points all fail. Despite his able E
 argument, I find myself in agreement with the learned judge and the registrar
 and the appeal must be dismissed.

BIRKETT, L.J.: I agree. The contention of counsel for the landlords
 was that it must be the second unfurnished letting in September, 1951, to which
 reference must be made to fix the standard rent because the first one, in Septem- F
 ber, 1940, was not a letting contemplated by the Acts or, indeed, a letting from
 which the standard rent could properly be determined. It is only on that point
 that I want to say a word. [HIS LORDSHIP stated the facts concerning the 1940
 letting and continued:] The two matters I desire to draw attention to are these:
 first of all, counsel for the landlords, who appeared before the registrar and
 before the county court judge, from the very beginning said that the lease in
 September, 1940, to C.W.B., Ltd. was a real agreement: it was not a sham. G
 The detail about the £5 for electricity is not unimportant in view of the con-
 tentions which have been put before us—£5 for electricity is put down separately,
 making the £110 up to £115. It looks as though the terms of this lease were
 carefully considered. Those two things, the fact that the agreement was not a
 sham and the evidence afforded by the nature of the agreement *prima facie* H
 make it an ordinary unfurnished letting of the premises. Counsel says, however,
 that although it may look like that it really is not so. Moreover, if one takes the
 wording of s. 12 (1) (a) of the Act of 1920, the courts during the years that the
 Rent Acts have been under discussion have admittedly added certain glosses
 to the language. Counsel, therefore, says that one cannot take the words of the
 definition of "standard rent" in s. 12 (1) (a) of the Act of 1920 in their simplicity
 and say—"Here in 1940 was the first unfurnished letting. That was at £110, I
 or £115 if you include the electricity. Therefore, applying the simple plain
 words of this section you need inquire no further". Counsel said that one could
 not do that because the courts had added to the simplicity of this language
 glosses about furnished premises and other matters. Therefore it was necessary
 to look and see what the real nature of the transaction was. Was it a letting
 which could properly be said to fix the standard rent? The trouble is that the
 information about this letting is so sparse. Counsel for the landlords submitted

- A that this was a business transaction only: that the idea was to give to C.W.B., Ltd. a right to deal with the furnished tenancy which had been in existence throughout and was in existence at the time when the agreement of Sept. 29, 1940, was made. There was a furnished tenancy in 1940. We know there was a furnished tenancy at a much later date, but as to many of the intervening years we have no information at all. It is in that state of affairs that one is
- B compelled to examine the language of the statute, the various glosses which have been put on it and the submissions made by counsel.

In *Insall v. Nottingham Corpn.* (10), TUCKER, L.J., after citing a long passage from the judgment of LORD GREENE, M.R., in *Chamberlain v. Farr* (11), said this ([1948] 2 All E.R. at p. 235):

- C "Those authorities, I think, strongly support the view that, provided one has a rent which is a real rent and not a sham, the fact that it does not come up to the true economic rent which might be obtained in respect of the premises, or the fact that it has been reduced for family reasons or in preference for a particular tenant, are matters which must be excluded from the purview of the court in fixing the standard rent."
- D Here it would appear, as a matter of fact, if one examines the nature of the furnished tenancies, that the rent of £110 was somewhere in the neighbourhood of what was a reasonable and fair economic rent. As, however, that is an irrelevant circumstance, one has to look at the matter in this way. Here was the agreement of 1940, admittedly a real agreement and not a sham. That fixes the unfurnished rent at £110 a year, and having regard to the language of
- E the section and all the authorities which have been cited to us, I can see no reason why the decision of the learned registrar and the county court judge should not be supported. Therefore I am in favour of dismissing this appeal.

PARKER, L.J.: I have reached the same conclusion and agree so entirely with both judgments that I do not think I can usefully add anything.

- F *Appeal dismissed. Leave to appeal to the House of Lords granted.*

Solicitors: *J. F. Coules & Co.* (for the landlords); *T. F. Peacock, Fisher, Chavasse & O'Meara* (for the tenant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

ATID NAVIGATION CO., LTD. v. FAIRPLAY TOWAGE & SHIPPING CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), February 15, 16, 1955.]

Practice—Parties—Adding persons as parties—Defendants applying that plaintiffs should add further defendants—Proposed new parties unnecessary for determination of issues pleaded but intended to become plaintiffs on counterclaim—R.S.C., Ord. 16, r. 11.

In an action for payment of money lent and interest the defendant company applied under R.S.C., Ord. 16, r. 11, for an order on the plaintiff company to add two new defendants and for leave to amend the defendant company's counterclaim by adding the new defendants as plaintiffs on the counterclaim. The issues between the plaintiff company and the defendant company in the action could be determined without adding the new defendants, but it was sought to add them so that they might join as plaintiffs on the counterclaim.

Held: an order to add the proposed new defendants should not be made against the wish of the plaintiff company because the reason that they were to join as plaintiffs on the counterclaim was not a sufficient reason by itself and in fact the issues between the existing parties to the action could be determined in the absence of the proposed new defendants.

Norbury Natzio & Co. v. Griffiths ([1918] 2 K.B. 369) considered; dictum of LORD COLERIDGE, C.J., in *Norris v. Beazley* (1877) (2 C.P.D. at p. 83) applied.

[For R.S.C., Ord. 16, r. 11, see ANNUAL PRACTICE (1954) 251, 252.]

As to Effect of Non-joinder of Parties, see 26 HALSBURY'S LAWS (2nd Edn.) 20, para. 17.]

Cases referred to:

- (1) *Norbury Natzio & Co. v. Griffiths*, [1918] 2 K.B. 369; 87 L.J.K.B. 952; 119 L.T. 90; 12 Digest (Repl.) 40, 170.
- (2) *Norris v. Beazley*, (1877), 2 C.P.D. 80, 85; 46 L.J.Q.B. 169; 35 L.T. 846; Digest (Practice) 429, 1243.
- (3) *Wilson, Sons & Co. v. Balcarres Brook S.S. Co.*, [1893] 1 Q.B. 422; sub nom. *Wilson, Son & Co. v. Killick*, 62 L.J.Q.B. 245; 68 L.T. 312; 12 Digest (Repl.) 39, 167.

Procedure Summons.

The defendants, Fairplay Towage & Shipping Co., Ltd., made applications by summons under R.S.C., Ord. 16, r. 11, for an order that the plaintiffs, Atid Navigation Co., Ltd., add as defendants to the action, the Borchard Shipping Agency, Ltd., and the Borchard (United Kingdom), Ltd., and that the defendants be at liberty to amend the counterclaim in the action by adding the Borchard Shipping Agency, Ltd., and the Borchard (United Kingdom), Ltd., as plaintiffs to the counterclaim.

On June 6, 1953, the plaintiffs issued a specially indorsed writ in the Queen's Bench Division asking for an order that the defendants pay to the plaintiffs £65,900, as money lent plus interest, and on an application by the plaintiffs, in September, 1953, for summary judgment under Ord. 14, leave to defend was given and a defence was subsequently delivered in December, 1953. In February, 1954, the action was transferred to the Chancery Division. At that date there was a second action pending in the Chancery Division in which the plaintiffs were the Atid Navigation Co., Ltd. and the defendants were the Borchard Shipping Agency, Ltd., and the Borchard (United Kingdom), Ltd., and the defendants made application for consolidation of that action and the present action which was refused. Following that application the defence in the present

A action was struck out in its entirety and a new defence and counterclaim were delivered on Dec. 14, 1954.

Ashe Lincoln, Q.C., and E. J. Cohn for the defendants.

E. V. Falk and I. Goldsmith for the plaintiffs.

WYNN-PARRY, J., stated the facts and continued: I approach this matter bearing in mind that the general rule is that a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and cannot be compelled to proceed against other persons whom he has no desire to sue. R.S.C., Ord. 16, r. 11, gives to the court a discretion, and the jurisdiction so given is entirely discretionary, to compel the plaintiff in certain circumstances to join other parties as defendants as a condition of allowing him to proceed with his action.

It is against that general background that I must now embark on the extremely difficult task of attempting an analysis of the defence which has been delivered in this case. [His LORDSHIP analysed the defence and counterclaim and continued:] It appears to me that, on a fair view of the defence in this action, it is not possible for the defendants to say that the addition of either of the two proposed new defendants is necessary for the determination of the issues raised between the plaintiff company and the defendant company by the statement of claim and defence in this action. The real defence is a defence of set-off, or, alternatively, a right to have substituted as between the plaintiffs and the defendants a third company as the debtor of the plaintiffs. It appears to me that those two issues can perfectly well be decided in the proceedings as they are at present constituted without bringing in either of the other two proposed defendants. In my view, the defendants' application must stand or fall on their submission that they ought to be allowed to have these two further companies joined as defendants in order that they may become plaintiffs in the counterclaim.

I do not doubt, in view of the judgment of the Court of Appeal in *Norbury Natzio & Co. v. Griffiths* (1) that there is jurisdiction in a proper case to make an order against the will of a plaintiff compelling a plaintiff to join other parties as defendants where one of the circumstances is that the defendants, and proposed further defendants, desire to prosecute a counterclaim against the plaintiff company. But it is to be observed that in that case the court was prepared to proceed on the basis that it was a case of a joint contract, reserving until the trial the question whether or not the contract was in fact a joint contract. It was, therefore, a case in which the court was persuaded to make the order for the purpose of joining the proposed interveners as defendants. The circumstance that there was a counterclaim to which they would become plaintiffs was treated as an additional ground. I know of no authority which goes so far as saying that the court would make an order, as asked in this case, merely to enable the proposed interveners to join with the existing defendants in prosecuting a counterclaim. Indeed it appears to me that there is no jurisdiction to make such an order. After all, the basis of the whole jurisdiction to add defendants is that there is a cause of action by the plaintiff against not only the existing defendant but the person who would be joined if the application were successful. In *Norris v. Beazley* (2), LORD COLERIDGE, C.J., after referring to Ord. 16, r. 13, as it then stood, said (2 C.P.D. at p. 83):

"It seems to me to be correctly argued that those words plainly imply that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any."

There is also this circumstance to bear in mind. It is made quite clear in *Wilson, Sons & Co. v. Balcarres Brook S.S. Co.* (3), that a defendant is not

entitled as of right to have another joint contractor added as a defendant, and that where the proposed further defendant is resident out of the jurisdiction, then, generally speaking, the court ought not to exercise its discretion to order such a person to be joined. Of course, it is quite true here that the two defendants sought to be joined are resident in the jurisdiction. But it is to be observed (and this is one of the great embarrassments I have had in considering this matter) that there has been joined as a defendant to the counterclaim, Barnett Brothers and Borchard, Ltd., one of the Haifa companies resident out of the jurisdiction. I wish to say no more than I need say at this stage on that matter. I am not to be taken as expressing any view one way or the other as to the success or failure of a summons if a summons be brought before the court for the purpose of obtaining leave to serve that company out of the jurisdiction. But I would be entitled to take into account, in weighing this matter and deciding how to exercise my jurisdiction assuming that I had any, that such a procedure must cause further delay. The matter appears to me to be complicated enough as it is and one which should not be complicated any further than is necessary, and one in which the plaintiffs should not be occasioned any further delay than is necessary. Taking those circumstances into consideration, and reading the defence as I do, I would not be prepared to make the order asked for. The defendants may start further proceedings and later ask for consolidation—that is a matter for them and their advisers to consider—or, although this case deals with a right of set-off in the defendants, the defendants may consider that having regard to all the matters pleaded in the defence there is a right of contribution from other parties, in which case third-party proceedings might be appropriate. Having given the matter the best consideration I can, I do not feel that this is a case in which, even assuming that I had jurisdiction which in my view I have not, I should exercise it to make the order asked for. In the result I propose to dismiss the summons.

Summons dismissed.

Solicitors: *Cardew-Smith & Ross* (for the defendants); *A. Kramer & Co.* for the plaintiffs).

[*Reported by PHILIPPA PRICE, Barrister-at-Law.*]

STOPHER *v.* NATIONAL ASSISTANCE BOARD. NATIONAL ASSISTANCE BOARD *v.* PARKES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Gorman, JJ.), March 2, 1955.]

Husband and Wife—Separation agreement—National assistance—Assistance granted to wife—Proceedings by National Assistance Board for recovery of cost from husband—Whether separation agreement a bar—National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 43.

Husband and Wife—Maintenance—Husband's obligation to maintain wife—Separation of husband and wife—No matrimonial offence by wife—National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 42.

National Assistance—Separation of husband and wife—Assistance granted to wife—Proceedings to recover sums from husband—Whether separation agreement a defence.

In 1946 S. and his wife separated by agreement, but the agreement did not provide for S. to maintain his wife. In 1951 she applied to the justices for maintenance on the ground of his desertion and wilful neglect to maintain her. Her application was dismissed. In 1954 she was given assistance by the National Assistance Board, on whose application, under s. 43 of the National Assistance Act, 1948, the justices made an order on the husband to pay a weekly sum of 10s. to the board. The wife had not committed any matrimonial offence.

- A** By a separation agreement made in 1952 between P. and his wife they agreed to live apart and she covenanted not to claim financial provision from him and that neither she nor anyone on her behalf would take judicial proceedings to compel him to make any financial provision for her. In 1954 a summons by her under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, for wilful neglect to maintain her was withdrawn on his consenting to an order for 30s. weekly maintenance for a child of their marriage, he also agreeing voluntarily to pay a weekly 10s. in addition.
- B** Subsequently in 1954 the wife was given assistance by the National Assistance Board who applied to the justices for an order, under s. 43 of the National Assistance Act, 1948, that P. should pay to the board such weekly sum as was appropriate. The wife had not committed any matrimonial offence.
- C**

Held: if a wife, who is living separate from her husband by agreement with him, has not committed a matrimonial offence, her husband may be ordered under s. 43 of the Act of 1948 to pay such sum weekly or otherwise as the court considers appropriate, notwithstanding that the husband and wife have agreed that he shall not be required to provide for her or although there has been no agreement whether the husband is or is not to provide for the wife.

National Assistance Board v. Prisk ([1954] 1 All E.R. 400) applied.

National Assistance Board v. Wilkinson ([1952] 2 All E.R. 255) explained.

Appeal dismissed in *Stopher's* case and allowed in *Parkes's* case.

- D**
- E** [**Editorial Note.** The decision in the present case of the question of the liability of a husband to be ordered to make payments to the National Assistance Board appears in the headnote. Consideration of some factors which may influence magistrates in deciding what is appropriate to be paid to the board will be found at p. 707, post. The present case is material when advising on separation agreements. It shows that the ordinary covenant by a wife, for whom provision is made at the time of separation, to maintain herself will be ineffective in favour of the husband as against the National Assistance Board should she in later years obtain assistance from the board. If, therefore, the parties are living in a time when the value of money is depreciating the practical consequence seems to be that the common form of covenant, exemplified in cl. 3 of Form 4 in 7 ENCY. FORMS AND PRECEDENTS (3rd Edn.) 319, whereby a wife agrees in a separation deed to maintain herself, must be accepted as being subject to an over-riding condition that if the level of assistance payments under national assistance rises above the covenanted maintenance, some additional periodical sum may be able to be recovered by the board from the husband if the wife has applied for assistance.
- F**
- G**

- A covenant in a separation deed for payment of a fixed amount as maintenance to a wife and a covenant by her to maintain herself do not, if the amount has ceased to be reasonably sufficient, constitute a bar to proceedings by her for wilful neglect to provide for her reasonable maintenance, either where the proceedings are under s. 23 of the Matrimonial Causes Act, 1950 (see *Tulip v. Tulip*, [1951] 2 All E.R. 91), or where they are under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949 (see *Dowell v. Dowell*, [1952] 2 All E.R. 141).
- H**

- I** As to the Obligation of a Husband to Maintain his Wife, see 16 HALSBURY'S LAWS (2nd Edn.) 608; and for cases on the subject, see 27 DIGEST (Repl.) 188-194, 1448-1528.

For the National Assistance Act, 1948, s. 42 and s. 43, see 16 HALSBURY'S STATUTES (2nd Edn.) 968, 969.]

Cases referred to:

- (1) *National Assistance Board v. Wilkinson*, [1952] 2 All E.R. 255; [1952] 2 Q.B. 648; 116 J.P. 428; 3rd Digest Supp.

- (2) *R. v. Flintan*, (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; A 37 Digest 233, 255.
- (3) *Jones v. Newtown & Llanidloes Union*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 37 Digest 233, 254.
- (4) *National Assistance Board v. Prisk*, [1954] 1 All E.R. 400; 118 J.P. 194.

Cases Stated.

(i) *Stopher v. National Assistance Board*.

This was a Case Stated by justices for the county borough of Ipswich. On July 15, 1954, at a court of summary jurisdiction sitting at Ipswich, the respondents, the National Assistance Board, preferred a complaint against the appellant, William Herbert Stopher, alleging that he was the husband of Martha May Stopher, whom he was liable to maintain pursuant to the National Assistance Act, 1948, s. 42, and by reference to whose requirements assistance under Part 2 of that Act was given at the Post Office, Norwich Road, Ipswich, on June 21, 1954, and divers other days and was continuing to be given at the weekly rate of 11s. 6d.

The complaint was heard on Aug. 5, 1954, when the following facts were found. Martha May Stopher and the appellant were married on Dec. 10, 1918. In 1946 they agreed to separate and had thereafter lived apart. The agreement to separate contained no express provision that the appellant should maintain the wife and no such provision was to be inferred or implied. On July 25, 1951, an application by the wife for an order for her maintenance on the grounds of the appellant's desertion and wilful neglect to maintain her was dismissed by the justices. On June 1, 1954, at the instance of the National Assistance Board, the wife wrote to the appellant saying:

"I am writing to know if you are willing to support me, or make a home for me. I shall give you fourteen days to consider it, and let me know your decision."

The letter was not a genuine offer to resume cohabitation, nor was there on the part of the wife a bona fide willingness to resume cohabitation with the appellant. Before, on and after June 21, 1954, the wife was given assistance under Part 2 of the Act of 1948, which assistance was continuing at the weekly rate of 11s. 6d. The wife had not been guilty of cruelty or of any other matrimonial offence. The resources of the appellant were a retirement pension of £1 12s. 6d. a week and capital assets arising out of compensation received for injury in a road accident amounting to £2,400.

It was contended by the appellant that he was not liable at common law to maintain the wife, and that liability under s. 43 of the Act of 1948 was consequently negated. It was contended on behalf of the National Assistance Board that for the purposes of the Act of 1948 the appellant's liability to maintain the wife could only be discharged or suspended by her adultery or desertion, neither of which was alleged or proved. The justices found the complaint proved and ordered the appellant to pay 10s. a week to the National Assistance Board and 7s. 6d. court fees.

The appellant appealed.

H. F. Cassel for the appellant.

Rodger Winn for the National Assistance Board, the respondents.

(ii) *National Assistance Board v. Parkes*.

This was a Case Stated by Flint justices. On July 3, 1954, at a court of summary jurisdiction sitting at Rhyl, the appellants, the National Assistance Board, preferred a complaint under the National Assistance Act, 1948, against the respondent, Roderick Bruce Parkes. The complaint alleged that the respondent was the husband of Victoria Brenda Parkes, whom he was liable to maintain pursuant to s. 42 of the Act of 1948, and by reference to whose requirements assistance under Part 2 of that Act was given at the Post Office, East

A Parade, Rhyl, on May 31, 1954, and divers other days, and was continuing to be given at the weekly rate of 39s. 6d., and they applied for a summons to be served on the respondent to show cause why an order should not be made on him under s. 43 of the Act of 1948 to pay such sum, weekly or otherwise, as the court might consider appropriate.

The complaint was heard on July 28 and 29, 1954, when the following facts were found. The respondent was lawfully married to Victoria Brenda Parkes on Mar. 21, 1950. On Aug. 9, 1952, the respondent and the wife entered into a separation agreement whereby the wife and the respondent agreed to live apart and the wife covenanted (a) that she would not at any future time be or claim to be entitled to any financial provision whatsoever from the respondent in respect of herself and the child of the marriage, or either of them, and that she would not at any future time pledge the credit of the respondent and would at all future times keep the respondent and his estate indemnified against all debts and liabilities thereafter contracted or incurred by her; and (b) that neither the wife nor any person on her behalf would at any future time, molest, annoy, disturb or interfere with the respondent, nor at any time require or by any means either by taking judicial proceedings or otherwise endeavour to compel the resumption of cohabitation between the respondent and the wife or to enforce any restitution of conjugal rights or to compel the respondent thereafter to make to the wife any financial provision for herself and for the said child or either of them. The wife was in need of assistance and had received it to the extent and in the manner alleged in the complaint. On July 1, 1954, the respondent was summoned to appear before the justices to answer a complaint by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that he had wilfully neglected to maintain her, but the complaint was withdrawn on the respondent consenting to an order being made under the Guardianship of Infants Acts, 1886 and 1925, for the payment of 30s. a week for the maintenance of the child and also agreeing to pay voluntarily an additional 10s. for such maintenance. The complaint was made on the advice of the officers of the National Assistance Board. The wife was not willing to resume cohabitation with the respondent. The respondent was employed by a bank in East Africa and was in receipt of a gross wage of £900 a year comprised of £500 basic salary and £400 local cost of living allowance.

It was contended on behalf of the National Assistance Board (a) that for the purposes of the National Assistance Act, 1948, the respondent was liable to maintain his wife unless she had committed a matrimonial offence; and the respondent's wife had committed no matrimonial offence; (b) that, even though the wife had failed to obtain an order for maintenance against the respondent, the board were entitled to an order against him under s. 43 of the Act of 1948; (c) that the existence of the separation agreement containing the covenants by the wife was no bar to the board obtaining an order under s. 43 of the Act of 1948.

H It was contended on behalf of the respondent that the liability under s. 43 was subject to the common law defences open to the husband, and that the existence of the separation agreement, in which the wife agreed not to claim or to be entitled to any financial provision from the respondent was a bar to the board obtaining an order under s. 43. The justices were of the opinion that the respondent's liability to maintain the wife ceased on the making of the separation agreement; and that the agreement was a bar to the wife obtaining an order in proceedings at her suit, and that the board were necessarily under a similar disability on the basis that their rights under s. 43 were subject to defeasance by any defences available to the respondent in proceedings for maintenance by the wife. The justices, therefore, dismissed the complaint, and the board appealed.

Rodger Winn for the National Assistance Board, the appellants.

R. I. Threlfall for the respondent.

LORD GODDARD, C.J. : These two cases, *Stopher v. National Assistance Board* and *National Assistance Board v. Parkes*, raise substantially the same considerations. A

In the first case, which is a Case Stated by the justices for the county borough of Ipswich, a complaint was made by the National Assistance Board against the appellant to recover the amount of national assistance which they had paid to his wife. [HIS LORDSHIP stated the facts and, after reading the wife's letter of June 1, 1954, to the appellant, HIS LORDSHIP continued:] The justices found that that letter was not a genuine offer by the wife and that she had no intention of carrying it out. I do not think that the National Assistance Board ought to encourage a wife to write such a letter, it is a course to be deprecated. It does not alter the position, unless a wife genuinely wants to return to her husband, and then questions will arise as to his obligation. On the findings of the justices the parties were exactly in the same position as they were before the wife wrote that letter. The justices were of opinion that: B

"(a) as the wife had committed no matrimonial offence, the appellant was for the purposes of [the Act of 1948] liable to maintain her, and (b) even if the appellant's liability had ceased by reason of the consensual separation, the wife's said letter to him, inasmuch as it was in effect a request for maintenance, was sufficient to revive his liability." C

Counsel for the board did not rely on (b) of these opinions, but relied on (a). D

Before I deal with the second case, I will refer briefly to the National Assistance Act, 1948. Section 42 (1) provides:

"For the purposes of this Act—(a) a man shall be liable to maintain his wife and his children . . ."

Section 43 provides: E

"(1) Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted. (2) On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate." F

In *Stopher's* case, the justices gave a great deal of attention to the matter and came to a perfectly right decision. G

The argument which we heard in these two cases shows that there may be considerable misunderstanding about the true effect of the decision of this court in *National Assistance Board v. Wilkinson* (1) and also of certain other cases which have been decided before the Probate, Divorce and Admiralty Division of the High Court. Let me endeavour briefly to explain what I believe to be the law on the subject apart from the provisions of the National Assistance Act, 1948. There is no doubt that at common law a man was obliged to support his wife subject to this: that if the wife committed adultery his obligation ceased entirely. A man is not required to maintain an adulterous wife. In *Wilkinson's* case (1) ([1952] 2 All E.R. at p. 258) I cited the dictum of LITTLEDALE, J., in *R. v. Flintan* (2), where he said with regard to an adulterous wife (1 B. & Ad. at p. 230): "Having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married". Nor is a husband obliged to maintain a wife who has deserted him, but his obligation is only suspended so long as the wife remains in a state of desertion, and on her return the obligation is renewed: see *Jones v. Newtown & Llanidloes Union* (3). H

The first Act of Parliament which gave guardians of the poor the right to recover money which they had paid for the maintenance of a married woman I

- A was the Poor Law Amendment Act, 1850. I think that I am right in saying that previous to that the only way to force a man to support his wife and family was by prosecuting him under s. 3 of the Vagrancy Act, 1824. The Poor Law Amendment Act, 1868, s. 33, enlarging the powers given by s. 5 of the Act of 1850, which related only to a lunatic wife, enabled guardians to recover the cost of maintenance that might have been given to a married woman apart from her husband. If the woman had committed adultery, the husband would have had an answer and would have said: "I am not bound to support the woman; I am entitled to regard her as not my wife and, therefore, I am not liable to repay the amount of money which you have expended on her". When this case was opened, my first impression, which I think was right, was that, whenever a wife, who had neither committed adultery nor deserted her husband, became chargeable to the poor law, as it used to be, the obligation of the husband had never been in dispute, at any rate since 1868. The poor law was very much the same in respect of a child. As I pointed out in *Wilkinson's case* (1) ([1952] 2 All E.R. at p. 258), at common law and apart from criminal responsibility, a father was not responsible for the maintenance of his children. It was a curious state of the law, but it is none the less true that at common law a father was not bound to supply his children with food or clothing. He could be prosecuted if he did not do so, but the civil liability did not exist. As soon as the children became chargeable to the guardians, then, under the poor law a father had to pay.* In *Wilkinson's case* (1) all we decided was that, as before the National Assistance Act, 1948, a husband would have had an answer to the guardians if he had been asked to repay relief which had been given to an adulterous wife or to a wife who was in a state of desertion, the Act of 1948 had not imposed any higher liability on him. It had not altered the law in that respect and, therefore, if the National Assistance Board assisted a wife who had been guilty of a matrimonial offence, the husband could escape liability. If she had not committed a matrimonial offence, there is no case, as far as I know, which suggests that the husband could escape liability.
- F Counsel for the appellant Stopher very properly called our attention to certain cases† which were decided in the Probate, Divorce and Admiralty Division and at first sight appear to support his proposition that, if there has been a consensual separation without any provision being made by the parties for the husband to pay maintenance to his wife, the wife cannot recover. That is perfectly true so far as the machinery, if I may use the expression, or the rights given by the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, are concerned because, in that class of case, the wife is seeking from the court an order against the husband for the payment of a sum of money, on the ground that the husband has failed to support her. At common law a wife never had the right to ask for a sum of money. If her husband did not support her, she had no right of action against him. A wife could not sue her husband at common law, nor could she have sued after the Married Women's Property Act, 1882, was passed. The most that she could do was to pledge the husband's credit, which was a very unsatisfactory remedy, at any rate, for a woman of the working class, because the local grocer and butcher would not be likely to supply her with food on the off-chance that he might, perhaps, be able to recover the price from the husband, who might have gone to the other side of England.
- I The legislature, therefore, provided that, where a man had deserted his wife or failed to supply her with proper maintenance, justices could make an order. If, however, the parties separated by mutual consent and have parted on the terms that the husband was not to maintain the wife, the husband is not guilty

*See s. 14 (1) and s. 19 (2) of the Poor Law Act, 1930 (now repealed), which replaced earlier enactments.

†*Baker v. Baker* (1949), 66 (pt. 1) T.L.R. 81; *Stringer v. Stringer*, [1952] 1 All E.R. 373; and *Tulip v. Tulip*, [1951] 2 All E.R. 91.

of wilful refusal to maintain the wife. Such an agreement, however, does not conclude the matter in the event of the wife becoming destitute and having to seek assistance from the National Assistance Board. She still remains the man's wife. She is still in the position of a woman who has not committed any matrimonial offence, and she is also in the position that she has no means of supporting herself. Or it may be that, ten or fifteen years ago, the husband agreed to pay her maintenance at a rate which in those days was adequate, but which has now become inadequate owing to the fall in the value of money. In each of these cases the marriage tie still subsists. We are asked to say that in this case, in such circumstances, the wife is to be supported by the taxpayers, rather than by her husband. It is quite clear that *Wilkinson's case* (1) gives no warrant for any such conclusion. *Wilkinson's case* (1) did no more than decide that a husband was under no liability to support his wife if she had committed adultery or, in other words, if she had been guilty of a matrimonial offence. If a wife has committed adultery or remains in a state of desertion, the husband is not bound to support her, and, therefore, he would not be liable to repay the National Assistance Board if they gave assistance to her.

In my opinion, where there is no matrimonial offence, the husband remains under an obligation to support his wife and, indeed, that is the foundation of the decision in *National Assistance Board v. Prisk* (4). In that case I endeavoured to explain, as I have endeavoured to explain today, what was the real decision in *Wilkinson's case* (1). After again citing the dictum of LITTLEDALE, J., with regard to an adulterous wife, I said ([1954] 1 All E.R. at p. 402):

"In a case where the wife has deserted her husband, the law is different. It was laid down in *Jones v. Newtown & Llanidloes Union* (3), that the right of the wife who is in desertion of her husband to maintenance is only suspended, and if she returns to her husband then she has a right to be maintained; but, as long as she is in desertion, the husband is under no obligation to support her. In *Wilkinson's case* (1) there was desertion by the wife. The husband provided a perfectly proper and adequate home for the wife, but she wanted to live elsewhere and would not go and live with him. The husband was not bound to support her so long as she lived apart from him. That is what *Wilkinson's case* (1) decided, and it decided nothing else. It was left open to the husband to say that he was under no obligation to maintain her."

Prisk's case (4) becomes very much in point when I turn to the other case which we are now considering, namely, *National Assistance Board v. Parkes*. In *Parkes' case*, there was a separation. The parties were in a different class of life from the parties in *Stopher's case*, and there was a deed of separation whereby the wife covenanted with the husband (the respondent):

"That the wife will not at any future time be or claim to be entitled to any financial provision whatsoever from the husband in respect of herself and the said child or either of them and that she will not at any future time pledge the credit of the husband and will at all future times keep the husband and his estate and effects fully and effectually indemnified against all debts and liabilities hereafter contracted or incurred by the wife . . ."

There was also a covenant by the wife not to molest the husband and not to take proceedings against him in respect of, among other things, financial provision for herself or for the child. The husband did, however, agree to pay to the wife a sum for the child, when the wife applied to the justices for a maintenance order. The wife became destitute and had to apply to the National Assistance Board for assistance. In *Parkes' case* the justices held that the deed was a bar to their making any order on the husband. In my opinion, that decision cannot be supported and it is entirely contrary to the true ground on which *Prisk's case* (4) was decided. In *Prisk's case* (4), the husband had agreed in 1938, under

- A a deed of separation, to pay £1 a week to the wife, but that sum was not enough for her maintenance, because of the fall in the value of money; and, when the National Assistance Board had increased her income by giving her assistance, this court decided that the husband was bound to repay. What difference can it make that, in one case, the husband agreed to give £1 a week to the wife, and, in the other case, an agreement was made under which the husband was to
- B undertake no liability? The answer is that the Act of 1948 does not require the court to be bound by the agreement between the parties. The court has to consider what is reasonable maintenance for the wife, and, if the wife has not committed any matrimonial offence, any reasonable allowance which the National Assistance Board give her can be recovered from the husband. There is a provision in s. 43 (2) of the Act of 1948, as there was in s. 33 of the Act of
- C 1868, which enables the justices to look at all the circumstances of the case, including the means of the husband. In a case where, for example, the husband is an old age pensioner, hardly able to keep body and soul together, or the husband himself is in receipt of national assistance, the justices probably would not think of making any order. There may be other cases in which the justices come to the conclusion that, if the wife would act more reasonably than she is
- D doing, the parties might come together, and there again, the justices might think that in all the circumstances of the case it would not be right to make the husband pay a large proportion of his income to his wife because the wife was a good deal more to blame for the state of affairs than the husband was. Those considerations apart, the obligation on a man to maintain his wife remains unless and until the wife commits a matrimonial offence. If, during the time the marriage
- E subsists, the wife becomes destitute, or substantially destitute, and the National Assistance Board, who have now taken the position formerly occupied by the guardians of the poor, give her reasonable maintenance, they are entitled to recover what the justices think reasonable from the husband who has not, in fact, provided—I will not use the words “failed to provide”—money for the wife.
- F The decisions of the Probate, Divorce and Admiralty Division which were cited to us deal with an entirely different state of things. It is laid down that, if there is a consensual separation, a wife cannot avail herself of the provisions of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, to apply to justices for maintenance. She has made her bargain and she cannot take advantage of the provisions of those statutes, and her only remedy is to go to the National Assistance Board. If the board, coming to the conclusion that
- G she is destitute, relieve her, the husband would have to repay the board under the National Assistance Act, 1948, even though he could not be made to pay under the Summary Jurisdiction Acts. For these reasons, I think that the appeal in *Stopher's* case should be dismissed, and the appeal in *Parkes's* case be allowed, and that *Parkes's* case should go back to the justices with a direction that they must
- H further hear the case and come to a conclusion as to what is a proper sum to be paid by the husband under s. 43 of the Act of 1948.

ORMEROD, J. : I agree, for the reasons set out by my Lord.

- I GORMAN, J. : I also agree, and would add only two observations. In the first place, it is important to realise that we are concerned in these cases with the right to public assistance given by the National Assistance Act, 1948. The second thing is this: it is right to point out that the decision of this court in *National Assistance Board v. Wilkinson* (1) must be read in relation to, and in relation only to, the facts of that case.

Appeal dismissed in Stopher's case; appeal allowed in Parkes's case.

Solicitors: *Field, Roscoe & Co.*, agents for *Gotelee & Goldsmith*, Ipswich (for the husband in the first case); *Gibson & Weldon* (for the husband in the second case); *Solicitor, National Assistance Board.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

MORELLE, LTD. v. WAKELING. A

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, Jenkins, Morris, and Romer, L.JJ.), February 14, 15, 16, March 3, 1955.]

Court of Appeal—Court bound by its previous decision—Decisions given per incuriam—Stare decisis.

As a general rule, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision, or some step in the reasoning on which it is based, is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, consistently with the stare decisis rule, which is an essential feature of our law, be of the rarest occurrence (see p. 718, letter A, post). B

A decision cannot be treated as given per incuriam simply because of a deficiency of parties (see p. 718, letter G, post).

Young v. Bristol Aeroplane Co., Ltd. ([1944] 2 All E.R. 293), *Huddersfield Police Authority v. Watson* ([1947] 2 All E.R. 193), *Penny v. Nicholas* ([1950] 2 All E.R. 89), and *A. & J. Mucklow, Ltd. v. Inland Revenue Comrs.* ([1954] 2 All E.R. 508) considered. C D

Company—Foreign company—Mortmain—Acquisition of lease—Title registered—Forfeiture—Time when forfeiture occurs—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1 (1). E

Land Registration—Proprietor—Registration of foreign corporation—Possessory leasehold title assigned to foreign corporation—No licence in mortmain or statutory authority to hold land—Forfeiture—Effect of registration—Land Registration Act, 1925 (15 & 16 Geo. 5 c. 21), s. 23, s. 80.

On Nov. 26, 1951, D. was registered under the Land Registration Act, 1925, as proprietor with a possessory title of the leasehold interest in land under a lease for ninety-nine years from Dec. 25, 1865. By an instrument of transfer dated Dec. 20, 1952, in consideration of £85, the receipt of which was thereby acknowledged, D. purported to assign his leasehold interest to a company, M. Ltd., described as having its registered office at an address in Dublin, Eire. The transfer was completed by registration under the Act of 1925 of the transfer to M. Ltd., which was registered as proprietor having a possessory title with an address "care of" Y. Ltd. in London. M. Ltd., was a company incorporated in Dublin according to the law of Eire, and had no business or address in England. It had not complied with the Companies Act, 1948, s. 408, nor had it a licence in mortmain so as to entitle it to hold land in England. M. Ltd. brought an action against tenants of the land for arrears of rent. F

Held: (i) the transfer to M. Ltd. was an assurance of land in mortmain within the Mortmain and Charitable Uses Act, 1888, s. 1 (1), and the term of years was automatically forfeited to the Crown by virtue of that section (*Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook* ([1954] 2 All E.R. 673) followed); and the fact of the registration under the Act of 1925 did not protect the term from forfeiture, because s. 23 of that Act was designed to protect a purchasing transferee from defects in a transferor's title, such as a forfeiture subsisting at the date of the transfer against the registered estate in the transferor's hands, and not to protect a transferee against his own incapacity or to relieve such a transferee from a defect in the transferee's own title, such as a forfeiture arising on completion of the transfer by reason of the transferee's own lack of authority to hold land in mortmain; and, therefore, M. Ltd. had no title to sue the tenants (see p. 721, letter C, post). G H I

- A (ii) having regard to s. 80 of the Act of 1925, the forfeiture occurred immediately on the completion of the transfer by registration under the Act, and not at an earlier stage of the transaction, because D. could not, in the circumstances, on entering into the contract or on receiving the purchase money, be regarded as a trustee for M. Ltd.; but even if he could be so regarded, so that a forfeiture occurred before the transfer, registration of the transfer would operate to vest the registered estate in M. Ltd., and thus a new forfeiture would immediately occur (see p. 722, letters A and D, post).

Land Registration—Transfer—Transfer not in prescribed form—Validity of transfer—Land Registration Rules, 1925 (S.R. & O. 1925 No. 1093), r. 74, r. 121 (1), r. 123 (1), r. 322 (1).

- C The Land Registration Rules, 1925, r. 121 (1), provide: "A transfer of land to an incorporated company or other corporation, sole or aggregate, shall be made by an instrument in Form 35, and, save as mentioned in this rule, shall refer to the licence in mortmain or statute enabling the corporation to acquire or hold the land". A transfer of a registered leasehold interest in land to M. Ltd., a foreign corporation holding no licence in mortmain and not entitled by statute to acquire or hold land in England, was not made by an instrument in Form 35, but was effected by the common form of transfer and accepted by the Land Registry on the footing that the Mortmain Acts did not apply to leasehold land unless the lease were virtually perpetual.

- D **Held:** the departure from r. 121 (1) did not invalidate the transfer, because having regard to r. 74, r. 123 (1), and r. 322 (1), the registrar was given a wide discretion as to the forms used, including discretion to authorise departure from the rules, and although the departure from r. 121 (1) was based on an erroneous view of the law, the acceptance of the transfer for registration must be taken as conclusive of its sufficiency in form.

- E Per CURIAM: if the Land Registration Rules, 1925, categorically enjoined that a particular form and none other should invariably be used for transactions of a particular kind, the use of a different form for a transaction of that kind might invalidate the transaction (see p. 724, letter C, post).

- F Appeal dismissed.

- [**Editorial Note.** The Court of Appeal considered that they were bound by their decision in *Morelle, Ltd. v. Waterworth*, [1954] 2 All E.R. 673 and did not accept the submission that that decision should be regarded as having been decided per incuriam. If, however, they had decided that s. 23 of the Land Registration Act, 1925, prevented land with registered title being forfeited if a company having no authority to hold land in mortmain were registered as proprietor, the Court of Appeal would have held further that their decision in *Rodnall, Ltd. v. Ludbrook*, [1954] 2 All E.R. 673, in which case the title to the land in question was registered, was decided per incuriam. The appeal in that case and in *Morelle, Ltd. v. Waterworth* were heard together and the point under the Land Registration Act, 1925, did not arise in *Morelle, Ltd. v. Waterworth* which alone was substantially argued (see p. 718, letter I to p. 719, letter A, post).

- H On the construction of the Land Registration Act, 1925, it is to be noted that the Court of Appeal considered that little significance is to be attached to the use of the word "deemed" in s. 9, s. 23 and s. 69 of the Act of 1925 (see p. 723, letter A, post).

- I As to the Binding Force of Decisions of the Court of Appeal, see 19 HALSBURY'S LAWS (2nd Edn.) 254, 255, para. 556; and for cases on the subject, see 30 DIGEST (Repl.) 225-227, 689-720.

As to the Law relating to Mortmain, see 9 HALSBURY'S LAWS (3rd Edn.) 73, paras. 144 et seq; and for cases on the subject, see 13 DIGEST 371, 1025-1028.

For the Mortmain and Charitable Uses Act, 1888, s. 1 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 910; for the Land Registration Act, 1925, s. 23, s. 80, see 20 HALSBURY'S STATUTES (2nd Edn.) 966, 1012.

For the Land Registration Rules, 1925, r. 74, r. 121, r. 123, r. 322, see 18 A HALSBURY'S STATUTORY INSTRUMENTS 156, 166, 167, 207.]

Cases referred to:

- (1) *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook*, [1954] 2 All E.R. 673.
- (2) *Re Budgett*, [1894] 2 Ch. 557; 63 L.J.Ch. 847; 71 L.T. 72; 4 Digest 441, 3981.
- (3) *Aristoc, Ltd. v. Rysta, Ltd.*, [1945] 1 All E.R. 34; [1945] A.C. 68; 114 L.J.Ch. 52; 172 L.T. 69; 2nd Digest Supp.
- (4) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 30 Digest (Repl.) 225, 691.
- (5) *Truro Corpn. v. Rowe*, [1901] 2 K.B. 870; 70 L.J.K.B. 1026; 85 L.T. 422; 65 J.P. 806; *on appeal* C.A., [1902] 2 K.B. 709; 71 L.J.K.B. 974; 87 L.T. 386; 66 J.P. 821; 13 Digest 371, 1027.
- (6) *Lancaster Motor Co. (London), Ltd. v. Bremith, Ltd.*, [1941] 2 All E.R. 11; [1941] 1 K.B. 675; 110 L.J.K.B. 398; 165 L.T. 134; 2nd Digest Supp.
- (7) *Huddersfield Police Authority v. Watson*, [1947] 2 All E.R. 193; [1947] K.B. 842; [1948] L.J.R. 182; 177 L.T. 114; 111 J.P. 463; 30 Digest (Repl.) 229, 734.
- (8) *Garvin v. City of London Police Authority*, [1944] 1 All E.R. 378; [1944] K.B. 358; 113 L.J.K.B. 305; 170 L.T. 336; 108 J.P. 107; 2nd Digest Supp.
- (9) *Penny v. Nicholas*, [1950] 2 All E.R. 89; 114 J.P. 335; sub nom. *Nicholas v. Penny*, [1950] 2 K.B. 466; 2nd Digest Supp.
- (10) *Melhuish v. Morris*, [1938] 4 All E.R. 98; Digest Supp.
- (11) *Mucklow (A. & J.), Ltd. v. Inland Revenue Comrs.*, [1954] 2 All E.R. 508; [1954] Ch. 615.
- (12) *Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs.*, [1933] 1 K.B. 488; 103 L.J.K.B. 33; 148 L.T. 199; 18 Tax Cas. 83; Digest Supp.
- (13) *Colville Estate, Ltd. v. Inland Revenue Comrs.*, [1930] 2 K.B. 393; 100 L.J.K.B. 101; 144 L.T. 28; 15 Tax Cas. 485; Digest Supp.
- (14) *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.
- (15) *Re Suarez (No. 2)*, [1924] 2 Ch. 19; 93 L.J.Ch. 483; 130 L.T. 800; 38 Digest 753, 905.

Appeal.

Appeal by the plaintiff from an order of His Honour JUDGE CLOTHIER at Lambeth County Court dated Sept. 13, 1954. The plaintiff, a foreign corporation, as registered proprietor of a possessory leasehold title No. 94,525 in respect of a dwelling-house and garden known as 158 Coldharbour Lane, Lambeth, in the county of London, claimed from the defendants, as tenants, £105 9s. 6d. in respect of the rent due from Jan. 27, 1953, to July 5, 1954. The defendants pleaded that the plaintiff had forfeited the lease by virtue of the Mortmain and Charitable Uses Act, 1888, s. 1 (1), and that they were not the tenants of the plaintiff. The plaintiff replied that, even if the lease had been forfeited, the Land Registration Act, 1925, s. 23, rehabilitated the title. The county court judge, following the decision of the Court of Appeal in *Morelle, Ltd. v. Waterworth* (1) ([1954] 2 All E.R. 673), dismissed the action on the ground that the leasehold property was forfeited and that s. 23 of the Act of 1925 did not protect the plaintiff's interest from forfeiture. When the appeal came on for hearing, the Court of Appeal adjourned in order to give the Crown an opportunity to be heard on the question of the effect of the transfer of a registered title to a corporation not qualified to acquire or hold land. The Attorney-General attended and stated that the Crown was interested to argue that *Morelle, Ltd. v. Waterworth* (1) was wrongly decided.

- A *C. N. Shawcross, Q.C.*, and *J. P. Widgery* for the plaintiff.
Gerald Gardiner, Q.C., and *G. Janner* for the defendants.
The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), *Geoffrey Cross, Q.C.*, and *Denys B. Buckley* as amici curiae.

Cur. adv. vult.

- B Mar. 3. **SIR RAYMOND EVERSHERD, M.R.**, read the following judgment of the court: The plaintiff, the appellant in this court, is a company incorporated in Dublin according to the laws of Eire, and claims in the present proceedings to be the proprietor of a leasehold interest in premises in London known as 158 Coldharbour Lane, Lambeth. The action is one for alleged arrears of rent from tenants occupying a part of the premises. The defence raised in the action included a challenge to the plaintiff's title to sue on the ground that since the plaintiff is a foreign corporation having no business or address in England, and since it has neither availed itself of the provisions of the Companies Act, 1948, s. 408, nor has a licence in mortmain, so as to entitle it to hold land in this country, the interest which the plaintiff claims to have in the premises in question had, prior to the initiation of the present proceedings, been forfeited to the Crown.
- C The defendant tenants rely particularly on the decision of this court in the earlier case in which the plaintiff was involved, *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook* (1).

- In the case just mentioned (which I will hereafter refer to as the "first *Morelle* case"), two distinct points were raised: (i) Was the assurance to the plaintiff of the unexpired residue of a term of years in house property in London an assurance of land in mortmain within the terms of the Mortmain and Charitable Uses Act, 1888, s. 1 (1) ? (ii) If so, was the term so assured automatically forfeited to the Crown by virtue of the same sub-section ? Both these questions were answered affirmatively by this court. Both questions turned on the proper interpretation of the relevant terms of the Mortmain and Charitable Uses Acts, 1888 and 1891. It is not in dispute that the only distinction between the present case and the first *Morelle* case (1), although the distinction may be one of substance, is that, in the present case the land in question (which, like that in the earlier case, is the subject of an unexpired residue of a term of years) is registered land, and that the name of the plaintiff has been inserted on the land register in respect of that land as proprietor thereof with a possessory title. It has been contended unsuccessfully in the county court on behalf of the plaintiff that such registration has, in any event, given to the plaintiff a good title to the land and, accordingly, to sue in this action, notwithstanding the effect of the Mortmain Acts, unless and until the Crown or some other person entitled to make application obtains rectification of the register.

- G It will be convenient to refer now to the relevant provisions of the Acts of 1888 and 1891. Section 1 (1) of the Act of 1888, which is in Part 1 of the Act entitled "Mortmain", reads:

- H "Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and, if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly."

I Sub-section (2) of the section contains a number of provisos of which, having regard to the nature of the argument later discussed, para. (iv) is of some significance. That paragraph is:

"If the right of entry under this Act is exercised by or on behalf of a mesne lord, the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty."

Section 10 contains certain definitions, and it is to be observed that these definitions relate equally to Part 1 of the Act relating to mortmain and Part 2 relating to charitable uses. The material definitions are: A

“(i) ‘Assurance’ includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument; and ‘assure’ and ‘assuror’ have meanings corresponding with assurance . . . (iii) ‘Land’ includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land.” B

The last mentioned definition was replaced by the Mortmain and Charitable Uses Act, 1891, s. 3, which (as later amended by the Statute Law Revision Act, 1908) reads: C

“‘Land’ in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land.”

It will be observed that the effect of the amendment by the Act of 1891 has been to exclude from the definition of land, for the purposes of both Acts, the formula “any estate and interest in land”. D

When this appeal was first called on in December, 1954, before SIR RAYMOND EVERSHERD, M.R., BIRKETT, L.J., and ROMER, L.J., it was suggested, having regard to the importance of the matters involved and since we were informed that a number of properties were similarly affected, that an opportunity should be given to the Attorney-General to attend the appeal and put forward such arguments as he thought fit as *amicus curiae*. The case was adjourned accordingly, and the Attorney-General has availed himself of the opportunity which we gave. We are greatly indebted to the Attorney-General and to Mr. Cross for their very considerable assistance in a difficult matter. On the appeal again coming on before a full court, the first point raised by the Attorney-General was that the Crown should be added as a party to the proceedings as being (within the terms of R.S.C., Ord. 16, r. 11): E

“[a party] who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter . . .” F

We decided to postpone our decision on this application until we had heard the argument on the whole case, and we shall deal hereafter with it. It may be stated, however, that though the apparent interest of the Crown would be to support the Court of Appeal's conclusion in the first *Morelle* case (1), in reality this is found not to be so: for, if the leasehold terms in question have vested in the Crown, then the Crown would presumably be liable on the covenants contained in the leases, including the covenants relating to repairs and delivery up. As we have stated, the alleged interests of the plaintiff in the present case and in the first *Morelle* case (1) are interests in the unexpired residues of terms of years. In the present case the term of years expires in 1964. It is plain that the Crown has not thought it right or in its proper interests to seek to support the decision in the first *Morelle* case (1) and of the county court judge in the present appeal. G

The next point accordingly taken by the Attorney-General was that the decision of this court in the first *Morelle* case (1) was erroneous and, having been arrived at *per incuriam*, was open now to review and ought not to be followed by this court. Counsel for the plaintiff felt a difficulty in himself arguing this point—assuming, since this is a county court appeal, that it was sufficiently taken in the court below. The main argument on this question was accordingly presented to us by the Attorney-General and Mr. Cross as *amici curiae*. At our H
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A invitation the Attorney-General and Mr. Cross put before us the general character of the argument on which they would rely in support of their main contention, viz., that this court, in the first *Morelle* case (1), had reached an erroneous conclusion on one or both of the two questions then submitted to it and above formulated. In so putting this main contention, the learned counsel for the Crown informed us of the authorities on which they relied, but they did not refer

B specifically to more than a few of them, nor did they fully elaborate their argument. But they then submitted their case for saying that this court had decided the first *Morelle* case (1) per incuriam; and we heard this part of the argument on the basis of the correctness of the Attorney-General's main contention.

This main contention was to the following effect: (i) The Mortmain and Charitable Uses Act, 1888, is by its own title an Act to consolidate and amend the law relating to mortmain. (ii) This Act and the amending Act of 1891 should, therefore, according to well-established principle and authority (see, e.g., *Re Budgett* (2), and *Aristoc, Ltd. v. Rysta, Ltd.* (3)) be construed, so far as their terms fairly admit, in conformity with the law relating to mortmain as it previously stood—particularly as it stood according to the terms of the confirmation of Magna Carta, 9 Henry 3 c. 36, and the Statute De Viris Religiosis (1279), 7 Edward 1. (iii) The earlier law relating to mortmain was based essentially on the conception of the feudal tenure of land. (iv) Thus (a) the dispositions struck at were dispositions of the fee and leaseholds were excluded from its scope except in so far as a leasehold term was in duration such as to be practically equivalent to a freehold; (b) alternatively, an assignment of a relatively short unexpired residue of a term of years such as those in question in the present case and the first *Morelle* case (1) was never comprehended by the law relating to mortmain; (c) the penalty for infringing the provisions of the law relating to mortmain was liability to forfeiture (following a distinct and established procedure) and not an automatic forfeiture; (d) moreover, the right of forfeiture in the Crown was subject to the prior like rights, in gradation, of the mesne

E lords, if any; (e) the subject-matter forfeited was in all cases the fee itself. (v) Finally, in construing the relevant terms of the Act of 1888, it is of the highest significance that the statute related both to the law relating to mortmain and also to that relating to charitable uses (previously the subject of the Charitable Uses Act, 1735 (9 George 2 c. 36)) and the inclusion in the definition of land in s. 10 (iii) of the phrase "any estate and interest in land", which

F was excluded by the amending Act of 1891, was attributable to the application of the Act to charitable uses.

It was clear to us that this argument had involved considerable research and reference to some of the oldest authorities in our law, and would have taken no little time to develop fully. We did not, in the circumstances, hear the answer which counsel for the defendants was prepared to offer. For, whether or not, if we

H were free to treat the matter as res integra, we should arrive at a different answer to either or both of the material questions from those given by this court in the first *Morelle* case (1), it is clear that we cannot now reopen those questions at all unless we can properly hold that the decision of this court in the first *Morelle* case (1) was given per incuriam so as, consistently with the judgment of this court in *Young v. Bristol Aeroplane Co., Ltd.* (4), to leave the matter

I at large for our independent decision.

We have carefully considered the judgments and the report of the arguments in the first *Morelle* case (1). We have also had available to us the notes made during the hearing of that case by DENNING, L.J., and MORRIS, L.J. With this material before us it has been impossible, in our judgment, to fasten on anything in the judgments in the first *Morelle* case (1) or on any step in the reasoning on which those judgments were based, and to say of it: "Here was a manifest slip or error". It is true that the argument formulated for us by the Attorney-

General and Mr. Cross was not (as clearly appears) so fully or carefully A
formulated on the former occasion. In particular, it does not appear that the
point was made or at all comparably emphasised that the Act of 1888, being
an Act only to consolidate and amend the previous relevant law, must be so
construed as *prima facie* not intended to bring about substantial changes in that
law. But, as we have already said and as we venture to emphasise, the question
before that court was one of the true interpretation of the language in fact used B
by Parliament in the Acts of 1888 and 1891. It is, we think, manifest that s. 1
of the Act of 1888 is widely different from that of the Statute De Viris
Religiosis, 7 Edward 1—which is indeed not surprising, having regard to their re-
spective dates. Thus, as regards forfeiture, the statute of Edward 1 lays it down
that any prohibited transaction should be “under pain of forfeiture” and
continues to provide that in the event of any person offending against the statute C

“It shall be lawful to us and other chief lords of the fee immediate
to enter into the land so aliened within a year from the time of the
alienation . . .”

On the other hand, whatever be the true sense in which the words “shall be
forfeited” are used at the end of s. 1 (1) of the Act of 1888, it seems clear, as D
the Attorney-General observed and conceded, that the same words in s. 1 (2)
(iv) refer inevitably as a matter of language to a forfeiture taking effect immedi-
ately. And although there have been several decisions of the courts (named by
the Attorney-General) on the scope of the old law relating to assurances in
mortmain, there has been none on the relevant terms of the Act of 1888, except
the case before *WILLS, J., of Truro Corpn. v. Rowe* (5), which is not binding on E
this court and which was criticised in *HALSBURY'S LAWS OF ENGLAND* (2nd
Edn.), vol. 8, p. 83, note (g) (see now 3rd Edn., vol. 9, p. 73, note (1)) on the
ground that the attention of the court had not been directed to the terms of
the definitions in s. 10 of the Act of 1888. Further, there is no doubt, in our
judgment, that the old law relating to mortmain, including the effect, as it had
been understood, of the Statute 7 Edward 1, was clearly put to this court in the F
first *Morelle* case (1), if less fully or elaborately than on the present occasion;
and this court in the first *Morelle* case (1) deliberately expressed its conclusion
on the question whether, as a matter of construction of the Acts of 1888 and
1891, the old view as to the non-applicability of the law of mortmain to relatively
short terms of years or to an assignment of the unexpired residues of such terms
still held good; and also on the question what effect should be given (in the light
of the earlier law) to the terms of s. 1 (1) of the Act of 1888 as to forfeiture to G
Her Majesty. It is also clear, from the judgment of *SINGLETON, L.J.* ([1954]
2 All E.R. at p. 675) that the court had also in mind the effect of s. 3 of the Act
of 1891 which removed from the definition of “land” in the Act of 1888 the
words “any estate and interest in land”.

In delivering the judgment of this court in *Young v. Bristol Aeroplane Co., Ltd.* (4) LORD GREENE, M.R., thus stated the effect of the rule *stare decisis* in H
its application to the Court of Appeal ([1944] 2 All E.R. at p. 298):

“In considering the question whether or not this court is bound by its
previous decisions and those of courts of co-ordinate jurisdiction, it is
necessary to distinguish four classes of case. The first is that with which
we are now concerned, namely, cases where this court finds itself confronted
with one or more decisions of its own or of a court of co-ordinate jurisdiction
which cover the question before it and there is no conflicting decision of this
court or of a court of co-ordinate jurisdiction. The second is where there is such
a conflicting decision. The third is where this court comes to the conclusion
that a previous decision, although not expressly overruled, cannot stand
with a subsequent decision of the House of Lords. The fourth (a special
case) is where this court comes to the conclusion that a previous decision
was given *per incuriam*. In the second and third classes of case it is beyond I

A question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment."

B LORD GREENE, M.R., returned to the fourth class—which is that now relevant—when he said (*ibid.*, at p. 300):

C "It remains to consider *Lancaster Motor Co. (London), Ltd. v. Bremith, Ltd.*, (6), in which a court consisting of SIR WILFRID GREENE, M.R., CLAUSON and GODDARD, L.JJ., declined to follow an earlier decision of a court consisting of SLESSER and ROMER, L.JJ. This was clearly a case where the earlier decision was given *per incuriam*. It depended upon the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*. We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions *per incuriam* fall outside the scope of our inquiry, namely, (i) those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow; and (ii) those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords.

G "On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*."

I Some further light has been thrown on the meaning and scope of the term "per incuriam" by later decisions. In the first, *Huddersfield Police Authority v. Watson* (7), a Divisional Court of the King's Bench Division consisting of LORD GODDARD, C.J., ATKINSON, J., and LEWIS, J., held that that court was, like the Court of Appeal and on similar principles, bound by previous decisions

of its own. In delivering the judgment of the court LORD GODDARD, C.J., said A
 ([1947] 2 All E.R. at p. 196):

"What is meant by giving a decision per incuriam is giving a decision when
 a case or a statute has not been brought to the attention of the court and
 they have given the decision in ignorance or forgetfulness of the existence
 of that case or that statute."

Applying that principle the Divisional Court held itself bound by the earlier B
 decision of the same court in *Garvin v. City of London Police Authority* (8).

In a later case of *Penny v. Nicholas* (9), concerned with the question whether
 evidence of a speedometer reading was prima facie evidence of the speed recorded,
 the Divisional Court, consisting of LORD GODDARD, C.J., HUMPHREYS, J., and
 MORRIS, J., held themselves not bound by a previous decision in *Melhuish v.* C
Morris (10), on the ground that that case had been decided per incuriam. LORD
 GODDARD, C.J., said ([1950] 2 All E.R. at p. 91; [1950] 2 K.B. at p. 472):

"But, without necessarily saying that we can always differ from a previous
 decision of the Divisional Court merely because it has not been argued on
 both sides, the court is not obliged to follow that decision, for it has been
 laid down by the Court of Appeal in *Young v. Bristol Aeroplane Co., Ltd.* (4), D
 which has been followed quite recently in this court, that where material
 cases or statutory provisions, which show that a court has decided a case
 wrongly, were not brought to its attention the court is not bound by that
 decision in a subsequent case. Two remarkable cases which might have
 been cited to the court in *Melhuish v. Morris* (10) if the case had been argued
 on both sides were not cited to it, and those cases, I think, would have had
 a considerable influence on that decision."

A third case to which we were referred by the Attorney-General was that of
A. & J. Mucklow, Ltd. v. Inland Revenue Comrs. (11), in this court. The case was
 concerned with the validity of a direction given under the Finance Act, 1922,
 s. 21 (as amended by the Finance Act, 1927, s. 31) in respect of the so-called
 "broken accounting period" up to the commencement of the appellant company's
 winding-up, on the ground that the company had not for such period distributed
 a reasonable amount of its income to its members. It was in that case contended
 by the Crown (who were held by this court entitled on other grounds to succeed)
 that a direction given under the section in respect of a broken period was in-
 escapable; and the Crown relied in support of that contention on the language
 of LORD HANWORTH, M.R., and (more particularly) of SLESSER, L.J., in an
 earlier case of *H. Collier & Sons, Ltd. v. Inland Revenue Comrs.* (12). This court
 held that they were not bound by the opinions of the majority of the court in
 the earlier case on the ground (among others) that those opinions proceeded
 on a premise which was admittedly erroneous, such premise being inconsistent
 with an authority binding on the Court of Appeal which had not been cited in
Collier's case (12). In *Mucklow's* case (11), SIR RAYMOND EVERSHERD, M.R.,
 said ([1954] 2 All E.R. at p. 516):

"It is conceded that SLESSER, L.J., fell into error in supposing that, in
 cases falling under the original Act, the commissioners had a duty to
 ascertain any 'reasonable' figure which fixed the limits of tax liability.
Colville Estate, Ltd. v. Inland Revenue Comrs. (13) was not cited to the
 Court of Appeal in *Collier's* case (12). In *Colville's* case (13) it had been
 clearly held that, if in such a case as I am supposing (i.e., one falling under the
 terms of the original Act of 1922) a company had not distributed a reasonable
 part of its actual income, then the members were liable to be taxed in respect
 of the whole of that income and not a reasonable part only of it; and that
 view of the section was later approved in the House of Lords in *Fattorini's*
case (14), see per LORD ATKIN ([1942] 1 All E.R. at p. 624), per LORD
 MACMILLAN (ibid., at p. 627), and per LORD WRIGHT (ibid., at p. 629). It

- A was argued that the error into which the learned lord justice fell was, nevertheless, not essential to the ratio of his decision of the case. As a matter of strict logic, it may be that the conclusion was independent of the false premise. The question is, however, not whether, as a matter of logic, the conclusion depended on the premise, but whether SLESSER, L.J., thought that his conclusion followed from the antithesis which he had earlier stated.
- B And I am very far from satisfied that, if it had not been for his view of the effect of the original section and of the contrast which he consequently discerned from the introduction of the formula 'available for distribution, etc.', he would ever have formed the view which he did of the meaning of that formula. For my part, therefore, I should be prepared to hold that the judgment of SLESSER, L.J., if it would otherwise be authoritative, can be reviewed in this court (within the principle of *Young v. Bristol Aeroplane Co., Ltd.* (4)) on the ground that it was delivered, in this essential respect, per incuriam, or that a material part of the reasoning on which the conclusion rests is inconsistent with later pronouncements (in *Fattorini's* case (14)) of the House of Lords."

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- D SIR RAYMOND EVERSHED, M.R., then referred to the judgment of LORD HANWORTH, M.R., and concluded (*ibid.*, at p. 517):

"... I think also that the disabling quality in SLESSER, L.J.'s judgment must, as a consequence, equally affect that of [LORD HANWORTH, M.R.]."

- E JENKINS, L.J., in the same case, after saying that he felt "considerable difficulty" as to *Collier's* case (12), and after referring to SLESSER, L.J.'s "misapprehension" and to the fact that the views of LORD HANWORTH, M.R., and SLESSER, L.J., on the point raised in *Mucklow's* case (11) were not necessary to the decision in *Collier's* case (12), said (*ibid.*, at p. 527):

- F "For the reasons I have stated, I cannot regard the circumstances in which the majority judgments in *Collier's* case (12) came to be delivered as wholly satisfactory, and having regard to those circumstances, to the probability that the court was consequently denied the assistance of anything comparable to the very full argument addressed to us in the present case, and to the fact that it was unnecessary for the purpose of deciding the case then before the court to express any opinion on this aspect of the construction of s. 31 (4), I think those are substantial grounds for the view that we would be justified in holding that it should not be considered as a binding authority for the proposition that s. 31 (4) is automatic in its effect."
- G

- H In the light of these authorities it was the contention of the Attorney-General that the question whether a decision had been given per incuriam was not to be determined according to any hard and fast rule but was one of degree, depending on the special circumstances of the case. He referred to the language of LORD GREENE, M.R., in *Young v. Bristol Aeroplane Co., Ltd.* (4), which we have earlier quoted ([1944] 2 All E.R. at p. 300): "We do not think that it would be right to say that there may not be other cases of decisions given per incuriam" (i.e., other than decisions given in ignorance or forgetfulness of a statute or a rule having the force of a statute)

- I "in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts."

In the first *Morelle* case (1) (so ran the Attorney-General's argument) the circumstances were of a very special and unusual character; and he referred particularly to the subject-matter—the law relating to mortmain—which is of a specialised and highly technical character and which very infrequently comes before the courts; to the fact that the arguments were brief, the learned counsel for the plaintiff having only been instructed in the afternoon before the case came on

for hearing; and to the absence of any sufficient emphasis, consequently, on the connection of the law relating to mortmain with the feudal conception of land tenure and on the fact that the Act of 1888 was a consolidating and amending statute. A

We have been unable to accept this argument. As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of LORD GREENE, M.R., of the rarest occurrence. In the present case, it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten on any part of the decision under consideration, or on any step in the reasoning on which the judgments were based, and to say of it: "Here was a manifest slip or error". In our judgment, acceptance of the Attorney-General's argument would necessarily involve the proposition that it is open to this court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the court had not, on the earlier occasion, had the benefit of the best argument that the researches and industry of counsel could provide. Such a proposition would, as it seems to us, open the way to numerous and costly attempts to re-open questions now held to be authoritatively decided. Although, as was pointed out in *Young v. Bristol Aeroplane Co., Ltd.* (4), a "full court" of five judges of the Court of Appeal has no greater jurisdiction or higher authority than a normal division of the court consisting of three judges, we cannot help thinking that, if the Attorney-General's argument were accepted, there would be a strong tendency in cases of public interest and importance, to invite a "full court" in effect to usurp the function of the House of Lords and to reverse a previous decision of the Court of Appeal. Such a result would plainly be inconsistent with the maintenance of the principle of stare decisis in our courts. In conclusion on this point, we would add that we are unable to accept the suggestion of counsel for the plaintiff that the decision in the first *Morelle* case (1) should be regarded as per incuriam on the ground that a necessary party to the proceedings, viz., the Crown, were not before the court. A decision cannot, in our judgment, be treated as given per incuriam, simply because of a deficiency of parties. We therefore hold that the decision in the first *Morelle* case (1) is binding on us. E

It remains to consider the contention that this case is distinguishable from the first *Morelle* case (1) on the grounds that the land here in question is registered land, and that the assurance in mortmain was effected by means of a transfer for valuable consideration from the previous registered proprietor, one Desmond Dixon, to the plaintiff, completed by the registration of the plaintiff as proprietor in succession to the transferor. We should note that *Rodnal, Ltd. v. Ludbrook* (1), decided by this court at the same time and in the same way as the first *Morelle* case (1), was in fact a case of registered land, but it was decided without separate argument on the admission of counsel that it was indistinguishable from the first *Morelle* case (1). Accordingly, if and so far as the fact and effect of registration are found on examination to afford valid grounds for distinguishing the first *Morelle* case (1) from the present case, we are free to make the distinction. On that assumption, there can be no doubt that *Rodnal, Ltd. v. Ludbrook* (1) was I

A decided per incuriam, for it was decided in disregard of the statutory provisions which (on the assumption now made) distinguished it in truth from the first *Morelle* case (1).

B The facts regarding the registered title to the land now in question, viz., the leasehold interest under a lease for ninety-nine years from Dec. 25, 1865, in No. 158, Coldharbour Lane, Lambeth, are briefly these. The land was first registered with a possessory title on July 19, 1904. The immediate predecessor in title of the plaintiff, Desmond Dixon, was registered as proprietor on Nov. 26, 1951. The instrument of transfer from Desmond Dixon to the plaintiff was dated Dec. 20, 1952, and was expressed to be made in consideration of £85, the receipt whereof was thereby acknowledged by Dixon, the plaintiff being therein described as having its registered office at 8, Upper O'Connell Street, C Dublin, Eire. The plaintiff was registered as proprietor on Jan. 27, 1953, with the address "care of Yamild, Ltd., 128, Albany Street, N.W.1." There is no evidence showing in detail the order in which the various stages of the transaction were carried out. It seems likely that there was an antecedent contract for the sale and purchase of the property, but this is not proved. Nor is it shown when the £85 was in fact paid by, and the instrument of transfer delivered to, the D plaintiff. It seems likely again, however, that, in accordance with the usual practice, the £85 was paid against delivery to the plaintiff of the executed transfer together with the land certificate, that the plaintiff thereafter applied for registration, producing these documents to the registry, and that registration was granted after the usual notice by the registry to Dixon as the registered transferor. There would thus have been an interval of some five weeks between the payment E of the purchase price and the completion of the transfer by registration on Jan. 27, 1953, that is on the assumption that the price was in fact paid on the date borne by the transfer, viz., Dec. 20, 1952.

It was argued by counsel for the plaintiff that, forfeiture or no forfeiture, the plaintiff as the registered proprietor of the land (i.e., the leasehold interest comprised in the registered title) must, under the provisions of the Land Registration Act, 1925, be considered as owner of the land for all purposes including F the right to recover and receive the rent payable by tenants of the land holding, as the defendant tenants hold, immediately under such owner, at all events until such time as the right of the Crown to the land by forfeiture might be asserted and established in proceedings for rectification of the register. This, in counsel's submission, flows as a necessary consequence from the cardinal principle of land G registration that registered interests alone are to be recognised. But the cardinal principle on which counsel relies is subject to certain exceptions. In particular, the Land Registration Act, 1925, s. 80, contains a saving of the rights of the Crown. That section is in these terms:

H "Subject to the express provisions of this Act relating to the effect of first registration of title and the effect of registration of a disposition for valuable consideration, nothing in this Act affects any right of His Majesty to any bona vacantia or forfeiture."

I This means, as we understand it, that registered land is to be forfeited to the Crown in any case in which it would have been so forfeited if unregistered, save in so far as the sections of the Act concerning the effect of first registration and the registration of dispositions for valuable consideration expressly provide that these operations are to discharge the land from any right of the Crown by way of forfeiture.

The provisions of the Act as to first registration are not directly material here, but we quote them as having some bearing on the arguments addressed to us. Section 5 of the Act provides, with respect to freeholds, that:

"... the registration of any person as first proprietor thereof with an absolute title shall vest in the person so registered an estate in fee simple in possession in the land, together with all rights, privileges, and appurtenances

belonging or appurtenant thereto . . . free from all other estates and interests whatsoever including estates or interests of His Majesty." A

Section 6 and s. 7 apply the provisions of s. 5 to the cases of first registration of freeholds with a possessory or qualified title, with modifications as to which it is sufficient for the present purpose to note that, where the first registration is of a possessory title only, estates rights and interests adverse to the title of the first proprietor and subsisting at the time of first registration are not affected. B

Section 9 of the Act provides with respect to leaseholds that:

" . . . the registration under this Act of any person as first proprietor thereof with an absolute title shall be deemed to vest in such person the possession of the leasehold interest described, with all implied or expressed rights, privileges, and appurtenances attached to such interest . . . free from all other estates and interests whatsoever, including estates and interests of His Majesty." C

Section 10, s. 11 and s. 12 apply the provisions of s. 9 to the cases of first registration of leaseholds with a good leasehold, possessory, or qualified title, subject to modifications which, where the title is possessory only, are comparable to those applicable to the first registration of freeholds with a possessory title only. D

The effect of these provisions would seem to be that if a corporation not authorised by statute, charter or special licence to hold land in mortmain were to acquire unregistered land, thereby incurring a forfeiture under the Act of 1888, and thereafter were to obtain registration of itself as first proprietor of the land with absolute title, such registration would vest in such corporation the fee simple estate in the land in the case of freeholds or be deemed to vest in such corporation the possession of the leasehold interest in the case of leaseholds, free from the estate or interest which had in fact accrued to the Crown by reason of the forfeiture (cf. *Re Suarez* (No. 2) (15)): but that is not this case. E

As to the effect of registration of a disposition for valuable consideration, which is the material operation for the purposes of the present case, s. 20 (1) of the Act provides with respect to freeholds registered with an absolute title that: F

" . . . a disposition of the registered land . . . for valuable consideration shall, when registered, confer on the transferee . . . an estate in fee simple . . . or other legal estate expressed to be created in the land dealt with . . . free from all other estates and interests whatsoever, including estates and interests of His Majesty, and the disposition shall operate in like manner as if the registered transferor . . . were (subject to any entry to the contrary in the register) entitled to the registered land in fee simple in possession for his own benefit." G

Sub-section (2) and sub-s. (3) of s. 20 apply the provisions of sub-s. (1) with modifications to registered dispositions for value of freeholds registered with qualified or possessory title. These modifications include, where the title is possessory only, a saving of the estates rights and interests excluded from the effect of first registration. With respect to leaseholds, s. 23 (1) of the Act provides that: H

"In the case of a leasehold estate registered with an absolute title, a disposition . . . for valuable consideration shall, when registered, be deemed to vest in the transferee . . . the estate transferred . . . to the extent of the registered estate . . . free from all other estates and interests whatsoever, including estates and interests of His Majesty; and the transfer . . . shall operate in like manner as if the registered transferor . . . were (subject to any entry to the contrary on the register) absolutely entitled to the registered lease for his own benefit." I

- A Sub-section (2), sub-s. (3) and sub-s. (4) of s. 23 apply the provisions of sub-s. (1) with modifications to the case of registered dispositions for value of leaseholds registered with good leasehold, qualified or possessory title, the last-mentioned being the class of title with which we are here concerned. The modifications applicable where the title is possessory only are comparable to those applicable to freeholds registered with possessory title only, and relating as they do to
- B the title of the first registered proprietor are not material in the present case.

The effect of these provisions for the present purpose would appear to be that if registered land had been transferred to a corporation not authorised to hold land and the transfer had been completed by the registration of such corporation as proprietor of the land transferred, the transferee corporation could thereafter by a registered disposition for valuable consideration vest the

- C land in the purchaser thereof free of the forfeiture which had in fact been incurred by reason of the transfer in mortmain to such corporation. But that is not this case. The forfeiture here in question was brought about by the registered disposition itself, by reason of the incapacity of the transferee, the plaintiff, to hold land in mortmain, and we cannot construe the provisions of s. 20 and s. 23 of the Act as extending to any forfeiture so occasioned. These
- D provisions are designed to protect a purchasing transferee from defects in the transferor's title, such as a forfeiture subsisting at the date of the transfer against the registered estate in the transferor's hands, and not to relieve such a transferee from a defect in the transferee's own title such as a forfeiture arising on completion of the transfer by reason of the transferee's own lack of authority to hold land in mortmain. The transfer is, by s. 23 (1) (to take the
- E section directly in point here) made to

" . . . operate in like manner as if the registered transferor . . . were (subject to any entry to the contrary in the register) entitled to the registered land for his own benefit",

- and not as if the registered transferor were so entitled and the registered transferee, if in fact a corporation not authorised to hold land in mortmain, were authorised to do so.
- F

- In the course of the argument there was some discussion as to the point of time at which the forfeiture arose. It was suggested that the contract for the sale of the land by Dixon to the plaintiff, if indeed there was any antecedent contract (as to which there was no evidence), or at all events the payment of
- G the purchase money against delivery of the executed transfer, constituted Dixon a trustee of the land for the plaintiff, and that this sufficed to work a forfeiture under the Act of 1888. We find difficulty in accepting this proposition. It is not clear to us that a man who contracts to sell land to a corporation not authorised to hold land in mortmain, even though he receives the purchase money, incurs or creates a forfeiture at any time before actual conveyance.
- H The contract would not be specifically enforceable and, therefore, could hardly give rise to a constructive trust. If the vendor refused to complete, *prima facie* the only remedy of the purchaser corporation would be to recover any purchase money paid as money had and received to its use. We say nothing as to the effect of an express declaration of trust in favour of such a corporation, and are referring only to a contract of sale and purchase to be carried out by conveyance in the ordinary way. Moreover, in the present case the transaction
- I was a sale and purchase of registered land intended to be carried out and in fact carried out by means of a transfer completed by registration under the Act. We note that by the Land Registration Act, 1925, s. 22 (1):

" A transfer of the registered estate in the land . . . shall be completed by the registrar entering on the register the transferee as proprietor of the estate transferred, but until such entry is made the transferor shall be deemed to remain the proprietor of the registered estate . . . "

Accordingly, we think the better opinion is that there was no forfeiture here until the completion by registration of the transfer from Dixon to the plaintiff. But if we are wrong in this, and if the contract for sale or the receipt of the purchase money sufficed to work a forfeiture on the ground that Dixon thereby constituted himself a trustee for the plaintiff, how does the case stand? On this assumption the position was that, immediately before the registration of the transfer, Dixon was a registered proprietor who had incurred or created a forfeiture, while the plaintiff had no interest at all; for ex hypothesi the forfeiture worked contemporaneously with the arising of the trust, which in any case had no effect on the registered title. Dixon then effected a disposition for valuable consideration of the registered estate in the land to the plaintiff, and by force of s. 23 of the Act that disposition when registered operated to vest the registered estate in the plaintiff free of the forfeiture occasioned by the arising of the trust in its favour. But that same disposition when registered brought about a new forfeiture operating against the registered estate in the hands of the plaintiff by reason of the plaintiff's want of authority to hold land in mortmain, and this forfeiture was not touched by the over-reaching effect accorded to registered dispositions for value by s. 23.

Accordingly we are of opinion that the result is the same, even if (contrary to our view) a forfeiture was incurred at any stage in the transaction earlier than the actual completion of the sale by registration of the plaintiff as proprietor, and that the plaintiff cannot escape the forfeiture consequent on the registration of the disposition for value in its favour on the ground that there was an earlier forfeiture from which the land was freed under s. 23 by the registration of such disposition. If this were not so, the strange result would ensue that transfers for value of registered land to corporations not authorised to hold land in mortmain could always be made without giving rise to a forfeiture of the land in the hands of the transferee corporation.

For these reasons, the fact that the present case concerns registered land does not in our opinion afford any valid ground for distinguishing the first *Morelle* case (1). The express provisions of the Act relating to the effect of registration of a disposition for valuable consideration, that is to say (so far as leaseholds are concerned) the provisions of s. 23, include no provision which can properly be construed as freeing the land from the forfeiture incurred by the registered transfer to the plaintiff. Accordingly, by virtue of s. 80 of the Act, such forfeiture took effect on the registration of the transfer, just as it would have done on the execution and delivery of an assignment of unregistered leaseholds, and, as we are bound to hold following the first *Morelle* case (1), took immediate and automatic effect without any act or proceeding on the part of the Crown to assert or establish it. This forfeiture being, as we have held, unaffected by the provisions of the Land Registration Act, 1925, it follows that it took effect without rectification of the register and was not suspended pending an order for rectification or contingent on such an order being obtained.

A good deal of the argument was directed to the use of the word "deemed" in s. 9, where the registration of a person as first proprietor of a leasehold interest is to be "deemed to vest" in such person possession of the interest described, and in s. 23 where the registration of a disposition for valuable consideration of a registered leasehold interest is to be "deemed to vest" in the transferee the estate transferred. Another example is in s. 69 where the registered proprietor of land is to be "deemed to have vested in him . . . the legal estate . . ." It was said, on the one hand, that the effect of "deeming" a man to have property vested in him is that he is to be treated as having it vested in him whether in fact he has it vested in him or not. On the other hand it was said that "deemed" means deemed for the purposes of the Act, and only so far as those purposes require, the relevant purposes here being the protection of third parties dealing with the registered proprietor for value and in good faith.

- A Several authorities bearing on this point were cited. We find it difficult to attach any great significance to the use of the word "deemed" in s. 9, s. 23 and s. 69 of the Act, as s. 5 provides with respect to the first registered proprietor of a freehold estate that registration "shall vest in the person so registered an estate in fee simple . . ." with no deeming about it; and again s. 20 provides, with respect to a registered disposition for value of a freehold estate, that the
- B disposition when registered "shall confer", not "shall be deemed to confer", on the transferee an estate in fee simple or other legal estate appropriate to the transaction. It can hardly have been intended that the effect of the registration of the first proprietor of a leasehold interest or the registration of a transfer for value of a leasehold interest was to differ from the effect of like transactions in regard to freehold estate in any respect other than such as flows
- C from the inherent differences between a freehold and a leasehold estate. There may perhaps have been technical conveyancing reasons for these variations in language. At all events we cannot extract from them anything of assistance in the determination of the present case, which to our mind turns simply on the absence in s. 23 of any express provision to oust the saving of the Crown's right of forfeiture contained in s. 80.

- D Before parting with this case we should refer to a point as to the form of the transfer to which counsel for the defendants called our attention. Rule 121 of the Land Registration Rules, 1925, provides by para. (1) as follows:

"A transfer of land to an incorporated company or other corporation, sole or aggregate, shall be made by an instrument in Form 35, and, save as mentioned in this rule, shall refer to the licence in mortmain or statute enabling the corporation to acquire or hold the land."

- E Form 35 is in the following terms, after the heading, "Pursuant to a licence . . .": "I, A.B., of etc. (the proprietor) hereby transfer to (blank) (fill in the corporate name of the transferee) all the land" as in the earlier form. Then there is a note:

- "If the licence or statute contains any limit to the extent of land which may be conveyed or held, or any provisions as to the purposes for which it may be used, add at the end of the form: 'And it is hereby declared that the land already held by the transferees under such licence (or Act), together with the land hereby transferred, does not exceed (blank) acres (or that no land other than that hereby transferred is held by the transferees), and that the present transfer is for the purposes of (fill in the purposes for which the land is to be used)'."

- G Rule 121 was not followed in the present case, and the transaction was carried out by the common form of transfer, which was accepted for registration, although it was apparent from the description of the plaintiff as having its registered office at 8, Upper O'Connell Street, Dublin, Eire, that it was a foreign corporation. If r. 121 had been followed, the plaintiff would never have been
- H registered as proprietor. The reason why r. 121 was not followed appears from the view expressed in this footnote to the rule contained in BRICKDALE AND STEWART-WALLACE'S LAND REGISTRATION ACT, 1925 (4th Edn.), at p. 380. The note is:

- "Leasehold land is not within the Mortmain Acts unless the lease is virtually perpetual, and leases for twenty, forty, and even ninety-nine years have been expressly held to be exempt (see TUDOR'S 'CHARITABLE TRUSTS', 5th Edn. (1929), p. 415, and, *ibid.*, the note to s. 1 of the Mortmain Act, 1888)."

I That being the view of the law on which the registrar, no doubt on competent legal advice, was accustomed to act, it appeared unnecessary to insist on the use of Form 35 on a transfer of short leaseholds to a corporation, as that form only differs from the common one in its references to the licence in mortmain, which would be inappropriate on the view that short leaseholds were not within the

Mortmain Acts. That view has now been shown by the first *Morelle* case (1) to have been erroneous, and no doubt the practice of the Land Registry will be altered accordingly. A

It was suggested that this departure from the rules might have invalidated the transfer in the present case, but the point was not pressed, and we are satisfied that the transfer was not so invalidated. The rule-making power is conferred by s. 144 (1) of the Act, which empowers the Lord Chancellor with the advice and assistance of the rule committee therein mentioned to make general rules (inter alia): B

“(ii) For prescribing the forms to be observed, the precautions to be taken, the instruments to be used, the notices to be given, and the evidence to be adduced in all proceedings before the registrar or in connection with registration . . .”, C

and, by sub-s. (2), any rules made in pursuance of that section are to be of the same force as if enacted in the Act. Accordingly, if the rules categorically enjoined that a particular form and none other should invariably be used for transactions of a particular kind the use of a different form for a transaction of that kind might be held to invalidate the transaction. But r. 74 provides: D

“The forms in the schedule hereto shall be used in all matters to which they refer, or are capable of being applied or adapted, with such alterations and additions, if any, as are necessary or desired and the registrar allows.”

Rule 123 (1) provides:

“A transfer of land under the last two rules shall not be registered until the registrar is satisfied that such transfer is in accordance with the law relating to mortmain or charitable uses”, E

and r. 322 (1) provides:

“The registrar, if he so thinks fit, may in any particular case, extend the time limited, or relax the regulations made by general rules, for any purpose; and may at any time adjourn any proceeding, and make any new appointment.” F

The registrar is thus given a wide discretion as to the forms to be used and his discretion extends to authorising a departure from the general rules if satisfied that he can properly do so. It follows that although the present transaction was completed otherwise than in accordance with r. 121 owing to the adoption in the registry of a view as to the law of mortmain now held to be erroneous, the acceptance for registration of the form of transfer used, such acceptance being in law the act of the registrar, must be taken as conclusive of its sufficiency in point of form. The contrary view would lead to much difficulty and uncertainty in the administration of the Act, as a person dealing with the registered proprietor of land might find it necessary to go behind the fact of his registration and inquire into the sufficiency in point of form of the disposition on the strength of which such registration was made. G

For the reasons we have stated, we think this appeal should be dismissed. H

Appeal dismissed. Leave to appeal to the House of Lords granted. Their Lordships refused the Crown's application to be made a party, and also refused leave to the Crown to appeal against such refusal. I

Solicitors: *S. A. Bailey & Co.* (for the plaintiff); *Barnett Janner & Davis* (for the defendants); *Treasury Solicitor*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A HAROLD HOLDSWORTH & CO. (WAKEFIELD), LTD. v.
CADDIES.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Earl Jowitt, Lord Morton of Henryton, Lord Reid and Lord Keith of Avonholm), January 11, 12, March 4, 1955.]

B *Company—Director—Managing director—Duties—Duties limited by board of directors.*

The respondent, who was a director of the appellant company, was appointed managing director of the appellant company for a period of five years from Oct. 1, 1948. Clause 1 of the agreement, which was dated Apr. 1, 1949, was in the following terms:—the respondent “shall be and he is hereby appointed a managing director of the company and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company”. The agreement further provided that the respondent should devote his whole time, attention and abilities to his duties under the contract and should obey the orders and directions of the board. At the date of the agreement the appellant company had three subsidiary companies, of which one company was a textile company of which the respondent was full-time managing director under a prior agreement. After his appointment by the agreement of Apr. 1, 1949, the respondent was, in fact, the only managing director of the appellant company. Differences having arisen, the board of the appellant company resolved on May 10, 1950, that the respondent should confine his attention to the textile company only. Thereafter the respondent performed no executive or managerial functions for the appellant company. The respondent claimed that the resolution was a repudiation of the agreement of Apr. 1, 1949, and brought an action against the appellant company for breach of contract.

F ✓ **Held** (LORD KEITH OF AVONHOLM dissenting): the appellant company was not in breach of the agreement of Apr. 1, 1949, because the appointment of the respondent to be a managing director of the appellant company by cl. 1 of the agreement and his description therein as such managing director did not limit the powers of the board under the subsequent words of the agreement and, on the true construction of the clause, the respondent's duties could be confined to the management of a subsidiary company of the appellant company.

Appeal allowed.

H [**Editorial Note.** The present case shows that an appointment to a position described as that of managing director is not an appointment to a post with settled functions where the terms of the appointment and of the company's articles of association are in usual form. The ordinary form of agreement for the appointment of a managing director provides for him to exercise such functions as the board delegate to him (cf. 5 ENCY. FORMS AND PRECEDENTS (3rd Edn.) 814, Form 443, cl. 4), and subject to that provision invests him with the general control of the company's business. The present decision does not go to the length of deciding that in a case where there is only one company, and not a group of companies, the board could, under such a clause, withdraw all duties from a sole managing director, without thereby committing a breach of contract.

I In the Court of Session the Lord President had said that a board could not have a managing director and at the same time withdraw the office. The ground on which the House of Lords allowed the appeal was based on the construction of the particular agreement, which they read as meaning that the allocation of managerial duties over one of the subsidiary companies was a sufficient allocation

of duties to comply with any obligations of the parent company under cl. 1 of the agreement. The present case also illustrates the exact attention required to be paid to the wording of such clauses; for example, the description of the appointment as that of "a managing director" or "the managing director" may be of considerable significance (see p. 738, letter G, post); moreover, the point of construction determined by the House of Lords in the present case could almost be summarised by saying that in the phrase "exercise the powers in relation to the business of the company and the businesses . . . of its existing subsidiary companies", which was in cl. 1 of the agreement, the word "and" should be read as "or".

As to the Position of Managing Director, see 6 HALSBURY'S LAWS (3rd Edn.) 297, para. 601; and for cases on the subject, see 9 DIGEST 533, 3517, 535, 3526.]

Case referred to:

- (1) *Collier v. Sunday Referee Publishing Co., Ltd.*, [1940] 4 All E.R. 234; [1940] 2 K.B. 647; 109 L.J.K.B. 974; 164 L.T. 10; 2nd Digest Supp.

Appeal.

Appeal by the company against an interlocutor of the First Division of the Court of Session, dated June 25, 1953, affirming an interlocutor of the Lord Ordinary (LORD STRACHAN), dated Nov. 28, 1952, in an action of damages for alleged breach of contract brought by the respondent, Robert Fyvie Caddies, against the appellant company. The appellant company tabled a plea to the relevancy of the respondent's averments, and the Lord Ordinary allowed parties a proof before answer of their averments. The appellant company lodged a motion for review of the Lord Ordinary's interlocutor and the First Division, after sundry procedure, affirmed that interlocutor. The facts appear in the first opinion.

C. W. G. Guest, Q.C. (of the Scottish Bar), J. Megaw, Q.C., and C. E. Jauncy (of the Scottish Bar) for the appellant company.

I. H. Shearer, Q.C., and R. S. Johnston (both of the Scottish Bar) for the respondent.

The House took time for consideration.

Mar. 4. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, in this action, the respondent seeks damages against the appellant company for breach of contract. In the summons he concludes for payment of £25,000 and in the condescendence he makes averments purporting to support his claim for payment of that sum. The appellant company plead that the action is irrelevant, and contended before the Lord Ordinary (LORD STRACHAN) and before the First Division of the Court of Session that it should be dismissed without inquiry. The First Division adhered to the interlocutor of the Lord Ordinary allowing a proof before answer. It is against that allowance of proof that the appellant company appealed to your Lordships' House.

The relevant facts as presented by the respondent are as follows. The respondent is a worsted spinner and manufacturer of wool goods. He was formerly managing director of the British Textile Manufacturing Co., Ltd. (which I shall call the Textile Company), and the beneficial owner of all the shares. In November, 1947, the appellant company, which carries on business as worsted spinners at Balne Mills, Wakefield, purchased from the respondent the whole share capital of the Textile Company. In terms of the agreement, dated Nov. 3, 1947, by which the purchase was effected, the appellant company was bound to procure that the respondent be appointed to the board of the appellant company and be appointed managing director of the Textile Company on terms set out in the second schedule to the said agreement. The terms of the said agreement were duly implemented, and the respondent was appointed managing director of the Textile Company on Nov. 3, 1947. The appointment was for a period of five

- A years and thereafter until terminated by written notice to be given by either party. The business of the Textile Company was in Irvine in Ayrshire, and was the manufacturing of knitted articles of wool clothing. By an agreement dated Apr. 1, 1949, but to operate as from Oct. 1, 1948, the respondent was appointed a managing director of the appellant company. This appointment was for a period of five years and thereafter until terminated by written notice by either party.
- B It was provided in the second agreement, in words which I shall examine more closely in a moment, that the respondent, as such managing director, should perform the duties and exercise the powers in relation to the business of the appellant company and the businesses of its existing subsidiary companies at the date thereof which might from time to time be assigned to, or vested in, him by the board of directors of the appellant company. At that time, the appellant
- C company controlled the Textile Company, Whalley & Appleyard, Ltd., and David Allan (Knitwear), Ltd. The respondent's remuneration under the second agreement was to be a fixed salary of £2,500 per annum with, in addition, an annual commission on the combined net profits of the company and all its then existing subsidiaries. At all times the respondent was the sole managing director of the appellant company, and he avers (though it is denied by the appellant
- D company) that he was entrusted with the whole executive management of that company. The effect of the second agreement on the first was not argued before us, but, in fact, the respondent continued to carry out certain duties in relation to the Textile Company. His actions and proposals occasioned opposition from certain members of the board of directors of the appellant company who, he avers, attempted to persuade him, under threat of removal, to relinquish his
- E appointment as managing director of the company. Ultimately, at a meeting of the board of directors of the company, held on May 10, 1950, the board resolved that the respondent should confine his attentions to the Textile Company only, and that permanent arrangements for the management at Balne Mills would be made later. The respondent regarded the said decision as a breach of the second agreement between himself and the appellant company and intimated
- F to the appellant company on June 19, 1950, that, as the appellant company had repudiated the second agreement, he was no longer bound to give, and would not give, his services to the appellant company. On Oct. 10, 1950, he commenced this action.

- My Lords, when the case was heard in the Procedure Roll on the appellant company's plea to the relevancy of the respondent's averments, the Lord Ordinary
- G held that the question whether the resolution of May 10, 1950, constituted a breach of the agreement could not be decided without an inquiry into the facts. LORD STRACHAN took the view that the agreement and resolution should be construed in the light of the whole surrounding facts and circumstances, and that regard should be had, not only to the terms of these documents, but also to the effect which the resolution in fact had on the possibility of the respondent
- H continuing to carry out the duties of a managing director of the appellant company. The Lord Ordinary also rejected an argument for the appellant company that, even on the assumption that there had been a breach of contract, the breach was not sufficiently material to justify repudiation of the second agreement by the respondent.

- When the appellant company's motion for review came before the First
- I Division on Feb. 24, 1953, the court took the view, on a construction of the agreement and resolution, that there had been no breach of the agreement. The Lord President (LORD COOPER), who gave the leading opinion, was of opinion that the respondent had made no clear and specific averments of surrounding facts and circumstances competent and relevant to be taken into account in determining whether a breach of the agreement had taken place. During the course of the hearing the respondent moved for leave to amend, and the case was continued in order that the respondent might be given an opportunity of considering an amendment. The Lord President said:

"If Mr. Shaw had not made the motion with which he concluded his argument, I should have been for recalling the Lord Ordinary's interlocutor, sustaining the first plea-in-law for the [appellant company] and dismissing the action." A

The respondent subsequently lodged a minute of amendment which was duly answered by the appellant company.

The case was again put out for hearing by the First Division, and on June 25, 1953, the court pronounced an interlocutor affirming the interlocutor of the Lord Ordinary. I cannot help noting that, on this second occasion, the Lord President said: B

"The averments, new as well as old, descriptive of 'surrounding facts and circumstances' bearing upon this question afford unexpectedly little aid on the point of construction, and disclose little, if any, material difference between the parties", C

and later stated:

"I am fully conscious that in expressing the above conclusions I am departing from the provisional views which I formed at the previous debate. But the fuller argument which we have heard and a closer examination of the documents and certain of the decisions have led me to change my mind." D

In his second view, the Lord President was of opinion that the very foundation of the agreement was the appointment of the respondent to a specific office, namely, the office of managing director, and that he was not appointed to perform such duties, if any, as the appellant company's board of directors might assign to him. LORD COOPER considered that, although the appellant company were free to vary the powers and duties of the respondent within reasonable limits, they were not entitled to deprive him of the right to act as "a managing director of the company" while leaving him with the name. LORD CARMONT, on the other hand, took the view that, under the agreement, the functions to be exercised by the respondent were incapable of being viewed as a post or office, and that he could claim nothing exclusive or paramount in control or even anything definite in its character. LORD CARMONT, nevertheless, was of the opinion that, under the agreement, some duties of a managerial kind had to be assigned to the respondent and that the resolution evinced an intention by the appellant company no longer to be bound by the contract. LORD RUSSELL concurred with the opinion of the Lord President. E F G

The most important clause in the second agreement is cl. 1, and I therefore set it out in full:

"[The respondent] shall be and he is hereby appointed a managing director of the [appellant] company and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company." H

Clause 2 sets out the period of engagement. Clause 3 states that the respondent shall devote his whole time, attention and abilities to his duties under the contract, shall obey the orders and directions of the board, shall well and faithfully serve the appellant company and shall not be engaged in any other occupation or business whatsoever, with a saving for investments and also for being a director of or shareholder in any of the company's subsidiary or associated companies. Clause 4 deals with salary. Clause 5 deals with the commission payable to the respondent, and fixes a minimum of £1,500 a year. Clause 6 deals with secrecy. Clause 7 gives the appellant company a power of determination in the event of incapacity, misconduct, breach of obligations or refusal or I

A neglect to comply with any lawful orders or directions given to the respondent by the board of directors of the appelland company. I do not think it is necessary to refer to the provisions of cl. 8, cl. 9 and cl. 10.

I return to cl. 1, and endeavour to analyse its provisions. First, the respondent is appointed a managing director. If one then asks what are the duties which he shall perform and what are the powers he shall exercise, the answer, from the words of the clause, is the powers and duties which may from time to time be assigned to, or vested in, him by the board of directors. If one then asks how shall he perform and exercise them, the answer is in relation to the business of the appelland company and the businesses (howsoever carried on) of its existing subsidiary companies at the date of the contract. The Lord President bases his second view on the initial words. He says:

C “On the other hand, if the agreement is to be given ordinary business efficacy, I have come to the conclusion that weight must be given to the plain fact that the appointment of the [respondent] was an appointment as ‘a managing director of the company’—a well recognised title in company administration, carrying responsibilities of a familiar nature and involving sundry obligations and liabilities under the Companies Act. The [respondent] was not appointed to perform such duties, if any, as the board might assign to him. To borrow the language of ASQUITH, J., in *Collier v. Sunday Referee Publishing Co., Ltd.* (1), the very ‘foundation of the contract was the appointment of the plaintiff during the contract period to a specific office.’”

Later the Lord President says:

E “The [appelland company] were in my view disabled from depriving the [respondent] of the right to act as ‘a managing director of the company’. They could not leave him with the name and withdraw the substance of his office.”

I confess that this conception of a stratification of a position as managing director has puzzled me. Neither side relied on any provision in the articles of the appelland company, and they were not included in the record. By way of illustration, however, I refer to the relevant provisions of Table A in Sch. 1 to the Companies Act, 1948. Paragraph 107, the first dealing with a managing director, is as follows:

G “The directors may from time to time appoint one or more of their body to the office of managing director for such period and on such terms as they think fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment. A director so appointed shall not, whilst holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors, but his appointment shall be automatically determined if he cease from any cause to be a director.”

H That paragraph states specifically that the board can fix such terms as they think fit, while the director so appointed gets the advantage of not being subject to retirement by rotation. Paragraph 108 gives the directors the right to determine remuneration. Paragraph 109 gives the directors a complete discretion to entrust to, and confer on, a managing director any of their own powers. I cite with approval the summary in 6 HALSBURY’S LAWS OF ENGLAND (3rd Edn.), p. 297, para. 601, where it is stated:

I “A managing director may either be merely a director with additional functions and additional remuneration, or else he may be a person holding two distinct positions, that of a director and that of a manager.”

I cannot find either in the statute or in the cases in which the matter has been considered anything to prevent a board of directors appointing a managing

director and limiting his duties according to their own wishes. In other words, the first part of cl. 1 does not, in my view, limit the powers of the board under the remainder of the clause. A

I now come to consideration of the view of LORD CARMONT, and I make two quotations from his judgment.

(i) "Although this is not an appointment to a post, I have come to be of opinion that it is a contract whereby *some* duties must be assigned to the [respondent] of a managerial kind." B

(ii) "I do not think that the [respondent's] averments further his case much beyond the statement which is not in dispute that he was withdrawn from any managerial participation at Balne Mills. If the board so acted under the impression that they were entitled totally to withdraw the [respondent] from management there, provided they allowed the [respondent] to continue to manage something elsewhere, then I think they were misinterpreting their contract with the [respondent]. The board may have been misled into the course they followed by the wrong view of the legal relations existing between the parent company and its subsidiaries, but none the less the [respondent] was deprived of all managerial functions at Balne Mills and in my opinion that deprivation could not be operated without a repudiation of the contract with the [respondent]. Such relegation to complete inaction from management so far as Balne Mills was concerned evinced an intention no longer to be bound by the contract." C D

With all respect to this reasoning, I cannot spell it out of cl. 1 of the contract. As I have stated, that clause lays down that the respondent, as such managing director, shall perform the duties and exercise the powers assigned to or vested in him by the board E

"in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies."

I find it difficult not to read these words distributively and to treat them as giving a right to assign duties in relation to a subsidiary, but even if one reads them collectively, then the result of so doing is to give the power to the board to assign duties with regard to the activities of a group of companies viewed as a whole. This cannot, in my mind, mean that the managerial duties must cover the appellant company and every subsidiary. They can be limited to such activities as the board may select. F

I have tried to give full weight to LORD CARMONT's words that the board must have been misled by a wrong view of the legal relations existing between the parent company and its subsidiaries. I regret that I cannot understand how this raises difficulties in relation to the Textile Company. On the respondent's own averments the respondent was still managing director of that company, and acting as such pending the appointment of a successor. There was no personal or mechanical difficulty in his exercising managerial functions in regard to that company. Further, the appellant company owned all the shares and, therefore, could, if any difficulty arose, ensure that the desires of its board with regard to the management of the Textile Company could be enforced. G H

Equally, the fact that the respondent was obliged to devote all his time to his duties under the second agreement does not seem to me to present any difficulty if managerial functions were assigned in relation to a particular subsidiary. I

On the view of the contract which I have taken and tried to explain, I am, therefore, of opinion that the resolution of May 10, 1950, did not constitute a breach of the contract. It is, therefore, unnecessary for me to consider counsel for the appellant company's second and third points, namely, that under the contract it was unnecessary for the appellant company to assign any duties and, alternatively, that, even if there was a breach, such breach did not go to the root of the contract. I, therefore, am of opinion that the appeal should be allowed,

A that the interlocutors of the First Division and of the Lord Ordinary should be recalled, that the first plea-in-law of the defenders, the present appellants, should be sustained and the action should be dismissed.

I should further say that the respondent pay the appellant company their costs here and in the courts below.

B **EARL JOWITT** : My Lords, the appellants are a limited company carrying on business as worsted yarn spinners at Balne Mills, Wakefield, Yorkshire. In 1947 the appellant company had purchased from the respondent the entire share capital of a company known as the British Textile Manufacturing Co., Ltd., whom I refer to as the Textile Company. The business of the Textile Company, which was carried on at Irvine, Ayrshire, was the manufacture of knitted articles of wool clothing. The appellant company thus became, and remained at all material times, the beneficial owners of all the shares in the Textile Company. They were also beneficial owners of all the shares in two other limited companies.

C By an agreement between the Textile Company and the respondent concluded in 1947, the respondent had become the managing director of the Textile Company at a salary of £2,200 a year together with a commission on profits. He was obliged under such agreement to devote the whole of his time to the business of the Textile Company and to obey the instructions of the directors of that company. By an agreement between the appellant company and the respondent dated Apr. 1, 1949, which was to operate as from Oct. 1, 1948, the respondent was appointed managing director of the appellant company; no reference was made in this agreement to the earlier agreement of 1947.

E It is unnecessary to express any opinion as to the impact of the later agreement on the earlier agreement, and I can confine myself to a consideration of the terms of the agreement of 1949. Clause 1 of that agreement was in the following terms:

F “ [The respondent] shall be and he is hereby appointed a managing director of the [appellant] company and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company.”

G Other clauses in that agreement provided that the respondent was to hold the said office for five years; that he was to devote his whole time and attention to his duties under the agreement and in all respects to conform to, and comply with, the directions and regulations of the board; and that he was to receive a salary of £2,500 per annum together with a commission on profits. By cl. 7 of the agreement, the appellant company were given the right to determine the agreement forthwith by notice in writing if the respondent refused or failed to comply with any lawful orders or directions given him by the board.

H Differences of opinion arose between the respondent and his fellow directors of the appellant company, and culminated in the passing of a resolution by the appellant company's board in the following terms:

I “ *Management at Balne Mills*: The board decided that the managing director confine his attentions to British Textile Manufacturing Co., Ltd. only. Permanent arrangements for management at Balne Mills will be made later. Meanwhile the board requested Mr. R. P. Pitcher to assume responsibility for local supervision. The managing director wished it recorded that as a director he did not agree with the decision.”

The respondent regarded this resolution as a repudiation of the agreement and, by letter of June 19, 1950, intimated to the appellant company that, as they had so repudiated the agreement, he regarded himself as no longer bound to give, and intimated that he would not give, his services to the appellant company.

The respondent, as pursuer, brought his action against the appellant company, as defenders: the record set out the relevant terms of the 1949 agreement and claimed that the passing of the resolution constituted a breach thereof. The defenders, the present appellants, stated a preliminary plea that the averments of the respondent were irrelevant. The action came before LORD STRACHAN (Lord Ordinary) in Procedure Roll discussion. He decided on Nov. 28, 1952, that there should be a proof before answer.

The matter first came before the First Division of the Court of Session on Feb. 24, 1953. During the argument, counsel for the respondent indicated that he desired an opportunity of considering whether it would be possible for him by way of amendment to add averments of surrounding facts and circumstances. The court were willing to allow this opportunity and, accordingly, the case was continued for a limited period, but the court unanimously expressed the view that, save for this application, they would have recalled the Lord Ordinary's interlocutor and dismissed the action.

The case came on again before the same judges of the First Division in June, 1953, when additional averments as to surrounding facts and circumstances had been inserted. On this occasion, the judges took a view differing from that which they had taken in February. They accordingly affirmed the interlocutor of the Lord Ordinary but granted leave to appeal to your Lordships' House.

The first question raised before us was, therefore, whether, in the light of the averments as to surrounding circumstances, which must be taken *pro veritate*, the passing of the resolution constituted a breach of the contract. It was further contended that even if the passing of such resolution did constitute a breach it was not a breach of such a nature and quality as to entitle the respondent to accept it as a repudiation of the entire contract. A further contention was advanced concerning the measure of damages if it was decided that a breach had been committed.

My Lords, in the view which I take, it is unnecessary to express any opinion on these two latter contentions since I am clearly of the opinion that the resolution did not constitute any breach of the agreement. I think that, on the true construction of cl. 1 of the agreement of 1949, the respondent was to perform such duties and exercise such powers in relation to the business of the appellant company, and to perform such duties and exercise such powers in relation to the business of the Textile Company and the other subsidiaries, as might from time to time be vested in him by the appellant company's board. In directing the respondent on May 10, 1950, to confine his attention to the Textile Company, the board of the appellant company were, in my opinion, merely exercising the right given to them by the agreement.

The Lord President (LORD COOPER) took a different view, because he considered that the appointment of managing director was

"a well recognised title in company administration, carrying responsibilities of a familiar nature and involving sundry obligations and liabilities under the Companies Act. The [respondent] was not appointed to perform such duties, if any, as the board might assign to him."

The Lord President, having formed this view, no doubt considered that the resolution which called on the respondent to devote his whole time to the affairs of the Textile Company prevented him from carrying out those responsibilities, obligations and liabilities which, on this view, he had the right to perform for the appellant company, by virtue of his office as their managing director. My Lords, with the greatest respect for the Lord President, I do not think that the respondent, by the mere fact that he was appointed managing director of the appellant company, had any responsibilities, obligations or liabilities which would prevent the appellant company ordering him to devote his full time to a subsidiary, and I am of the opinion that the appellant company had, by cl. 1 of the agreement, expressly preserved their right to call on the respondent to devote

- A his time to the affairs of the Textile Company if they judged this course desirable. Being of the opinion that there was no relevant breach of contract averred, I think the action should have been dismissed without proof, and, accordingly, I would allow the appeal.

- B LORD MORTON OF HENRYTON : My Lords, the events leading up to this appeal have already been stated, and I shall only repeat them so far as may be necessary to enable me to express my opinion. The first question arising for your Lordships' decision is whether the averments of the pursuer (the respondent to this appeal) in his condescendence, accepting for this purpose that his averments of fact are accurate, establish a breach of contract by the defenders, the present appellants. The only breach of contract alleged is that the directors of the appellant company passed a resolution at a meeting of directors on May 10, 1950, in the following terms:

- C " *Management at Balne Mills*: The board decided that the managing director confine his attentions to British Textile Manufacturing Co., Ltd. only. Permanent arrangements for management at Balne Mills will be made later. Meanwhile the board requested Mr. R. P. Pitcher to assume responsibility for local supervision. The managing director wished it recorded that as a director he did not agree with the decision."

- E The respondent alleges that he had rights under an agreement of Apr. 1, 1949, whereby he was appointed to be "a managing director" of the appellant company which were infringed by the resolution in question. That agreement has already been read, and it must, of course, be construed as a whole, with due regard to the surrounding circumstances at the date of its execution.

- F The events leading up to the 1949 agreement are set out in the respondent's condescendence, and the history begins with the agreement of sale of Nov. 3, 1947, whereby the appellant company bought from the respondent the whole of the issued share capital of the British Textile Manufacturing Co., Ltd. (hereafter called "British Textile") and of David Allan (Knitwear), Ltd. By that agreement, it was provided (inter alia) as follows, the "company" referred to being British Textile:

- G "4 . . . (c) If so required by Holdsworth [the respondent] shall procure all directors of the company and Knitwear (other than the [respondent]) to resign and waive any claims against the company in respect of their directorships or other offices and procure the appointment of nominees of Holdsworth as directors of the company and Knitwear in his or their stead . . . (e) Holdsworth shall procure [the respondent] to be appointed to the board of directors of Holdsworth and also as managing director of the company upon the terms of the agreement set out in the second schedule hereto in place of any other office under the company held by him . . ."

- H The agreement set out in the second schedule provided for the appointment of the respondent as "a managing director" of British Textile for a period of five years, and cl. 3 thereof was as follows:

- I "[The respondent] shall (unless prevented by ill-health) throughout the period of this agreement devote the whole of his time attention and abilities to his duties hereunder and shall obey the orders from time to time of the board of directors of the company and in all respects conform to and comply with the directions and regulations made by such board and shall well and faithfully serve the company and use his utmost endeavours to promote the interests thereof. [The respondent] shall not during the continuance of this agreement (without the previous consent in writing of the company which the company shall be under no obligation to give) be engaged concerned or interested either directly or indirectly and whether solely or jointly

with others in any other occupation or business whatsoever provided that nothing herein contained shall prohibit [the respondent] from holding shares securities or obligations of any other company by way of bona fide investment only or from being a director of or shareholder in Harold Holdsworth & Co. (Wakefield), Ltd. or any of its subsidiaries.” A

Under the agreement of Apr. 1, 1949, already mentioned, the respondent's appointment as a managing director of the appellant company was to date from Oct. 1, 1948, and, in his condescendence 4, the respondent says: B

“From Oct. 1, 1948, to May 10, 1950, the [respondent] normally spent from early afternoon on Monday to about noon on Friday each week at Wakefield and visited Irvine at weekends to supervise the conduct of the British Textile Manufacturing Co., Ltd.'s business there, *pending the appointment of a managing director to succeed him there.*” C

From this sentence, it would appear likely that the parties regarded the respondent's appointment as managing director of the appellant company by the agreement of 1949 as superseding his appointment as managing director of British Textile by the agreement of 1947, but it seems to me unnecessary, for the present purpose, to form a concluded view whether, on the true construction of the two documents, one superseded the other. D

With these facts in mind I turn to consider the terms of the agreement of 1949 and, in particular, the terms of cl. 1. This clause has already been read. It contains both the appointment of the respondent as a managing director—not, be it observed, as *the* managing director—of the appellant company, and the definition of the duties and powers which he is to perform and exercise “as such managing director”, namely, the duties and powers E

“in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company.” F

My Lords, this clause refers to a group of companies consisting of the appellant company and their existing subsidiary companies. I cannot read the clause as compelling the board to assign duties to the respondent in relation to the business of every company in the group. Nor can I read it as compelling the board to assign him duties in relation to the business of the appellant company. That business is not treated as being on a different footing from the business of British Textile or of another subsidiary of the appellant company, Whalley & Appleyard, Ltd., which is mentioned in the respondent's condescendence 3. As I read the clause, it leaves the board of the appellant company free to assign to the respondent duties in relation to the business of one only, or two only or all of the companies in the group, and to vary the assignment and the duties from time to time. Further, I think the clause leaves the board free to appoint another person to be “a managing director”, and to divide the duties and powers referred to in the clause between the respondent and the other managing director in such manner as they think fit. It is true that each company in the group is, in law, a separate entity, the business whereof is to be carried on by its own directors and managing director, if any; but there is no doubt that the appellant company, by taking any necessary formal steps, could make any arrangements they pleased in regard to the management of the business of (for instance) British Textile. They owned all the issued capital and the directors were their nominees. G H I

I turn now to the resolution of May 10, 1950. I am prepared to assume in favour of the respondent that this resolution was intended to exclude him permanently from any share of the management at Balne Mills, whence, as the respondent avers, “the whole business of the [appellant company] was administered”,

- A** although it would, of course, have been open to the board at any time to rescind the resolution. Even on the assumption just mentioned, I fail to see that the appellant company committed any breach of the 1949 agreement by deciding that the respondent should "confine his attentions" to British Textile only. If the resolution were carried out, the respondent would go to Irvine as a managing director of the appellant company, and would there perform such duties and
- B** exercise such powers in relation to the business of British Textile as the board of the appellant company might from time to time assign to, or vest in, him. He was already a director of British Textile, and, if his appointment as a managing director thereof in 1947 should be regarded as having been superseded by the agreement of 1949, the appellant company could easily procure his re-appointment thereto by the exercise of their controlling interest in British Textile. The
- C** resolution of May 10, 1950, did not purport to remove the respondent from his position as a managing director of the appellant company. In that capacity he would, presumably, go from Irvine to Wakefield from time to time, to attend meetings of the appellant company's board and to report on progress at Irvine.

- If the respondent had accepted the resolution as binding on him, he would have retained all his rights under the agreement of 1949, and would have been
- D** entitled to receive all the remuneration, by way of salary and commission, provided for by that agreement. I can quite appreciate that the respondent bitterly resented being told to confine his attentions to British Textile, and he no doubt thought that his management at Balne Mills would have increased the profits of the group of companies and would, consequently, have increased the amount of his yearly commission. In my opinion, however, he was bound by his
- E** contract to comply with the resolution.

- I have not overlooked the averments which were inserted in the respondent's condescendence by amendment, but, in my opinion, neither these averments nor the original averments, if they were all proved, would establish that the board of the appellant company committed a breach of contract by passing the resolution in question. As no other breach is alleged, it follows that no proof is
- F** necessary.

In my view, the appellant company's first plea-in-law should have been sustained, and the action should have been dismissed. I would allow the appeal.

- LORD REID:** My Lords, the respondent was in 1947 the owner, and
- G** acted as the managing director, of British Textile Manufacturing Co., Ltd. In that year he sold the whole share capital of the company to the appellant company, who are worsted spinners, carrying on their business at Balne Mills, Wakefield. On Apr. 1, 1949, the respondent and the appellant company made an agreement whereby it was provided that the respondent

- H** "is hereby appointed a managing director of the company [the appellant company] and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company."

- I** This appointment was for the term of five years from Oct. 1, 1948, and there were existing subsidiary companies, of which two need to be mentioned, viz., the British Textile Manufacturing Co., Ltd. and Whalley & Appleyard, Ltd. Under this agreement, the respondent was paid a salary of £2,500 per annum and an annual commission dependent on the combined net profits of the appellant company and the subsidiary companies, the minimum commission payable in any year being £1,500 so that the respondent obtained a minimum remuneration of £4,000 per annum.

The respondent thereafter appears to have acted both as managing director of the appellant company and as managing director of British Textile Manufacturing Co., Ltd. but disagreements arose, and on May 10, 1950, the following resolution was passed at a meeting of the directors of the appellant company: A

"*Management at Balne Mills:* The board decided that the managing director confine his attentions to British Textile Manufacturing Co., Ltd. only. Permanent arrangements for management at Balne Mills will be made later. Meanwhile the board requested Mr. R. P. Pitcher to assume responsibility for local supervision. The managing director wished it recorded that as a director he did not agree with the decision." B

The respondent regarded this resolution as a breach of the terms of his agreement with the appellant company and as a repudiation of it, and on June 19, 1950, he intimated to them that, as they had repudiated the agreement, he was no longer bound to give, and would not give, his services to them. Thereafter he took no part in the executive management of the appellant company's business, but he continued to act as a director until Oct. 25, 1950, when he resigned, as he says, at the request of his co-directors. It was admitted that, after the resolution of May 10, 1950, the appellant company were willing to continue to pay remuneration to the respondent in terms of the 1949 agreement, but after the intimation made by the respondent on June 19, 1950, they ceased paying him any remuneration. C

On Oct. 10, 1950, the respondent raised the present action concluding for payment of £25,000 damages. The appellant company pleaded, *inter alia*, that the respondent's averments were irrelevant. On Nov. 28, 1952, LORD STRACHAN (Lord Ordinary), after hearing counsel in the Procedure Roll, allowed proof before answer. On Feb. 24, 1953, the First Division heard counsel on a reclaiming motion and, on the respondent's motion, allowed amendments to be tendered. Finally, on June 25, 1953, the First Division pronounced an interlocutor allowing the record to be amended, refusing the motion for review of LORD STRACHAN's interlocutor, and remitting the cause back to the Lord Ordinary to take the proof. The respondent then presented a petition for leave to appeal to this House, and on Nov. 12, 1953, the First Division granted leave as craved. D

The points which are now before the House are, no doubt, difficult, but they are short and they can be simply stated. In the first place, were the appellant company in breach of contract in requiring the respondent to confine his attention to their subsidiary company, British Textile Manufacturing Co., Ltd.? And, secondly, if they were, was the respondent justified in treating that breach as a repudiation of the contract? E

Admittedly the respondent cannot succeed in his action unless, on a true construction of the agreement of 1949 and of the resolution of the appellant company's board of directors of May 10, 1950, this resolution involved a breach of contract. Of course, each of these documents must be construed in the light of all relevant circumstances at its date, and, if there were any such circumstances which could influence its construction and which are averred by the respondent but not admitted by the appellant company, then a proof would be necessary before the true meaning of these documents could be determined. But I cannot find any averments of this kind in the respondent's condescendence. As regards the agreement, counsel could not even suggest any, but, as regards the resolution, he founded on the averments in the earlier part of condescendence 4. These are detailed averments of disagreements between the respondent and his co-directors, of attempts by them to induce him to resign, and of a deliberate policy on their part to prevent him from carrying out any executive or managerial functions of the appellant company. In reply, the appellant company admit differences of opinion, but otherwise deny these averments. For reasons which I shall explain later, I am of opinion that it can make no difference to the decision of this case whether these averments of the respondent are true or not. F

- A It follows that the agreement can be construed now just as well as it could be after a proof and if, on the construction of the resolution most favourable to the respondent's case, it discloses no breach of contract, then proof is unnecessary and the respondent's action fails. I shall, therefore, proceed to consider the construction of the agreement of 1949. This agreement must be construed in light of the admitted agreement of Nov. 3, 1947, by which the respondent sold to the appellant company the whole share capital of his company, British Textile Manufacturing Co. I need only notice those provisions in it which appear to me to be relevant. The respondent undertook, if so required, to procure the appointment of nominees of the appellant company as directors, and the appellant company undertook to appoint the respondent managing director for five years. The agreement provided that he should devote his whole time to his duties as managing director of that company, provided that these should not prevent him from being a director of the appellant company, and it provided that his remuneration should be £2,200 per annum, together with a commission based on the profits of British Textile Manufacturing Co.
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- The agreement of 1949 appears to have superseded the 1947 agreement insofar as it provided for the respondent's remuneration, and it plainly superseded this agreement insofar as it required the respondent to devote his whole time to the affairs of British Textile Manufacturing Co., for the 1949 agreement provided, by cl. 3, that he should devote his whole time to his duties under this agreement and obey the orders of the appellant company's board of directors, provided that nothing should prohibit him from being a director of two of the appellant company's subsidiary companies, viz., British Textile Manufacturing Co. and Whalley & Appleyard. There is nothing to indicate, and no averment to the effect, that the respondent's appointment as managing director of British Textile Manufacturing Co. was terminated or that he ceased to act in that capacity.
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- Clause 1 of the agreement of 1949 appoints the respondent a managing director (not the managing director) of the appellant company. The law does not specify the duties of a managing director and there is no averment that they were specified in the articles of association. But cl. 1 proceeds to deal with this matter: it provides that, as such managing director, he shall perform the duties and exercise the powers in relation to the business of the appellant company and the businesses of its subsidiary companies which may, from time to time, be assigned to, or vested in, him by the appellant company's board of directors. On this clause, two questions arise. First, what was the nature of the duties in relation to the subsidiary companies which could be assigned to the respondent?; and, secondly, were the appellant company entitled to require him to devote his whole time to duties in relation to the business of the subsidiary companies and to assign to him no duties of a managerial character in relation to the business of the appellant company?
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- It was common ground that it would have been a breach of contract to assign to the respondent duties of a wholly subordinate character in relation either to the appellant company's business, or to the businesses of the subsidiary companies, and that the contract contemplated that any duties assigned must be of a managerial character. But there is no averment that there was any breach of contract of this kind. The respondent's contention on this question was that the only duties in relation to the businesses of subsidiary companies which could be assigned to him under the 1949 agreement were duties which would come directly within the ordinary scope of duties of a managing director of the appellant company—duties such as co-ordinating its business with the businesses of the subsidiary companies or making an investigation of the affairs of the subsidiary companies for the information of the appellant company's board of directors. It was argued that the subsidiary companies were separate legal entities, each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to any one in relation to the
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management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. A

My Lords, in my judgment, this is too technical an argument. This is an agreement in re mercatoria, and it must be construed in the light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Manufacturing Co., and, under the agreement of 1947, the directors of this company were to be the nominees of the appellant company. B So, in fact, the appellant company could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective. Moreover, before the 1949 agreement, the respondent was under obligation to act as managing director of British Textile Manufacturing Co., and he avers that, after the making of that agreement, he continued to supervise the conduct of that business. C It is true that he qualifies this by averring that this was pending the appointment of a managing director to succeed him there, but there is no averment that the appellant company had undertaken to relieve him of his duties as managing director of the subsidiary company, and I cannot infer from the 1949 agreement that the appellant company were under any obligation to do that. D On the contrary, I read cl. 1 of this agreement as entitling the appellant company to assign to him as duties under that agreement any duties in relation to British Textile Manufacturing Co. which were of a managerial and not of a subordinate character. But it was argued that any duties assigned to the respondent must be duties which he could perform as a managing director of the appellant company, and that he could not perform internal duties of management of a subsidiary company in that capacity. E I think that this argument is not only technical, but unsound. As I have already said, the law does not prescribe the duties of a managing director, the parties are left to define his duties, and I can see nothing inconsistent in an agreement that a person shall be a managing director of a company, but shall devote his attention to managing subsidiary companies. F I am, therefore, of opinion that the agreement of 1949 entitled the appellant company to require the respondent to devote his time to managing the businesses of the subsidiary companies.

But then it was argued that, even if that be so and if the agreement entitled the appellant company to assign to him extensive duties in relation to the business of the subsidiary company, it did not entitle them to require him to devote his whole time throughout the agreement to such business, but required them to assign to him at least some duties of a managerial nature in relation to the business of the appellant company. G I cannot agree with this argument. To begin with, it is extremely vague. It was admitted that, as the respondent was only appointed a managing director, the appellant company would have been within their rights in appointing a second managing director and assigning to him at least the greater part of the managerial functions of their company. H And it was not disputed that duties in relation to subsidiary companies which might be assigned to the respondent might occupy his whole time and attention for a period. But the contention was, I think, that he must have sufficient duties in relation to the affairs of the appellant company to make his position as a managing director of that company a reality.

The respondent supported this contention by a further argument. I His remuneration depended on the profits of the appellant company and its subsidiary companies; and the minimum commission of £1,500 was, in fact, exceeded during the first year and would, he avers, have become still greater in subsequent years if he had been allowed to exercise the functions of management. Therefore he says that he had a right to exercise those functions. But, in my opinion, the short answer to that argument is that he was only appointed a managing director and, admittedly, the greater part of those functions could have been taken from

A him. Even if he were right in saying that some managerial functions in the appellant company must be assigned to him, it does not follow that the exercise of a comparatively small part of the management would have any appreciable influence on the profits of the company. And, further, the respondent's commission depended on both the profits of the appellant company and the profits of the subsidiary company, and the success of his work in managing this company would, therefore, be reflected in the amount of his remuneration. I am, therefore, unable to agree with the respondent's arguments on the construction of the agreement, and I pass to consider the resolution of May 10, 1950.

It was argued that there must be a proof of the averments in condescendence 4 to which I have already referred because, if proved, they would show that the resolution of May 10, 1950, was, in effect, a dismissal of the respondent from his position of managing director of the appellant company. At this stage, when dealing with the case on relevancy, I must, of course, assume that all these averments would be fully established by proof, but, if I am right in my interpretation of the agreement, I cannot see how proof of these averments would assist the respondent's case. The resolution is not capable of meaning that the respondent was dismissed, but it is, I think, capable of having the meaning that the arrangement set out in it was to be permanent, and that the respondent was not at any time to take any further part in the management of the appellant company's business, but was to confine his attention in future to the business of British Textile Manufacturing Co. It may be that the facts averred would show that that was its meaning. I am not sure that that is so, but I shall assume that it is. But that is not, in my opinion, a breach of the agreement of 1949. The parties in that agreement provided what the duties of the respondent should be: he was to perform the duties from time to time assigned to him in relation to the business of the appellant company and the businesses of the subsidiary companies. This cannot mean that all duties assigned to him must be in relation to all the businesses: some duties might relate solely to one and some solely to another. It was not disputed that all the duties assigned to him might have related to the appellant company's business, so that he had nothing to do with managing the subsidiary businesses. And, similarly, in my opinion, the agreement authorised the appellant company to require him to devote his whole attention to the business of one or both of the subsidiary companies, so that he had no share in the management of the appellant company's own business. I have already said that, in my opinion, that is not inconsistent with his position of managing director as defined in the agreement. He would, of course, have remained a director of the appellant company with all his rights as a director, but his managerial duties would have been solely in relation to the subsidiary company. I do not think that the resolution is capable of a construction more favourable to the respondent's case than that, and that, in my opinion, involves no breach of contract. I am, therefore, of opinion that this appeal should be allowed with the result that the appellant company's first plea-in-law must be sustained, and the respondent's action dismissed.

LORD KEITH OF AVONHOLM : My Lords, the view which commends itself to your Lordships in this case is one with which I regret I am unable to agree. I shall express my difficulty briefly.

I The appellant company and the respondent entered into an agreement dated Nov. 3, 1947, by which, inter alia, the appellant company purchased from the respondent the whole share capital of the British Textile Manufacturing Co., Ltd. and of David Allan (Knitwear), Ltd. The latter company need not be further noticed. As part of the agreement, the appellant company undertook to have the respondent appointed a director of their board and also managing director of the British Textile Manufacturing Co. (which I shall call the Textile Company), on terms scheduled to the agreement, which included appointment as managing director for a term of five years from the date of the agreement and

thereafter until the agreement was determined by not less than three months' notice in writing by either party. It is admitted that the respondent became managing director of the Textile Company. A

On Apr. 1, 1949, a second agreement was made between the appellant company and the respondent, by which the respondent was appointed a managing director of the appellant company on certain terms and conditions. This agreement operated as from Oct. 1, 1948, and was to last for five years from that date and, if not then determined by three months' notice in writing by either party, was to continue thereafter till determined by such a notice. B

It is to be observed that, both under this agreement and under the agreement of 1947, the respondent was bound to devote the whole of his time and attention and abilities to his duties under the respective agreements and to obey the orders from time to time of the boards of directors of the respective companies. It would seem obvious that this was an impossible situation. A man cannot serve two masters, not at least so as to give full time to each. The only conclusion I can come to is that, as the appellant company controlled the Textile Company as a subsidiary company of which it owned all the shares, the agreement of 1947 was regarded by all parties as superseded, so far as the appointment of a managing director was concerned. Were it otherwise, the respondent would be drawing salary and commission under each agreement, and there is no suggestion that this was the case. That this seems also to have been the respondent's view, would appear from his averment that C D

"From Oct. 1, 1948, to May 10, 1950, the [respondent] normally spent from early afternoon on Monday to about noon on Friday each week at Wakefield and visited Irvine at weekends to supervise the conduct of the British Textile Manufacturing Co., Ltd.'s business there, pending the appointment of a managing director to succeed him there." E

I assume, then, that from Oct. 1, 1948, or at latest from Apr. 1, 1949, the respondent had ceased to be managing director of the Textile Company, and that he was a whole-time managing director of the appellant company, and, in fact, the sole managing director of the latter company. If this does not represent the true position, then it is material, in my opinion, to ascertain the true facts by proof. In this situation, the appellant company's board passed the resolution of May 10, 1950. It records, inter alia: F

"The board decided that the managing director confine his attentions to British Textile Manufacturing Co., Ltd. only." G

What does this mean? It is not clear to me, and in the course of the hearing I was unable to get from counsel for the appellant company any clear indication of what it meant. But it seems to me to be at least capable of meaning that the respondent should become again managing director of the Textile Company, albeit with the remuneration agreed to be paid to him as a managing director of the appellant company. H

The averments of the respondent are relevant to cover this point. In consequence 4 it is averred:

"The other members of the [appellant company's] board were opposed to these proposals and thereafter attempted to induce the [respondent] to relinquish his appointment as managing director and to return to Irvine to act as managing director of the British Textile Manufacturing Co., Ltd. only, on the basis of the [appellant company] continuing to pay the [respondent] the remuneration provided in the agreement of Apr. 1, 1949." I

And later:

"The [respondent] believes and avers that the said resolution was passed in implement of the deliberate policy of the other directors on the [appellant company's] board to prevent the [respondent] taking any further part in

- A the executive control and practical management of the [appellant company's] business. The resolution was intended to have and did in fact have the result that the [respondent] was prevented from carrying out any executive or managerial functions of the company [i.e., the appellant company]."

B In my opinion, it is relevant and material to know what was meant by that part of the resolution which I have quoted, unless it can be said that it was no breach of agreement to insist on the respondent serving as managing director of the Textile Company.

It is said that the agreement covers this case. I quote the words relied on:

- C "As such managing director he shall perform the duties and exercise the powers in relation to the business of the [appellant company] and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company."

But I cannot read these words as empowering the directors to force another master on the respondent. Ex hypothesi he had ceased to be managing director of the Textile Company. It is no answer to say that the Textile Company is a subsidiary of the appellant company, controlled entirely as regards policy and the personnel of its board by the latter company. In law, the companies are separate persons, and it has been held in a number of cases that a breach of contract is committed when a servant, under a contract of employment for a fixed term, finds his employer during that term has effected a change of partnership or transformed a personal business into that of a private or public limited company.

- E It is, in my opinion, fundamental to know what the appellant company's board meant by their resolution. It is not a resolution that speaks for itself. What the parties said, and thought, and did, the way they understood it was to be enforced, the way they acted, or proposed to act on it, the whole surrounding facts and circumstances, must be assessed before the question of breach can be properly decided, and this cannot be done without a proof. Until this
- F has taken place, it is premature, in my opinion, to consider some of the other questions of law that have been argued.

I would dismiss the appeal.

Appeal allowed.

- G Solicitors: *Slaughter & May*, agents for *Maclay, Murray & Spens*, Glasgow, and *Dundas & Wilson*, Edinburgh (for the appellant company); *Allen & Overy*, agents for *McGrigor Donald & Co.*, Glasgow, and *J. & R. A. Robertson*, Edinburgh (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

NOTE.**CARTWRIGHT v. W. RICHARDSON & CO., LTD.**

[QUEEN'S BENCH DIVISION (Barry, J.), March 3, 4, 7, 1955.]

*Document—Admissibility in evidence—"Person interested"—Evidence Act, 1938 (1 & 2 Geo. 6 c. 28), s. 1.**Practice—Re-examination—Previous contradictory statement of own witness—Written statement.*

[As to Previous Contradictory Statements of a party's Own Witness, see 13 HALSBURY'S LAWS (2nd Edn.) 760, para. 835; and for cases on the subject, see 22 DIGEST (Repl.) 478, 479, 5271-5280.]

For the Evidence Act, 1938, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 626.]

Action.

The plaintiff claimed damages from the defendants for injuries, alleged to be due to their negligence, received by him when working in their employment as chargehand on installing cylindrical metal tanks in a pit in the ground. The tanks were to be used for the storage of inflammable liquid and were of considerable weight. The accident occurred when a tank which had been resting on a brick wall came to be lowered into the pit. A winch and wire rope were being used for this operation. The plaintiff received his injuries when he came into contact with the stub axle of the winch and a fact in issue was how the winch behaved at the moment when the tank came off the wall.

A witness, Mr. Joyce, who at the time of the accident was in the defendants' employment, was called by the defendants and he gave his account of the events leading up to the accident. In cross-examination he admitted that when the tank came off the wall the winch jumped forward and "ran away". In re-examination counsel for the defendants sought to produce in evidence a statement made by Mr. Joyce while he was in the defendants' employment but which was signed and verified by him shortly before the trial of the action. Counsel for the plaintiff objected to the production of the statement and the following preliminary judgment was given on the question of its admissibility.

G. G. Blackledge, Q.C., and J. G. Burrell for the plaintiff.

E. M. Jukes, Q.C., and M. J. P. Macnair for the defendants.

BARRY, J.: This application made by counsel for the defendants to put the statement to this witness, Mr. Philip Joyce, seems to me to raise a point of considerable importance.

The production of the statement is objected to by counsel for the plaintiff on two grounds: first that the statement was made by a person interested, and secondly on the ground that despite the provisions of the Evidence Act, 1938, the statement cannot be put to a witness or put in evidence in re-examination in the circumstances in which counsel for the defendants seeks to produce it in this action.

I am bound to say that in my judgment, and with the very greatest respect to the opinion of other judges who I am told have allowed statements to be put in in circumstances similar to this, I do not think that it can be put to this witness in re-examination.

In s. 1 (1), the Evidence Act, 1938, provides that

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact . . ."

under the conditions provided in the Act. Here Mr. Joyce was called by the defendants to give his account of this matter, which he did very fully and very

- A clearly. He was cross-examined, and in substance repeated the important portions of his evidence regarding the movements of the tank and the winch at or immediately before the moment when this accident occurred. It was in those circumstances, the witness having given that information, that counsel for the defendants applied to produce in evidence the statement which was admittedly made by Mr. Joyce in 1951 at a time when he was still in the defendants' employment,
- B but which was signed and verified by him as his statement early this year when he was no longer in the defendants' employment.

Now I do not think that the Evidence Act, 1938, overrules the ordinary rules of procedure applicable in the trial of civil actions. Counsel for the defendants has, very rightly, not invited me to treat Mr. Joyce as a hostile witness. Having seen Mr. Joyce, and having heard his evidence, it would have been impossible for me to have acceded to any such invitation had it been made.

- C In those circumstances, Mr. Joyce not being an adverse or hostile witness, I do not think that the provisions of the Evidence Act, 1938, assist counsel for the defendants in any way. The only purpose of introducing this statement is to show that on an earlier occasion some portion of the account of the accident given by Mr. Joyce was differently described by him. If such evidence were
- D admissible that might have the result of shaking the faith of the court in the evidence given by Mr. Joyce in the witness-box. That does not seem to me to be a proper use of the provisions of the Evidence Act, 1938. Except in the case of an adverse witness I do not think that the fact that he made a previous contradictory statement is a fact which is admissible in evidence in re-examination, and in those circumstances I am not prepared to agree to the statement being
- E put in evidence or being put in as a document as evidence of any fact, having regard to the very full description of the facts which has been given by Mr. Joyce and which could not be improved on but only varied if this were allowed to be admitted.

On those grounds primarily I feel bound to hold that the statement should not, at this stage and in these circumstances, be put in evidence in this case.

- F I think, on the authorities cited to me, it is highly probable that Mr. Joyce was, in the correct interpretation of that term, a "person interested"* at the time when the statement was made. I think the material time must be the time when the statement was in fact made, and at that time Mr. Joyce was employed by the defendants. It is true he was not employed on the brake of the winch but was merely there to assist the brakesman, but having regard to his very
- G close association with the work which was being carried out, and having regard to the then interest that his employers should be successful in any litigation, I think that he ought to be regarded as a "person interested" at the time that the statement was made. The fact that he was not in the defendants' employment at the time when he merely signed the statement in order to acknowledge that it had been made by him does not, in my judgment, alter the position which must
- H be judged, I think, as at the time when the statement was made.

In those circumstances, I think that on both the grounds submitted by counsel for the plaintiffs this statement is inadmissible.

Statement held inadmissible.

Solicitors: *Helder, Roberts & Co.*, agents for *John A. Behn, Twiford & Reece*, Liverpool (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

* Section 1 of the Evidence Act, 1938, does not render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish (*ibid.*, sub-s. (3)).

R. v. WILSON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Sellers, JJ.), January 12, 1955.]

Criminal Law—Indictment—Assault with intent to resist arrest—Whether jury may convict of common assault—Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 38.

The appellant was indicted under s. 38 of the Offences against the Person Act, 1861, for assault with intent to prevent lawful apprehension. At the trial it appeared that the apprehension, owing to a technicality, would not have been a lawful apprehension. The appellant was convicted of common assault. On appeal against conviction on the ground that this verdict was not open to the jury,

Held: the offence with which the appellant had been indicted was an assault with circumstances of aggravation, and accordingly, the offence being a misdemeanour, the appellant could lawfully be convicted of the lesser offence of common assault.

Appeal dismissed.

[**Editorial Note.** This case may be compared with and distinguished from *R. v. Day & Cox* (1870), 11 Cox, C.C. 505 (C.C.R.), where it was held that a prisoner, charged first with a count for an assault on a gamekeeper (laid under s. 2 of the Night Poaching Act, 1828) and second with a count for common assault, could not, after the second count had been abandoned, be convicted of common assault on the first count. The present case shows that on a charge of aggravated assault, such as using excessive force in resisting arrest by a gamekeeper, the jury may convict of common assault.

As to Convictions of an Offence different from that Charged, see 9 HALSBURY'S LAWS (2nd Edn.) 175, para. 254; and for cases on the subject, see 14 DIGEST 317-324, 3330-3397.

For the Game Act, 1831, s. 31, see 10 HALSBURY'S STATUTES (2nd Edn.) 697; for the Offences against the Person Act, 1861, s. 38, see 5 HALSBURY'S STATUTES (2nd Edn.) 801.]

Appeal against conviction.

The appellant was indicted before Nottinghamshire Quarter Sessions for assault with intent to prevent lawful apprehension contrary to s. 38 of the Offences against the Person Act, 1861, and was convicted of common assault. The chairman of quarter sessions gave a certificate that the case was fit for appeal on the question whether a verdict of common assault was open to the jury, and the appellant appealed. The facts appear from the judgment.

P. A. Bruce for the appellant.

A. Ellis for the Crown.

LORD GODDARD, C.J. : The appellant in this case appeals by certificate granted by the learned deputy chairman of the Nottinghamshire Quarter Sessions before whom he was convicted of common assault. Along with another man the appellant was found poaching by a gamekeeper and was charged with an assault on the gamekeeper with intent to evade arrest. The reason why the appellant was thus charged was because under s. 31 of the Game Act, 1831, a gamekeeper is entitled to arrest a person whom he finds in pursuit of conies, as this man was, if he first asks for his full christian name, surname and address. The gamekeeper in this case, who gave evidence with commendable frankness, although given every opportunity of saying what he had asked the appellant, apparently said before the jury that he had only asked for his name. Thus arises one of those technicalities which it would be a good thing to have abolished, because very often a gamekeeper may know perfectly well where a person lives though he does not know his name. Nevertheless the statute still requires that before he arrests him he must ask for his name and address and the gamekeeper in this case did not ask as fully as he ought to have done. The learned deputy

A chairman, therefore, quite properly ruled that the appellant could not be convicted of the offence of intent to prevent lawful apprehension under the section* because the apprehension was not lawful as his full name and address had not been asked for. The learned deputy chairman, however, said further that the man might be found guilty of a common assault if the jury were of opinion that he used more force than necessary to avoid the unlawful apprehension. That, I think, again was a perfectly unimpeachable statement of the law, namely, that if a person is purporting to arrest another without lawful warrant, the person arrested may use force to avoid being arrested, but he must not use more force than necessary. No doubt what the court thought was the serious part of this case, as I think the jury must have thought too, was that the man threatened to get out knives. He called out "Get out knives", which itself would be an assault, in addition to kicking the gamekeeper. At any rate the jury came to the conclusion that he did use more force than necessary for repelling the unlawful arrest. Counsel for the appellant, however, submits that though in those circumstances the appellant could have been found guilty of common assault had he been charged with common assault, he could not, on a charge of intent to evade arrest, be found guilty of common assault. With all respect to the interesting argument counsel for the appellant has put up, and for which we are obliged to him, the argument fails. An assault with intent to evade arrest is simply one form of aggravated assault, that is to say, it is an assault with circumstances of aggravation which allow a heavier sentence to be passed than for a simple assault. It involves an assault, however, and what has happened here is that the jury have found the appellant guilty of an assault without aggravation. The law has been well laid down over a great number of years that where a man is charged with an offence he may be found guilty of a lesser offence of the same quality. This seems, therefore, to be an *fortiori* offence. It is necessary to prove an assault and necessary to prove intent to evade arrest. If the assault is proved but the intent to evade arrest is not proved, so that part of the offence fails, the accused can, however, be found guilty of the offence of assault because that is an ingredient of the first offence. The jury find him guilty of the act complained of but without the matter of aggravation. Therefore, in my opinion the deputy chairman was perfectly right in leaving this case to the jury. I do not think that the cases cited† apply here. They were cases, curiously enough, in which those two eminent lawyers, PARKE, B., and WIGHTMAN, J., appear to have held that a man could be convicted of an assault, that is to say a misdemeanour, where the charge was so grave that it amounted to a felony. It is clear that the law does not allow a man to be indicted for a felony unless there is a statute which permits it. There is statutory provision‡ by which a person indicted for certain felonies may, if the jury see fit, be found guilty of the misdemeanour of unlawful wounding. So here the court are clearly of opinion that a verdict of common assault was justified in this case. The court cannot measure the amount or weigh the actual violence; it was a common assault. An assault was necessary to prove the offence laid in the indictment, but the intent laid in the indictment fails. For these reasons the conviction is upheld.

Appeal dismissed.

Solicitors: *Hibbert & Son*, Mansfield (for the appellant); *Registrar, Court of Criminal Appeal* (for the Crown).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

*I.e., under s. 38 of the Offences against the Person Act, 1861; 5 HALSBURY'S STATUTES (2nd Edn.) 801.

† *R. v. St. George* (1840), 9 C. & P. 483 (173 E.R. 921); *R. v. Hollingberry* (1825), 4 B. & C. 329 (107 E.R. 1081).

‡I.e., Prevention of Offences Act, 1851, s. 5; 5 HALSBURY'S STATUTES (2nd Edn.) 706; this provision applies to the felonies of wounding with intent to murder and wounding with intent to commit grievous bodily harm or to resist apprehension under s. 11 and s. 18 of the Offences against the Person Act, 1861; 5 HALSBURY'S STATUTES (2nd Edn.) 791, 793.

H.R.H. PRINCE ERNEST AUGUSTUS OF HANOVER v. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Vaisey, J.), February 16, March 1, 1955.]

Alien—British nationality—Lineal descendant of the Electress Sophia—4 & 5 Anne c. 4 or c. 16—British Nationality Act, 1948 (11 & 12 Geo. 6 c. 56), s. 12. Statute—Construction—Preamble limiting general language in enacting provisions—4 & 5 Anne c. 4 or c. 16.

The Statute 4 & 5 Anne c. 4, intituled "An Act for the naturalisation of the most Excellent Princess Sophia Electress and Duchess Dowager of Hanover and the issue of her body" by its preamble recited that "... to the end the said Princess ... and the issue of her body and all persons lineally descending from her may be encouraged to become acquainted with the laws and constitutions of this realm it is just and highly reasonable that they in your Majesty's lifetime ... should be naturalised and be deemed taken and esteemed natural born subjects of England ...". The Act provided: "The said Princess ... and the issue of her body and all persons lineally descending from her born or hereafter to be born be and shall be ... deemed ... natural born subjects of this kingdom ...". The statute was repealed by the British Nationality Act, 1948, s. 34 (3), but by s. 12 a person who was a British subject immediately before the commencement of that Act (Jan. 1, 1949) became a citizen of the United Kingdom and Colonies. The plaintiff, who was born in 1914 in or near Hanover, was lineally descended from the Electress Sophia, and claimed a declaration that he was a British subject.

Held: although the enacting provision of the Statute of Anne was unqualified and plain in its meaning, yet its words, taken alone, were of such character and led to such consequences as showed that the legislature must have intended that some limitation should be put on their operation; this limitation was supplied by the preamble, which indicated that the purpose of the Act was to be effected in the lifetime of Queen Anne; accordingly that purpose was fulfilled and spent, and the plaintiff was not entitled to the declaration which he claimed.

Dictum of SIR THOMAS PARKER, C.B., in *Ryall v. Rolle* (1749) (1 Atk. at p. 174) applied.

Powell v. Kempton Park Racecourse Co., Ltd. ([1899] A.C. 143) considered.

[As to Statutory Rights not Lapsing because of Non-User, see 31 HALSBURY'S LAWS (2nd Edn.) 560, para. 757; and for cases on the subject, see 42 DIGEST 772, 773, 2004-2008.]

As to a Preamble Restraining Enacting Words, see 31 HALSBURY'S LAWS (2nd Edn.) 462, para. 558 note (i); and for cases on the subject, see 42 DIGEST 652-654, 599-629.

For the statute, 4 & 5 Anne c. 4 or c. 16, see 4 HALSBURY'S STATUTES (2nd Edn.) 165.

For the British Nationality Act, 1948, s. 12, see 28 HALSBURY'S STATUTES (2nd Edn.) 146; for the Titles Deprivation Act, 1917, see 17 HALSBURY'S STATUTES (2nd Edn.) 796, and for the Act of Settlement (1700), see 4 HALSBURY'S STATUTES (2nd Edn.) 158.]

Cases referred to:

- (1) *The India*, (1864), 33 L.J.P.M. & A. 193; 12 L.T. 316; 42 Digest 773, 2007.
- (2) *Leigh v. Kent*, (1789), 3 Term Rep. 362; 100 E.R. 621; 42 Digest 773, 2006.
- (3) *Joyce v. Public Prosecutions Director*, [1946] 1 All E.R. 186; [1946] A.C. 347; 115 L.J.K.B. 146; 174 L.T. 206; 2nd Digest Supp.
- (4) *Powell v. Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143; 68 L.J.Q.B. 392; 80 L.T. 538; 63 J.P. 260; 42 Digest 652, 595.

- A (5) *Brett v. Brett*, (1826), 3 Add. 210; 162 E.R. 456; 42 Digest 647, 529.
 (6) *Ryall v. Rolle*, (1749), 1 Ves. Sen. 348 (27 E.R. 1074); 1 Atk. 165 (26 E.R. 107); 42 Digest 645, 507.

Action.

B The plaintiff claimed a declaration that immediately before the coming into force (on Jan. 1, 1949) of the British Nationality Act, 1948, he was a British subject and that he was by virtue of that Act a British subject.

C The defendant denied that the plaintiff was by virtue of the Statute 4 & 5 Anne c. 4, otherwise c. 16, a British subject immediately prior to the coming into force of the British Nationality Act, 1948, and contended that the Act of Anne only applied to persons who, being lineally descended from the Princess Sophia Electress and Duchess Dowager of Hanover, were born during the lifetime of her late Majesty Queen Anne.

K. Diplock, Q.C., and R. O. Wilberforce, Q.C., for the plaintiff.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and B. J. H. Clauson for the defendant.

Cur. adv. vult.

D Mar. 1. VAISEY, J., read the following judgment: The plaintiff in this action is H.R.H. Prince Ernest Augustus of Hanover, who contends, and asks the court to declare, that he is a British subject under the combined effect of two Acts of Parliament. These are, first, the Act 4 & 5 Anne c. 16 (otherwise c. 4), passed in 1705, and intituled "An Act for the naturalisation of the most
 E Excellent Princess Sophia Electress and Duchess Dowager of Hanover and the issue of her body" (I will refer to it as the Act of Anne); and, second, the British Nationality Act, 1948, which came into force on Jan. 1, 1949.

F The defendant is the Attorney-General who, while disclaiming any hostility in his attitude to the plaintiff, puts him to proof of his contention, and has assisted the court by advancing or suggesting arguments against it. The case is one of considerable difficulty. There is, on the one hand, in the plaintiff's favour, the apparently clear and unambiguous terms of the enacting provisions of the Act of Anne. On the other hand, the consequences of a literal interpretation and application of those terms are such as to give rise to some serious misgivings whether it would be proper so to treat them.

G The plaintiff is a descendant of the Electress Sophia, being the great-great-grandson of Ernest Augustus, Duke of Cumberland, the fifth son of King George III. He was born in or near Hanover on Mar. 18, 1914. It is admitted that he is and at all times was of the Protestant religion, and that he is not and never has been a Papist, and has never professed the Popish religion. These expressions are taken from the Act of Anne. There are at the present time a large number of other persons descended from the Electress Sophia and with similar religious
 H associations; the number of such persons is stated to be upwards of four hundred, and they include members of the royal families of practically every European country. It would therefore seem that my decision in the present case is likely to affect many other persons who would not be technically bound by it. I confess that the case seems to me to be of greater historical interest than it can possibly be of importance either to the plaintiff or to any other person.

I It is, I think, convenient for me here to state what I understand to be the plaintiff's actual status according to English law, apart from any question as to his nationality, and I take the following particulars mostly from BURKE'S PEERAGE, 1953 Edn., pp. XXXIII, XLI, CVII, CLI and CLII. Under or by virtue of the Titles Deprivation Act, 1917 (7 & 8 Geo. 5 c. 47), and an Order in Council dated Mar. 28, 1919 (S.R. & O. 1919 No. 475) the plaintiff's father (1887-1953) was deprived of his right to succeed his (the plaintiff's) grandfather (1845-1923) as Duke of Cumberland and Earl of Armagh, but the plaintiff's title of "Prince of Great Britain and Ireland" was in no way affected by this Act or

the said Order in Council, nor was his right to be designated "Royal Highness", and there is now vested in him the right under s. 2 of the Titles Deprivation Act, 1917, to petition for his restoration to the roll of the British peerage. A

It is surely significant that neither in 1917 nor at any other time has any attempt been made to deprive the members of the plaintiff's family of their status as British subjects, if, in fact, they possessed or possess that status, which is, of course, the question which I have now to consider. If they were British subjects in 1917, the omission to deal with the situation arising therefrom certainly suggests that they were not then regarded as British subjects. I should add that the plaintiff's right of succession to the Crown, remote though it is, is also wholly unaffected by the Act, and it is indeed pointed out in *BURKE* that, apart from many other cogent arguments, it is a well settled rule of law that even an attainer, "albeit the blood be corrupted and uninheritable", is automatically void and ended if the person attainted inherits the Crown. It is also pointed out in the same work that under the Act of 1917 and the Order in Council of 1919 the Cumberland peerages have been placed in a position, theretofore unknown in peerage law, of being neither extant, abeyant, dormant or extinct, but (and here was the novelty) merely suspended. The plaintiff is, without question, in the order of succession to the Crown under the Act of Settlement, not only through his paternal ancestry in the line of the Dukes of Cumberland of the creation of George III, but by reason of a nearer, though still very remote, degree of relationship through his mother, who was the daughter of the Kaiser Wilhelm II and therefore a great-grand-daughter of Queen Victoria. With his British peerages, in existence though in suspense, his position and style as a Prince of Great Britain and Ireland, and his place in the order of succession to the Crown, all undisputed, it is difficult to see what advantage he would gain from being declared to have been a British subject under the Act of Anne, and so to be a British subject today. B

The enacting provision of the Act of Anne reads as follows: C

"The said Princess . . . and the issue of her body and all persons lineally descending from her born or hereafter to be born be and shall be to all intents and purposes whatsoever deemed taken and esteemed natural born subjects of this kingdom as if the said princess and the issue of her body and all persons lineally descending from her born or hereafter to be born had been born within this realm of England any law statute matter or thing whatsoever to the contrary notwithstanding." D

Now it is, of course, plain that a statute is not impliedly repealed merely by becoming obsolete or by mere non-user, however long the time may have been since it was known to have been actually put into force; see per *DR. LUSHINGTON* in *The India* (1) (33 L.J.P.M. & A. at p. 193). But this principle must, in my judgment, be applied with due regard to the circumstances of the case, and although the word "obsolete" cannot in strictness be applied to any Act of Parliament remaining on the statute book, there are undoubtedly statutes still to be found there which would seem only to have been permitted to remain there because their existence has been overlooked. The text-books give instances of this, such as the Tumultuous Petitioning Act, 1661*, which enacts that everyone commits a misdemeanour who procures the signatures of more than twenty persons to a petition to the King or to Parliament without the previous permission of the justices or the grand jury, "which", said *SIR JAMES STEPHEN* (*DIGEST OF THE CRIMINAL LAW* (1877), p. 31) "obviously exists only because it is forgotten". E

There is, I understand, no record of the Act of Anne ever having been put into any practical operation or referred to or relied on or regarded as relevant in any F

* The Act, 13 Charles 2 c. 5, was given its short title by the Statute Law Revision Act, 1948; 24 *HALSBURY'S STATUTES* (2nd Edn.) 459. G

A way and, as was said by LORD KENYON, C.J., in *Leigh v. Kent* (2) (3 Term Rep. at p. 364):

“ . . . where the words of an Act of Parliament are plain, it cannot be repealed by non-user, yet where there has been a series of practice, without any exception, it goes a great way to explain them where there is any ambiguity.”

B Many examples of statutes effete or forgotten, though remaining on the statute book, are to be found in the text-books. For instance, trial by battle was still in force in 1819 and drawing and quartering was still part of the sentence for treason until 1870. And, as usage is a good interpreter of law, so non-usage lays an antiquated Act open to any construction weakening or even nullifying its effect. Such considerations as these cannot be excluded in connection with the Act of Anne.

C Turning for a moment to the British Nationality Act, 1948, by which the Act of Anne was repealed, s. 12 provides that a person who was a British subject immediately before the commencement of the Act (viz., Jan. 1, 1949) should on that day become a citizen of the United Kingdom and Colonies, subject to certain exceptions which I need not specify, and there is no doubt to my mind (and the Attorney-General admits) that if the plaintiff was a British subject immediately before Jan. 1, 1949, he did in fact on that date become and now is a British subject under that Act. The question, therefore, which falls to be decided is whether the plaintiff was, or was not, a British subject under the Act of Anne immediately before Jan. 1, 1949. One must just consider, I think, what is involved in the possession of that status. In the first place it involves “allegiance”. This, I think, is clear by implication from the proviso of the Act of Anne which enacts that

“ . . . every person and persons who shall be naturalised by virtue of this Act of Parliament and shall become a Papist or profess the Popish religion shall not enjoy any benefit or advantage of a natural born subject of England but every such person shall be adjudged and taken as an alien born out of the allegiance of the Queen of England to all intents and purposes whatsoever anything herein contained to the contrary notwithstanding.”

F “Allegiance” is defined in *TERMES DE LA LEY* as “such natural or legal obedience which every subject owes to his prince”; and in *Joyce v. Public Prosecutions Director* (3), it was held that an alien under the protection of a British passport owes allegiance to the Crown. Again, SIR WILLIAM HOLDSWORTH in the article “Constitutional Law” in 6 *HALSBURY’S LAWS OF ENGLAND* (2nd Edn.) 530, para. 656,* writes:

H “It is said that the Crown enjoys the right of recalling subjects from abroad by letters under the great seal . . . disobedience thereto formerly rendering the person’s property in the realm liable to seizure . . . until the recall was complied with. This prerogative, so far as it is not obsolete, applies, it seems, either in time of war or in time of peace”.

I When it is remembered that members of practically every European royal family, with perhaps one exception, are covered by the literal words of the Act of Anne, it is difficult to see how such obligations as these could ever have been intended to apply to so wide a class of persons. No doubt it may be said that such anomalies must occur in every case of dual nationality, but never, I should suppose, on such a large scale and with such surprising consequences as in this case, if the plaintiff’s contention is well founded. At the date of the passing of the Act of Anne there were but seven persons besides the Electress herself who were affected by its provisions. These were her son George, afterwards King George I, born May 28, 1660; his two brothers, born in 1666 and 1674 respectively; and three grandchildren, viz., George Augustus, afterwards

* See 7 *HALSBURY’S LAWS* (3rd Edn.) 294, para. 619.

King George II, born 1683, Sophia Dorothea, born 1685, his sister and Frederick William, born 1688, son of a deceased daughter of the Electress. These being the persons immediately covered by the provisions of the Act, what must have been its intention? Not to secure the Protestant succession which had already been provided for by the Act of Settlement (1700) (12 & 13 Will. 3 c. 2). It can only be supposed that it was thought advisable and convenient that any of such then existing persons who might succeed to the throne should do so in possession of the status of British nationality. If such were in fact its purpose, it became at an early date entirely superfluous, when the number of those in the succession who were British subjects by birth had reached such numbers that the succession of an alien-born descendant had become only a remote possibility.

It now becomes necessary to look at the preamble to the Act of Anne and to see whether it throws any light on the matter and, secondly, to consider whether it is legitimate to have recourse to it on a question of construction, notwithstanding the general rule that a preamble cannot be used to control an enactment expressed in clear and unambiguous terms: see *Powell v. Kempton Park Racecourse Co., Ltd.* (4). CRAIGES ON STATUTE LAW (5th Edn.), p. 189, does state that

“If very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply.”

Among other examples given (*ibid.*, pp. 189-192) he cites *Brett v. Brett* (5), where it was held that, inasmuch as it clearly appeared from the preamble that the Statute 25 Geo. 2 c. 6, professed to deal only with wills and codicils devising real estate, the expression “any will or codicil” whenever used in the enacting words of the statute did not include a will or codicil bequeathing personalty.

Now the preamble in the present case, after reciting the effect of the Act of Settlement and after some complimentary words to the Queen, proceeds:

“... to the end the said Princess Sophia Electress and Duchess Dowager of Hanover and the issue of her body and all persons lineally descending from her may be encouraged to become acquainted with the laws and constitutions of this realm it is just and highly reasonable that they in your Majesty's lifetime (whom God long preserve) should be naturalised and be deemed taken and esteemed natural born subjects of England . . .”

The words “in your Majesty's lifetime” seem to suggest some temporary purpose in the Act, but the indication is certainly very vague. If these words had followed the words “descending from her”, there would have been an end of the plaintiff's case. But, of course, no such transposition is admissible. To the question put to the plaintiff, on the assumption that he establishes his case, “Were you naturalised in the lifetime of Queen Anne?”, neither an affirmative nor a negative answer would be otherwise than ambiguous. He would say that in a sense he was, and in a sense he was not. And that leads me rather to the supposition that the main object of the Act was to make sure that whichever of the foreign born and alien-tongued persons who would be proclaimed, crowned and enthroned as the Queen's immediate or next proximate successors should have already become subjects of England. No doubt the enacting portion of the statute might operate according to its literal expressions to the remotest point of time, but that it had any such far-reaching purpose is very difficult to believe. To suppose that Parliament thought that every descendent however remote in time or distant in kinship of the Electress ought to study English law is really rather absurd, however salutary the topic would have been to the immediate successors of Queen Anne. Even in its primary purpose the Act of Anne achieved a very poor measure of success, for it is notorious that King George I never learnt to speak the English language, and is not, I believe, thought to have possessed much knowledge of English law.

- A There have been plenty of Statute Law Revision Acts since 1861, and the question may naturally be asked why this Act, if it was, in fact, as I consider it was, entirely spent, was not repealed like so many others contemporaneous with it. I think the answer may be that such revising Acts usually contain clauses preserving and safeguarding vested rights, and reluctance may have been felt to the repeal of an Act such as the Act of Anne which appeared at first sight on
- B one possible construction of it to confer privileges on a large number of persons whose opinions would have been difficult to discover, and whose consent would have been difficult to obtain. It is well-known that the descendants of a particular stock may in a fairly brief period of time become almost uncountable. For example, it is said that there are at least one hundred thousand persons in England who can prove descent from King Edward III (see Marquis de Ruvigny's
- C Plantagenet Roll, Mortimer-Perey, Volume I, p. xi), and it may not be very long before those who can prove descent from the Electress Sophia will be equally or nearly as numerous. When that event happens, the operation of the Act of Anne would be not merely inconvenient but absurd, and one of the questions which I have tried to consider is whether it had not already reached that point long before Jan. 1, 1949. If over four hundred persons, including
- D members of nearly all the royal houses of Europe, were just prior to Jan. 1, 1949, already naturalised by the Act of Anne, it seems to me that at least one provision of the laws of our country had become little short of ridiculous. If, then, the very general language of the Act of Anne was intended to have some limitation put on it, the preamble may surely be used to indicate what that limitation ought to be, and slight though the indication is it seems to me that
- E the reference to Queen Anne's lifetime makes the preamble what preambles have been described as being, "a key to the statute" and indicates that what the legislature was doing was to make sure that every possible successor to the throne within sight, as it were, was ready as a naturalised Englishman or Englishwoman to take the Queen's place on her death. I accept the words of SIR THOMAS PARKER, C.B., in *Ryall v. Rolle* (6) where he says (1 Atk. at p. 174):
- F " . . . if the not restraining the generality of the enacting clause will be attended with an inconvenience, the preamble shall restrain it . . . "

- Now I think that if the generality of the enacting clause in the Act of Anne is not restrained, it would lead to a conclusion which would certainly be inconvenient and also, I think, absurd, seeing that an appreciable part of the inhabitants of Europe would be invested without their consent and for the most
- G part without their knowledge with British citizenship. The Act was, in my judgment, not repealed before because the extent of its application was doubtful and because its repeal might have interfered with vested rights. If I am right in thinking that its application was limited in point of time, i.e., that it did not affect descendants of the Electress born after the death of Queen Anne, there was
- H neither any need to repeal it nor any harm in leaving it on the statute book. It was there, in my view, as an interesting historical document and nothing more.
- I I have come, with a good deal of hesitation, to the conclusion that the enacting words, though unqualified and plain in their meaning when standing alone, are nevertheless of such a character and produce inevitably such consequences that the legislature must have intended to put some limit on their operation. When once this conclusion is reached, the question arises: what limit? And then one turns to the preamble and one finds (though only I agree, by implication) that the purpose of the enactment was a purpose to be effected not indefinitely at some future time or times but in the lifetime of Queen Anne herself, and in consequence I think that the plaintiff is not entitled to the relief for which he seeks. Let me say that I have every reason to believe that he, the plaintiff, who was educated at Oxford, is a friend to this country, proud of his long descent as a member of its ancient royal house and anxious to assert and emphasise his association with it by establishing, if he could, a right to the status of a British

subject. That is an ambition, however, which can perhaps be satisfied by other means which avoid implicating in its consequences a large number of persons who neither want nor would value for themselves the status of British nationality which he claims. A

There are other examples of possession of a particular status by persons who are unaware of it or take no interest in it, or choose completely to ignore it. For example, until recent years*, every King's or Queen's Counsel was a Governor of Queen Anne's Bounty, though few of them were aware of the fact. There are also examples of citizenship being conferred on a man and his heirs, an expression which would probably not include all his descendants. I should like here to acknowledge my indebtedness to the courtesy of PROFESSOR ARTHUR GOODHART, who, from his stores of knowledge, both of law and of history, has supplied me with a reference to a letter written by George Washington to the Marquis de Lafayette on Dec. 23, 1784, informing him that he and his heirs male had been made citizens of the State of Maryland, which carried with it the status of national citizenship when the United States Constitution came into force; see the WRITINGS OF GEORGE WASHINGTON, United States Government Printing Office, Vol. 28, p. 17, where there is a note that the Marquis de Lafayette was also made a citizen of Virginia. PROFESSOR GOODHART tells me that he also knows French citizens who possess American nationality conferred on an ancestor and his descendants. I mention these matters in order to show that the plaintiff's contentions are not without precedent or support and, indeed, as I have said, the case seems to me to be difficult, but the examples of dual nationality, which undoubtedly do exist, give rise to so many anomalies and sources of confusion that their number ought not to be extended further than is necessary. It is, I think, very significant indeed, that, while in the wars 1914-18 and 1939-45 so many of the descendants of the Electress were engaged in hostile operations against this country, nothing at all was done to denationalise those persons and so to regularise their position. If it is wrong to say that the Act of Anne or any other Act has "become obsolete", the necessity for any such statement in the present case does not seem to me to arise, for I construe the Act of Anne in a way which results in saying that its purpose has been fulfilled and its operation brought to an end, and that it is in fact, and in point of law, entirely spent. E

I will not dismiss the action but, more conveniently, make a negative declaration that the plaintiff was not immediately before the coming into force of the British Nationality Act, 1948, a British subject and that he is not now, either by virtue of that Act or otherwise, a British subject to any intent or for any purpose. I am glad to know that the parties have relieved me from having to say anything about the costs of this action. F

Declaration accordingly.

Solicitors: *Farrer & Co* (for the plaintiff); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

* The functions of Queen Anne's Bounty were transferred to the Church Commissioners and Queen Anne's Bounty was dissolved by the Church Commissioners Measure, 1947, s. 2; 7 HALSBURY'S STATUTES (2nd Edn.) 1171. G

A MADRAS ELECTRIC SUPPLY CORPORATION, LTD. (In Liquidation) v. BOARLAND (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Lord Oaksey, Lord MacDermott, Lord Reid, Lord Tucker and Lord Keith of Avonholm), January 31. February 1, 2, 3, March 11, 1955.]

B *Income Tax—Deduction in computing profits—Wear and tear—Balancing charge—Sale of undertaking to the Crown—Undertaking carried on by Crown—“Person [who] succeeds to any trade”—Inclusion of Crown—Assessment as if trade “discontinued”—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Rules Applicable to Cases I and II, r. 11 (2), as substituted by the Finance Act, 1926 (16 & 17 Geo. 5 c. 22), s. 32 (1)—Income Tax Act, 1945 (8 & 9 Geo. 6 c. 32), s. 17 (1).*

C A company sold its undertaking to the Crown, which carried it on so that the trade was not discontinued. The company was assessed to income tax for the period terminating on the date of the sale in the sum of £850,000 in respect of balancing charges under the Income Tax Act, 1945, s. 17 (1), arising on the sale of machinery and plant included in the transaction. The liability of the company to the tax depended on whether the Crown's succession to the trade was within the words “. . . any person succeeds to any trade . . .” in r. 11 (2) of the Rules Applicable to Cases I and II of Sch. D to the Income Tax Act, 1918, as substituted by the Finance Act, 1926, s. 32 (1).

E **Held:** the Crown was a “person” within the meaning of that term in r. 11 (2) mentioned above, and, therefore, the company was liable to be assessed as if the trade had been discontinued, and the balancing charges were properly made.

F Decision of the COURT OF APPEAL sub nom. *Boarland (Inspector of Taxes) v. Madras Electric Supply Corpn., Ltd. (In Liquidation)* ([1954] 1 All E.R. 52) affirmed.

G [**Editorial Note.** Although the House of Lords reached no decision on the basis in law of the Crown's immunity from taxation under a taxing statute unless thereby bound expressly or by necessary implication, LORD MACDERMOTT and LORD REID concurred in the view that the Crown's immunity depended on the construction of the statute rather than on an immunity by royal prerogative. LORD KEITH OF AVONHOLM held that a different explanation was the true one (see p. 765, letter I, post). On the construction of Sch. D to the Income Tax Act, 1918, there was concurrence in the view that the word “person” might include the Crown in one context but not in another, and that, in particular, the Crown might not be a “person” within para. 1 of Sch. D which was a charging enactment, although the Crown was within the meaning of “person” in r. 11 (2) to Cases I and II of that schedule, which was an enactment concerned with the computation of tax.

H As to the Exemption of Crown Property from Taxation, see 7 HALSBURY'S LAWS (3rd Edn.) 465, para. 980; and as to the Crown Not Being Bound by Statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 521, para. 681, and for cases on the subject, see 42 DIGEST 689, 1036 et seq.

I For the Rules Applicable to Cases I and II of Sch. D to the Income Tax Act, 1918, r. 11 (2), as amended by the Finance Act, 1926, s. 32 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 164; and for the Income Tax Act, 1945, s. 17 (1), see *ibid.*, 629. Rule 11 (2) of the Rules Applicable to Cases I and II of Sch. D to the Income Tax Act, 1918, has been replaced by the Income Tax Act, 1952, s. 145 (2), for which, see 31 HALSBURY'S STATUTES (2nd Edn.) 143, and s. 17 (1) of the Income Tax Act, 1945, has been replaced by the Income Tax Act, 1952, s. 292 (1), for which, see *ibid.*, 283.]

Cases referred to:

- (1) *Coomber v. Berks JJ.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 28 Digest 14, 69.
- (2) *A.-G. v. Hancock*, [1940] 1 All E.R. 32; [1940] 1 K.B. 427; 109 L.J.K.B. 243; 164 L.T. 52; 2nd Digest Supp.
- (3) *Bank Voor Handel en Scheepvaart, N.V. v. Administrator of Hungarian Property*, [1954] 1 All E.R. 969; [1954] A.C. 584.
- (4) *Income Tax Comrs. v. Gibbs*, [1942] 1 All E.R. 415; [1942] A.C. 402; 111 L.J.K.B. 301; sub nom. *Inland Revenue Comrs. v. Gibbs*, 166 L.T. 345; sub nom. *R. v. Income Tax General Comrs., Ex p. Gibbs*, 24 Tax Cas. 221; 2nd Digest Supp.
- (5) *Mersey Docks v. Cameron, Jones v. Mersey Docks*, (1865), 11 H.L. Cas. 443; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 E.R. 1405; 38 Digest 466, 286.
- (6) *Gorton Local Board v. Prison Comrs. (1887)*, [1904] 2 K.B. 165, n.; 73 L.J.K.B. 114, n.; 89 L.T. 478, n.; 68 J.P. 27; 42 Digest 690, 1050.
- (7) *Bombay Province v. Bombay Municipal Corpn.*, [1947] A.C. 58; [1947] L.J.R. 380; 2nd Digest Supp.
- (8) *A.-G. v. Donaldson*, (1842), 10 M. & W. 117; 11 L.J.Ex. 338; 152 E.R. 406; 11 Digest (Repl.) 589, 266.

Appeal.

Appeal by the company from an order of the Court of Appeal, dated Dec. 9, 1953, and reported sub nom. *Boarland (Inspector of Taxes) v. Madras Electric Supply Corpn., Ltd. (In Liquidation)*, [1954] 1 All E.R. 52, affirming an order of UPJOHN, J., dated June 18, 1953, and reported [1953] 2 All E.R. 467, allowing an appeal by the Crown from a decision of the Special Commissioners of Income Tax, and holding that balancing charges in the sum of £850,000 had been properly made on the company under the Income Tax Act, 1945, s. 17 (1), on the sale of its undertaking, including machinery and plant, to the Crown.

Millard Tucker, Q.C., K. Diplock, Q.C., and G. B. Graham for the appellant company.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), J. H. Stamp and Sir Reginald Hills for the Crown.

The House took time for consideration.

Mar. 11. The following opinions were read.

LORD OAKSEY: My Lords, this is an appeal from an order of the Court of Appeal (SINGLETON, BIRKETT and HODSON, L.JJ.), dated Dec. 9, 1953, dismissing an appeal by the appellant company from an order of the High Court (UPJOHN, J.), dated June 18, 1953, whereby an appeal by the Crown from a determination of the Commissioners for the Special Purposes of the Income Tax Acts on a Case Stated by those commissioners was allowed, and the decision of the commissioners was reversed.

The matter arises on an assessment to income tax for the year of assessment 1947-48 for balancing charges made in the estimated sum of £850,000 on the appellant company under s. 17 of the Income Tax Act, 1945, in respect of the sale by the company of its undertaking and the machinery and plant belonging to it to the government of Madras on Aug. 29, 1947. The undertaking was sold as a going concern and was taken over and carried on as previously by the purchaser, and it is agreed that the purchaser succeeded to the trade of the appellant company on Aug. 29, 1947. It is agreed that, in these circumstances, the appellant company was liable to balancing charges in respect of the sale of its plant and machinery and, further, that such balancing charges were correctly assessed for the year of assessment 1947-48, if the purchaser of the company's undertaking was a "person" within the meaning of r. 11 (2) of the Rules Applicable to Cases I and II of Sch. D to the Income Tax Act, 1918. If, however,

- A the purchaser was not a "person" within the rules, such balancing charges could not be assessed for 1947-48 as, unless r. 11 (2) applied, the basis of assessment for that year would be the profits of the previous year which would not include the said balancing charges. The point in issue in the appeal is, therefore, whether the purchaser, the government of Madras, being for this purpose (as is admitted by the Crown) a branch of the Crown, was a "person" within the meaning of r. 11 (2), the contention for the appellant company being that neither the Crown nor any person exercising the functions of the Crown is a "person" within the meaning of the rule, so that no "person" succeeded to the undertaking of the company.

- There is no dispute as to the construction and effect of the provisions of the Income Tax Act, 1945, which impose balancing charges. The balancing charge is to be made for the year of assessment in the "basis period" for which the disposal of the machinery or plant takes place, and the "basis period" for the year of assessment 1947-48 in the present case is the period on the profits of which income tax for that year falls to be computed under the directions contained in the Rules Applicable to Cases I and II of Sch. D to the Income Tax Act, 1918, and in subsequent amending enactments. These directions (so far as they affect the question in dispute) are as follows: (a) Section 31 (1) (a) of the Finance Act, 1926, provides that, where in any year of assessment a trade is permanently discontinued, the profits of the trade for the period from the beginning of the year (Apr. 6) to the date of discontinuance shall be the profits to be charged to income tax under the Rules Applicable to Cases I and II of Sch. D for that year. (b) By s. 32 of the Finance Act, 1926, the present r. 11 was introduced by amendment into the Rules Applicable to Cases I and II of Sch. D. and was substituted for the previous r. 11 contained in those rules. Paragraph (1) of the rule deals with successions to a trade as the result of the formation of a partnership or a change in a partnership in circumstances which, admittedly, do not apply to the facts of the present case.

- E Paragraph (2) of r. 11 (the meaning of the word "person" in which is the issue in this appeal) is in the following terms:

- "(2) If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued. In this paragraph references to a person include references to a partnership."

- G If the succession by the government of Madras to the trade of the appellant company was the succession of a "person" within the meaning of r. 11 (2) of the Rules Applicable to Cases I and II of Sch. D, the "basis period" for the year of assessment 1947-48 will, admittedly, be the period from Apr. 6, 1947, to Aug. 29, 1947, in which said period the sale of the machinery and plant took place, and the assessment for that year in respect of the balancing charges will admittedly be competent, the joint effect of r. 11 (2), if it applies, and s. 31 (1) (a) of the Finance Act, 1926, being that the year of assessment in which the sale takes place is its own "basis period". If, however, r. 11 (2) was not applicable to the succession by the government of Madras, the "basis period" for the year of assessment 1947-48 would, according to the rule for computing profits in the normal case when not displaced by r. 11 (2), be the preceding accounting year, viz., the year to Dec. 31, 1946. As the sale of the plant and machinery did not take place in that period, no assessment could be made for a balancing charge on account of it for the year of assessment

1947-48, and the assessment for that year which was made would not be competent. An assessment for 1948-49 would also not be competent, as in that year the appellant company was not carrying on a trade. Accordingly, if r. 11 (2) was not applicable, the balancing charges which would otherwise have been assessable for 1947-48 escape assessment. A

The Income Tax Act, 1945, enacted a revised and extended general code of capital allowances in the taxation of the profits of business undertakings, and in Part 2 thereof made special provisions as regards machinery and plant. A new feature of these allowances was the provision on the acquisition by a trader of machinery or plant of an initial allowance in respect of a percentage of its cost, as well as an annual allowance of a specified amount representing the annual depreciation in value of the machinery or plant as previously provided by r. 6 of the Rules Applicable to Cases I and II of Sch. D. Where the machinery or plant is disposed of by a trader before the initial and annual depreciation allowances in respect of it have amounted to its full cost and, on its disposal, the value received falls short of the balance of its cost, it is provided by s. 17 of the Act, that a balancing allowance shall be claimable by the trader in respect of such balance in reduction of his chargeable profits. Conversely, in the event of the value received on such disposal being in excess of the written-down value of the machinery and plant, a balancing charge may be imposed on the trader, so as, in effect, to restore to the public revenue the amount in respect of past allowances for income tax which is shown in the results to have been excessive. B C D

The appellant company was assessed to income tax for the year of assessment 1947-48 in an estimated amount of £850,000 in respect of balancing charges claimed to be due on the sale of its plant and machinery on Aug. 29, 1947, to the government of Madras. The company appealed to the Special Commissioners against the assessment. E

It was common ground between the parties at the hearing of the appeal—(i) that by reason of s. 17 (1) of the Income Tax Act, 1945, the balancing charges forming the subject of the assessment under appeal fell to be made on the company (if at all) for the year of assessment in the company's basis period for which the sale of its plant and machinery occurred; (ii) that for the purposes of the said Act such sale occurred on Aug. 29, 1947; (iii) that, applying the definition of "basis period" contained in s. 57 (2) of the same Act, the company's basis period for the year of assessment 1947-48 was the period on the profits or gains of which income tax for that year fell to be computed under Case I of Sch. D in respect of its trade. F G

The contentions on behalf of the Crown in support of the assessment before the Special Commissioners were as follows: (i) that on Aug. 29, 1947, there was a succession to the company's trade, which brought into operation the provisions of r. 11 (2) of the Rules Applicable to Cases I and II of Sch. D; (ii) that by virtue of the said r. 11 (2) the tax payable by the company for all years of assessment fell to be computed as if the trade had been discontinued on that date; (iii) that by virtue of s. 31 (1) (a) of the Finance Act, 1926 (which deals with the permanent discontinuance of a trade), the company fell to be charged to income tax for 1947-48 on the amount of the profits or gains for the period beginning Apr. 6 and ending Aug. 29, 1947, and that that period was the company's basis period for 1947-48; (iv) that the sale of the company's plant and machinery occurred in its basis period for 1947-48; (v) that, accordingly, the assessment was correctly made, subject to final adjustment of the figures. H I

The contentions on behalf of the appellant company before the Special Commissioners in opposition to the assessment were as follows: (i) that the person succeeding to the company's trade on Aug. 29, 1947, was the Crown, and that r. 11 (2) had no application to a case where the Crown succeeded

- A to a trade; (ii) alternatively, that, if the Crown did not succeed to the trade, the person so succeeding was not a person chargeable to income tax in respect thereof, and that r. 11 (2) has no application where the person succeeding to the trade in question is not so chargeable; (iii) that s. 31 of the Finance Act, 1926, did not apply to the company in relation to 1947-48 or any relevant year; (iv) that the company's basis period for 1947-48 was the preceding year, namely, the year to Dec. 31, 1946; (v) that the sale did not occur in the company's basis period for 1947-48, and that the assessment was, therefore, bad.

- The Special Commissioners accepted the company's first contention that the purchaser of the trade was not a person within the meaning of r. 11 (2), and allowed the appeal of the company against the assessment to the balancing charges. At the request of the Crown, they stated a Case for the opinion of the High Court, pursuant to s. 64 of the Income Tax Act, 1952. The Case Stated by the Special Commissioners came on for hearing in the High Court on May 12 and 13, 1953, before UPJOHN, J., who, on June 18, 1953, gave judgment allowing the appeal and reversing the determination of the Special Commissioners. The appellant company appealed to the Court of Appeal, and, on Dec. 9, 1953, the Court of Appeal gave judgment dismissing the appeal and affirming the decision of the High Court.

- In your Lordships' House, counsel for the Crown contended that, as a matter of construction, the Crown is included in the persons chargeable to tax under the Income Tax Acts, but that the Crown obtains immunity from taxation by the prerogative right to claim such immunity. In the Crown's Printed Case the argument is expressed as follows:

- E " (7) Because the Crown is upon accepted principles of English law a person and comes within the ordinary meaning of that word in an Act of Parliament. (8) Because the immunity of the Crown from taxation is based upon the prerogative right to claim such immunity and not upon the construction of the word ' person ' in a taxing Act as excluding the Crown."

- F My Lords, I agree with my noble and learned friend, LORD TUCKER, that it is unnecessary in this case to decide whether the Crown's admitted immunity from taxation depends on the construction of the statute or arises from the prerogative in some other way. In the present case, the only question is whether r. 11 (2) applies to the case of a succession by the Crown to a trade previously carried on by a person taxable under the Income Tax Acts. I have come to the conclusion, though not without some doubt, that, whatever the construction of the word " person " in the charging provisions of Sch. D may be, it must necessarily be implied that the person succeeded is not deprived of his right to balancing allowances, and remains liable to balancing charges when the Crown succeeds to his trade. It cannot, I think, have been intended that, in cases where the Crown succeeds to a trade, the taxpayer whose trade is taken over should be affected in the matter of income tax. Either that must be the necessary implication of the statute or the Crown would be entitled by asserting the prerogative to claim to make the balancing charges but not bound to allow the balancing allowances. The words

- H " the tax payable for all years of assessment by the person succeeding " must, I think, be construed to mean the tax, if any, and not to deprive the taxpayer of balancing allowances to which he would have been entitled because his successor is not taxable.

- I For these reasons, I would dismiss the appeal.

LORD MACDERMOTT: My Lords, this appeal challenges the validity of an assessment under Sch. D to the Income Tax Act, 1918, made on the appellant company for the tax year 1947-48 in respect of balancing charges under s. 17 of the Income Tax Act, 1945, which were alleged to arise on a sale of the appellant company's plant and machinery. The dispute now lies within

a narrow compass, and the only question calling for determination by your Lordships is as to the true construction of r. 11 (2) of the Rules Applicable to Cases I and II of Sch. D. A

In these circumstances, the situation which makes r. 11 (2) decisive may be stated briefly and with a minimum of detail. On Aug. 29, 1947, the appellant company transferred its electric light and power undertaking in Madras to the Crown. As from that date the Crown succeeded to the appellant company's trade and the appellant company ceased trading. The transfer was by way of sale, and included the plant and machinery already mentioned. Depreciation allowances on these assets had been received in previous years by the appellant company to an extent that justified an assessment for balancing charges, provided such assessment could properly be made with reference to the period in which the sale occurred. The appellant company's normal basis period for assessment was its own accounting period immediately preceding the year of assessment, and this meant that, had the appellant company continued trading, the balancing charges in question would have been payable on the basis of an assessment for the tax year 1948-49. An assessment for that year could not, however, be made, as trading had ceased during the previous year; and an assessment for the tax year 1947-48, based on the appellant company's previous accounting period, would have been ineffective to impose liability for these balancing charges as the sale which evoked them took place subsequent to that period. These difficulties do not, however, confront the present assessment for 1947-48, the last year of trading, if r. 11 (2) applies, for in that event s. 31 (1) of the Finance Act, 1926, would operate to make the relevant basis period that which began on Apr. 6, 1947, and ended when the appellant company's machinery and plant had been sold. B C D E

Rule 11 (2), therefore, becomes the crux of this litigation. Omitting what is not material it reads as follows:

"(2) If at any time after the said Apr. 5 any person succeeds to any trade . . . which until that time was carried on by another person . . . the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade . . . at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade . . . shall be computed as if it had then been discontinued . . ."

The applicability of this rule, accordingly, depends on whether the transfer to the Crown of the appellant company's undertaking comes within the words G

"If at any time . . . any person succeeds to any trade . . . which until that time was carried on by another person . . ."

And this, in turn, depends on whether the word "person", as first used in this context, includes the Crown. That is the governing issue. If the Crown is included, the assessment is competent and the appeal fails. If the Crown is not included, r. 11 (2) does not apply, the assessment is bad and the appeal succeeds. H

For the appellant company it was contended that, in the charging provisions of para. 1 (a) (i), (ii) of Sch. D in respect of the annual profits or gains arising or accruing "to any person residing in the United Kingdom", the word "person" did not, on its true construction, include the Crown, and that there was nothing in the language or subject-matter of r. 11 (2) of that schedule to give the same word there a different meaning. Against this, an argument in alternative form was advanced on behalf of the Crown. First of all, it was said that "person" in the charging provisions of para. 1 of Sch. D included the Crown, and that r. 11 (2) used the word in the same sense. And, secondly, it was submitted that, even if "person" in para. 1 did not include the Crown, the language and purpose of r. 11 (2) justified a wider interpretation which would include the Crown. I

- A My Lords, the meaning of the word "person" in the charging provisions of para. 1 of Sch. D was vigorously canvassed at your Lordships' Bar, and counsel for the Crown took the first branch of their argument, logically enough, the length of saying that the Crown's undoubted immunity from tax under Sch. D flowed, not from the construction of the statute, but from the assertion, or at any rate the existence, of a prerogative right. In seeking to show that the decision of the
- B Court of Appeal was wrong, counsel for the appellant company contended that it had accepted that view, and he relied on certain passages in the judgments of SINGLETON and HODSON, L.JJ., as indicating this to be the case. When these judgments are read in their entirety, I am by no means certain that they were meant to go quite as far as this, though they do contain observations such as

- C "It is, however, recognised that the freedom of the monarch from taxation arises by virtue of the prerogative"

[(1954] 1 All E.R. at p. 56, per SINGLETON, L.J.), and

- "When the Act has been construed the Crown is entitled to set up its right against the construction if prejudiced thereby, and the construction will, when necessary, yield to the prerogative"
- D

(*ibid.*, at p. 59, per HODSON, L.J.). Some of the authorities cited in the course of the hearing also contain expressions which, when read literally, appear to relate the Crown's immunity from tax to the prerogative. But in those cases, the distinction between ascribing this immunity to the prerogative and treating it as a matter of statutory construction was not the subject of dispute, and I do not think much can be built on the use of a phraseology which was never directed to the point now under consideration, and which was sufficient for the purposes in connection with which it was used. It may, indeed, be said that, for most purposes, it matters little whether one attributes the Crown's immunity from taxation to the existence of a prerogative right or to a construction of the taxing statute that respects that right. In the present appeal, however, the choice between these ways of explaining the position of the Crown is relevant to the issue and was regarded by both parties as having an important bearing on it.

- My Lords, I consider the appellant company to be right on this particular matter. Whatever ideas may once have prevailed on the subject it is, in my opinion, today impossible to uphold the view that the Crown can find in the prerogative an immunity from tax if the statute in question, according to its true construction, includes the Crown amongst those made liable to the tax it imposes. The appropriate rule as I understand it is that, in an Act of Parliament, general words shall not bind the Crown to its prejudice unless by express provision or necessary implication. That, however, is, and has long been, regarded as a rule of construction, and, such being its nature, its application to the charging provisions of para. 1 of Sch. D seems to me to make an end of the Crown's submission on this aspect. In that paragraph, the word "person" is a general word capable of including the Crown, but there is no express provision and nothing by way of necessary implication to make it include the Crown, and so, as a matter of construction, it must be read in accordance with the rule as excluding the Crown.
- G
- H

- I The question, then, is whether the word is to receive a similar construction in r. 11 (2), or whether it is there used in a less restricted sense and so as to include the Crown. The presumption that the same word is used in the same sense throughout the same enactment acknowledges the virtues of an orderly and consistent use of language, but it must yield to the requirements of the context and it is, perhaps, at its weakest when the word in question is of the kind that readily draws its precise import, its range of meaning, from its immediate setting or the nature of the subject with regard to which it is

employed. In the present instance it seems to me that para. 1 and r. 11 (2) of Sch. D are so different in their subject-matter and purpose that the word "person" must be given a different connotation in each. Paragraph 1 is intended to impose a tax and, in conformity with the rule of construction I have mentioned, the Crown is not included in the general word "person" because, if it were, it would be bound to its prejudice. Rule 11 (2), on the other hand, is not intended to impose a tax or to do anything prejudicial to any of the persons to whom it refers. It may work now one way and now another, but its object is not to add to the liabilities of the taxpayer but to provide for terminal computations in the case of a trade changing hands. It does not purport to tax those who were not taxable before, and I am unable to see how its provisions can prejudice the Crown so as to justify its exclusion from the word "person" as used therein. Moreover, so to exclude the Crown would be to ignore and run counter to the natural meaning of r. 11 (2) and its obvious purpose. It is expressed in terms—" . . . any time . . . any person . . . any trade . . ."—which are designedly comprehensive, and it caters for a situation which is there to be met, whether or not it is the Crown that succeeds to, or is succeeded in, the trade in question.

For these reasons, I am of opinion that the assessment was competent and I would, therefore, dismiss the appeal.

LORD REID: My Lords, the appellant company have been assessed to income tax in respect of balancing charges under s. 17 of the Income Tax Act, 1945, arising from a sale of plant and machinery, which was in use by them in their electricity undertaking in Madras until the government of Madras, who are admitted to have been the Crown, in 1917 exercised an option to purchase the undertaking. It is admitted that the Crown succeeded to the appellant company's trade within the meaning of the Income Tax Acts, and it is further admitted that, if the appellant company's successor in their trade had been anyone else but the Crown, there would be no ground for the present appeal.

The sole point at issue in this case is the meaning of the word "person" in r. 11 (2) of the Rules Applicable to Cases I and II of Sch. D. That rule provides:

"(2) If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued. In this paragraph references to a person include references to a partnership."

It is common ground that, if the word "person", where it first occurs in that rule, includes the Crown, the appeal fails, but if it does not, then the appeal succeeds.

It is not disputed that the Crown is, in law, a person, and the Crown's first argument is that the word "person", wherever it appears in the Income Tax Acts, includes the Crown. The appellant company, on the other hand, argued that the word "person" in the Income Tax Acts never includes the Crown. In my opinion, both these arguments are unsound. It is common ground that the Crown does not have to pay income tax, but the reason for that is in dispute. The rule is often stated in the form that an Act does not bind the Crown unless the Crown is bound expressly or by necessary implication. But neither party accepts that as an accurate or sufficient statement of the rule. It is said for the Crown that, as a matter of construction, the Crown is within

- A the scope of the words of all the charging provisions of the Act; it is a person and could be assessed for tax, but if it were, it could plead the royal prerogative and decline to pay. When it is said that the Crown is not bound, what is meant is that, although the terms of an Act apply to the Crown, the Crown can, by the exercise of the prerogative, prevent the Act from being applied so as to prejudice its interests. The appellant company, on the other hand, says that
- B the prerogative operates at an earlier stage, and that, unless an Act binds the Crown expressly or by necessary implication, the Crown is never brought within the scope of any of its provisions which might operate to prejudice Crown interests if they applied to it; so, as a matter of construction, the word "person" in the Income Tax Acts must be held to mean "person other than the Crown."
- C My Lords, this argument for the Crown is novel. I do not think that it has ever even been suggested, at least since 1688, that if an Act in its terms and on its true construction applies to the Crown, its operation can be prevented by the royal prerogative. It is true that there does not appear to be in the authorities any statement which precisely negatives this argument, but that is not surprising. As the point has never been raised, it has not been necessary
- D to formulate the answer to it. CHITTY'S PREROGATIVES OF THE CROWN, p. 383, states the rule as follows:

"But Acts of Parliament which would divest or abridge the king of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to, or bind the king, unless there be express words to that effect."

- E I draw attention to the words "extend to, or bind the king". It is not a matter of the king preventing the operation of an Act which extends to the Crown, but of the scope of provisions which prejudice the Crown being so limited that they never extend to the Crown.
- F The Crown relied on *Coomber v. Berks JJ.* (1). In that case, it was held that the justices were entitled to plead, against the Crown, immunity from taxation in respect of certain buildings used for what were held to be Crown purposes. LORD BLACKBURN there speaks of (9 App. Cas. at p. 66) "the exemption, by virtue of the prerogative" of Crown property and of (*ibid.*, at p. 71) "an implied exemption on the ground of prerogative," and LORD
- G WATSON speaks of the privilege of the Crown. But I do not find in any of the speeches anything to suggest that this exemption or privilege only comes in after the Act has been passed to limit the operation of provisions which, until so limited, apply to Crown property, or that it does not limit the scope of the Act by preventing it from ever applying to such property. The case is notable in that the justices successfully invoked the prerogative against the Crown. This is intelligible if the operation of the prerogative was to exclude entirely
- H from the scope of the Act property used for certain "Crown" purposes, whoever it might belong to. The justices could then say that on a true construction of the Act it did not apply to, or make them liable in respect of, this property, and that the Crown, by making a demand for tax, could not alter the true construction of the Act. But, if the true view were that the Act did apply in the first instance and the prerogative had then to be invoked to prevent
- I its operation, I find it difficult to see what right the justices could have themselves to invoke the prerogative against the will of the Crown.

I shall not multiply references because, the present question not being in issue, the language used was not directed to it and is generally capable of more than one interpretation. But I might add a passage from the judgment of WROTTESELEY, J., in a recent case, *A.-G. v. Hancock* (2) ([1940] 1 All E.R. at p. 40):

"the rule is now . . . well-laid down and clear, the rule being that, if an

Act of Parliament would otherwise divest the Crown of its property, its rights, its interests or its prerogative, then it is not to be construed as applying to the Crown unless the Crown is specifically mentioned."

I must, however, deal with *Bank Voor Handel en Scheepvaart, N.V. v. Administrator of Hungarian Property* (3), because a passage in my speech is said to assist the Crown on this question. The Custodian of Enemy Property had paid income tax on a sum which came into his hands, and the sole question was whether, when he paid the sum assessed on him, he was liable to do so. I agreed with the majority that he was not. I said at one point that ([1954] 1 All E.R. at p. 987):

"Undoubtedly, he would have had to pay if the Crown had waived its immunity and if he had been directed to pay by the Board of Trade . . ."

It was argued that one cannot waive an immunity unless one is first liable, and that this statement of mine is inconsistent with the view that the charging provisions of the Income Tax Acts do not apply at all to Crown income. I must confess that I had thought that if an Act of Parliament imposes a general charge but contains an exception that A.B. shall not be liable to pay that charge, and if A.B. is then asked to pay and, notwithstanding his immunity, agrees to pay the charge, that could properly be described as waiving his immunity. But I am not the best interpreter of what I said. It must stand. I can only say that I do not read anything in that case as supporting the Crown's present argument (which was not submitted in that case). Indeed, I rather think that, if it had been submitted and were right, I should have been able to decide the case the other way. The question was whether the custodian was liable to pay when he paid the tax. If the true view were that the Acts apply to Crown income unless and until the prerogative is invoked, then it would seem to me that the Crown or its servants must be liable under the Acts unless and until the prerogative is invoked. In the *Bank* case (3) the prerogative was not invoked before payment and payment was made, in this view, under the Act. That seems to me to be very like paying what the custodian was then liable to pay.

It is true that a variation of the Crown's argument was submitted to the effect that, although an Act applies to the Crown, the prerogative comes into play automatically to prevent the Act from operating and, if the Crown wishes the Act to operate in a particular case on its property, it must for that case waive its privilege. At least, that appeared to be the argument, but I found it too subtle to grasp easily. It seems to me to be indistinguishable from saying that the Act does not apply to the Crown but that, in a particular case, the Crown may waive its immunity in the sense of agreeing in that case to pay as if the Act did apply to it.

In my opinion the real question is, what is the proper construction of the statutory provision taking into account the royal prerogative? I now turn to the appellant company's argument. They say that, inherently, the Crown is not a taxable person and, therefore, in a taxing Act, "person" must, as a matter of construction, always mean a person other than the Crown. I think that that is much too widely stated. I agree that the question is one of construction, but the Act may state expressly that some one of its provisions does bind the Crown, and then the Crown will be bound by that provision, though not by others. In the Income Tax Act, 1918, there is a provision of this kind. A tenant who pays tax under Sch. A can deduct tax from his rent when he pays it to his landlord. If his landlord is the Crown he is liable to pay tax as in other cases, but, in the absence of special provision, he could not deduct tax in paying his rent because that would be prejudicing the Crown by interpreting the provision which allows deduction as binding the Crown. But No. VIII, r. 1, of the Rules Applicable to Sch. A, expressly provides that

" . . . any receiver on behalf of the Crown or other person receiving the rent shall . . . allow the deduction on receipt of the residue of the rent."

- A If an Act contains a general provision and an express exception, then the scope of the general provision is limited by the exception. In the same way, it appears to me that a general taxing provision must be construed in the light of what LORD BLACKBURN (in *Coomber v. Berks JJ.* (1), 9 App. Cas. at p. 71) called the "implied exemption on the ground of prerogative". A charging provision which, on the face of it, would, or could, result in imposing a charge on the Crown, must be held inapplicable to the Crown unless the Crown is bound expressly or by necessary implication, and if the result of reading the word "person" in r. 11 (2) as including the Crown would be to make the Crown chargeable to tax, then it could not be so read.

- B But at this point I part company with the appellant company's argument. Rule 11 (2) is not a charging provision. It does not say that the person succeeding to a trade shall pay tax. For example, let me suppose that, instead of being bought by the Crown, the appellant company's undertaking had been bought by an Indian company which had no connection with this country. It is admitted, and rightly, that the company would have been a person succeeding to the trade of the appellant company within the meaning of r. 11 (2), but that company would not have been taxable under r. 11 (2), or any other provision of the Act.
- D In effect, what r. 11 (2) provides is only this: if the person succeeding to the trade is taxable in this country, his tax shall be computed in a certain way. And there is nothing to exclude the application of the rule to the seller if it so happens that the purchaser is not liable to pay tax; whether or not the purchaser is taxable, the tax payable by the person who sold the business is to be computed as if the business had been discontinued at the time of the sale.

- E The appellant company founds on a passage in the speech of LORD MACMILLAN in *Income Tax Comrs. v. Gibbs* (4) ([1942] 1 All E.R. at p. 425), where he says:

- F "The important thing to ascertain is the meaning of the word 'person' in the vocabulary of the Income Tax Acts. The word constantly occurs throughout the Acts, and I think it is most generally used to denote what may be termed an entity of assessment, i.e., the possessor or recipient of an income which the Acts require to be separately assessed for tax purposes."

- LORD MACMILLAN does not say that the word is always used in this sense, and I do not think that it is used in this sense in r. 11 (2). If an Indian company, not taxable in this country, had bought the appellant company's undertaking, it would have been a person within the meaning of this rule. But it would not have been an entity of assessment in the sense that the Acts would require its income to be assessed for tax purposes.

- G So the reason which requires the scope of charging provisions to be limited so as not to include the Crown does not apply to r. 11 (2). But the appellant company say that, even if this rule is not in itself a charging provision, it is so closely connected with the charging provisions in the Act that the word "person" must have the same meaning here as in those other provisions, where it does not include the Crown. I do not agree with that. No doubt there is a presumption that the same word preserves the same meaning in closely related sections, but there are numerous cases where that presumption has had to give way to other considerations and, in my opinion, it cannot prevail in this case. To apply it would produce an entirely unreasonable result. There is no reason why the amount of tax payable by the seller of a business should depend on the tax liability of the purchaser, and there is nothing in this rule or in any other part of the Act to indicate any intention that it should.

I am, therefore, of opinion that this appeal should be dismissed.

LORD TUCKER: My Lords, I am not persuaded that the decision of this appeal calls for an historical investigation of the true nature of the royal prerogative or its precise impact on parliamentary legislation. It is beyond dispute that the Income Tax Acts do not operate to charge the Crown with

payment of tax—in other words, the immunity derived from the prerogative has not been affected by express words or by necessary implication. This being the position, I can see no reason why the word “person” in those parts of the Acts which do not impose a charge to tax should be construed otherwise than in its ordinary and natural meaning, which clearly includes the Crown. A

Rule 11 (2) does not prescribe what persons shall be chargeable to tax. It deals with the computation of tax payable by taxable persons in a certain event, viz., when a succession to a trade takes place. It is quite immaterial to the computation of the tax payable by the person who previously carried on the trade whether the successor is, or is not, a taxable person. Similarly, it is immaterial to the computation of tax payable by the successor whether the previous trader was taxable. It is in this context that the words “if any person succeeds to any trade” occur. This is the natural way to describe a trade succession—an event on the happening of which a computation of the tax payable by taxable persons is to be made. B C

My Lords, this appears to me to be the natural and reasonable construction of r. 11 (2), whatever may be the correct approach to the construction of the word “person” in para. 1 of Sch. D, which is the charging provision. I would, accordingly, dismiss the appeal. D

LORD KEITH OF AVONHOLM: My Lords, it is not in dispute that the appellants’ undertaking was sold to the Crown on Aug. 29, 1947. It is also not in dispute that the validity of the assessment made on the appellants (whom I shall call “the company”) for 1947-48, being the company’s last year of trading, depends on what is the “basis period” for that year of assessment as defined by s. 57 of the Income Tax Act, 1945. The company says it is its trading year 1946, for which its accounts were made up. The Crown say it is the year of assessment, viz., 1947-48. The importance of the question lies in the fact that the balancing charge which falls to be made on the company under s. 17 of the Income Tax Act, 1945, in respect of the sale of its machinery and plant, arises in the year 1947-48 and, unless that year is its “basis period” for the purpose of the assessment, the balancing charge cannot be brought into computation for the purpose of estimating the profits of the company liable to tax. E F

The determination of this question depends on whether r. 11 (2) of the Rules Applicable to Cases I and II of Sch. D to the Income Tax Act, 1918, introduced by s. 32 of the Finance Act, 1926, applies to the company or not. Again, it is agreed that if r. 11 (2) applies to the company the present appeal fails; if it does not apply the appeal succeeds. For convenience, I quote the rule in question: G

“11 (2) If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued. In this paragraph references to a person include references to a partnership.” H

In seeking to exclude the application of this rule, counsel for the company relied on two submissions: first, that “person” in r. 11 (2), has the same meaning as under the charging provision of Sch. D, which taxes the annual profits or gains arising or accruing to any person, etc.; and, secondly, that, under the charging provision, “any person” means any person other than the Crown. I

For the second of these submissions, reliance was placed on the royal prerogative as introducing a principle of construction into legislation which limited the meaning of words so as not to affect the Crown. For the Crown, on the other hand, it was contended that the prerogative operated to give an exemption,

A or privilege, to the Crown to say that, though general words in a statute were capable of including the Crown, the Crown had the prerogative to claim exemption or to say that it was not bound by the Act. Thus, while it was common ground that the prerogative operated to prevent the Crown being taxed under the statute, the dispute was as to how it did it. Much authority was cited on this matter. But as, in my opinion, none of the cases was directed to the aspect

B of the matter raised by this appeal, I do not find them very helpful. In *Mersey Docks v. Cameron, Jones v. Mersey Docks* (5), references are made by the consulted judges and by their Lordships of this House, in almost identical terms, to the rule that the Crown not being named in a statute is not bound by it. But, in *Coomber v. Berks JJ.* (1), the emphasis is laid on the exemption by virtue of the prerogative. LORD WATSON states the matter thus (9 App. Cas. at p. 76):

C “The exemption of the Crown from the incidence of rating statutes is a general privilege, and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases when the Crown is not named in the statute, or, I should prefer to say, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication.”

D The matter will be found similarly expressed by DAY, J., and WILLS, J., in *Gorton Local Board v. Prison Comrs.* (1887) (6), and LORD DU PARCQ in *Bombay Province v. Bombay Municipal Corpn.* (7). In BACON'S ABRIDGMENT (I quote from the 7th Edn., vol. 6, p. 462), it is said:

E “But where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him”;

and again, at p. 463,

F “in a variety of cases we find it determined, that general words in an Act shall not oust the king of his prerogative.”

The authority most favourable to the company's contention would seem to be the following passage from ALDERSON, B., in *A.-G. v. Donaldson* (8) (10 M. & W. at p. 123):

G “It is a well established rule, generally speaking, in the construction of Acts of Parliament, that the king is not included unless there be words to that effect; for it is inferred *prima facie* that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown.”

That passage based on PLOWDEN has not escaped criticism from more modern authority.

H The contention for the company seems indistinguishable from the proposition that it is a principle of statutory construction that words used do not include the Crown, or Crown property, unless the contrary is expressed, or clearly implied. But, if so, no question of the prerogative arises. The matter is just a rule of statutory construction that calls for no invocation of the prerogative. If so, all the previous decisions are unexplained, in their reference to, and reliance on, the prerogative. The true explanation, easily understandable on historical and legal grounds, is that words in a statute capable of applying to the Crown may be overridden by the exercise of the prerogative. That is necessarily involved in the oft repeated phrase that the king is not bound by a statute unless by express words or by clear implication. If the statute does not apply to him, there can be no question of his being bound by it. It is only because it can apply to him that appeal to the prerogative is necessary. The conception of the prerogative, in my view, is of something that stands outside the statute, on which the Crown can rely, to control the operation of the statute so far as

it prejudices the Crown. This, in my opinion, is implicit in all the decisions and works of commentators on the subject and underlies the observations of most of their Lordships in this House who delivered speeches in *Bank Voor Handel en Scheepvaart, N.V. v. Administrator of Hungarian Property* (3). If then it had been necessary, my opinion would, I think, have been adverse to the contention for the company. But I find a more limited ground of decision in the language of r. 11 (2) itself. A

Rule 11 (2) is a rule designed with other rules to set up the basis of assessment on which the taxpayer will be taxed. As, ex hypothesi, the Crown escapes taxation under the charging provision, the Crown is not affected directly by r. 11 (2). But the Crown is bound by the assessment and other provisions of the statute which fix the basis of taxation. The tax is levied for the benefit of the Crown and can only be raised by statute, and the Crown must recognise the conditions on which Parliament says it shall be levied. Whatever the word "person" means in the charging provision, it does not necessarily follow that it means the same thing in r. 11 (2). If in r. 11, "person" meant person other than the Crown, the whole basis of assessment in the case of a particular class of taxpayer, viz., purchasers from, or sellers to, the Crown, would be disrupted. A different basis of assessment would exist for persons who had bought or sold businesses according as they bought from, or sold to, the Crown, or persons other than the Crown. No reason for any such distinction was, or can be, suggested. The rule is, in my opinion, intended merely to deal with the situation that arises on a purchase or sale of a business, and to give the rule a reasonable and intelligible meaning, "person" must, if possible, be given a meaning that will include the Crown. There is nothing in the Act to exclude such a reading, and it is supported also by the definition of "person" in the Interpretation Act, 1889. I would dismiss the appeal. B C D E

Appeal dismissed.

Solicitors: *Sanderson, Lee, Morgan, Price & Co.* (for the appellant company);
Solicitor of Inland Revenue (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

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WOODS v. WISE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), December 7, 8, 9, 1954, March 2, 1955.]

Rent Restriction—Premium—Requirement of payment as condition of grant of lease—Sum paid as commuted rent—Landlord and Tenant (Rent Control)

B

Act, 1949 (12 & 13 Geo. 6 c. 40), s. 2 (1), (5), s. 18 (2).

Evidence—Extrinsic evidence of nature of transaction—Underlease—Premium—Action to recover premium—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6 c. 40), s. 2 (5).

By an underlease dated Nov. 4, 1952, the landlord let to the tenant for a term of fourteen years (determinable as therein mentioned) a flat which was a dwelling-house within the meaning of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, "in consideration of the sum of £850 paid by the tenant to the landlord . . . and of the rent and covenants hereafter reserved and contained . . .". The underlease contained a provision (cl. 2 (15)) under which, in the event of the landlord taking a surrender of the underlease, a portion of the £850 (computed at a rate of about £60 for each year surrendered) would become repayable on the basis of the sum of £850 having been a payment of commuted rent. The rent recoverable under the Rent Restrictions Acts, 1920 to 1939, exceeded, in the landlord's belief, the rent reserved by the underlease by about £73 annually. The tenant claimed under s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, the return of the sum of £850 as a premium which could not lawfully have been required by the landlord. Oral evidence was admitted to show that the £850 was regarded by the landlord and understood by the tenant to represent commuted rent, viz., a capitalisation of the excess of the permissible over the actual rent for the term of the underlease, and that the amount (£850) was arrived at after a discounting calculation and was fixed by bargaining. There was a conflict of evidence about the negotiations for the underlease, and whether the payment of the £850 was offered by the tenant or required by the landlord, and neither the evidence of the tenant nor the evidence of the landlord was wholly accepted.

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Held: extrinsic evidence was admissible to show the true nature of the transaction, as the tenant's claim was made under s. 2 of the Act of 1949, not under the underlease, and, if established, involved the consequence that the landlord had contravened the prohibition of s. 2 of the Act of 1949 which also created a criminal offence (dictum of COHEN, L.J., in *Regor Estates, Ltd. v. Wright* ([1951] 1 All E.R. at pp. 223, 224) applied); on the evidence, however, the tenant had failed to prove that the £850 was required by the landlord as a condition of the grant of the tenancy within the meaning of s. 2 (1) of the Act of 1949, and accordingly the £850, whether or not it constituted a premium within that Act, was not recoverable by the tenant under s. 2 (5) of that Act.

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Per SIR RAYMOND EVERSHED, M.R.: the conception of requiring some money payment as a "condition" of the grant of a tenancy is well understood. To my mind, there is a real distinction between such a requirement as a condition precedent to the grant of a tenancy (on any terms) on the one hand, and, on the other hand, the provision in the lease or contract of tenancy for payment of some lump sum by way (as in the present case) of compounding of rent and in addition to the periodic rent. It is the former, and the former only, which is prohibited, and made the subject of criminal proceedings. The latter, if not in truth a disguised premium required as a condition of the grant, might, at least, be properly regarded as a disguised part of the rent (see p. 778, letter E, post).

Per ROMER, L.J.: it seems to me that although the primary object of s. 2 (1) of the Act of 1949 was to prevent landlords from circumventing the

disadvantages of the standard rent by demanding a premium in addition to it, a subsidiary object, and one within the language of the sub-section, was to prevent the exaction of payments of a capital nature from the tenants who would in many cases be unable to raise them (see p. 783, letter B, post).

Appeal dismissed.

[**Editorial Note.** In the present case the Court of Appeal did not decide whether the £850 in fact constituted a premium within the meaning of that word as defined in the Landlord and Tenant (Rent Control) Act, 1949, s. 18 (2). The question whether and to what extent commutations of permissible rent by payment in advance at the beginning of a tenancy are outside the statutory prohibition of taking a premium is left open. ROMER, L.J., for example, said that although in certain circumstances and to a limited extent a pre-payment of rent might lawfully be demanded, yet, if the landlord required payment of substantially the whole of the standard rent in advance as a condition of the granting of a lease, such a payment would be within the prohibition of s. 2 of the Act of 1949 (see p. 782, letter H, and p. 783, letter A, post).

For the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), (5), s. 18 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 1097, 1110.]

Cases referred to:

- (1) *O'Connor v. Hume*, [1954] 2 All E.R. 301.
- (2) *Regor Estates, Ltd. v. Wright*, [1951] 1 All E.R. 219; [1951] 1 K.B. 689; 115 J.P. 61; 3rd Digest Supp.
- (3) *Samuel v. Salmon & Gluckstein, Ltd.*, [1945] 2 All E.R. 520; [1946] Ch. 8; 115 L.J.Ch. 103; 173 L.T. 358; 2nd Digest Supp.
- (4) *Rush v. Matthews*, [1926] 1 K.B. 492; 95 L.J.K.B. 409; 134 L.T. 571; 31 Digest (Repl.) 688, 7796.
- (5) *King v. Cadogan (Earl)*, [1915] 3 K.B. 485; 84 L.J.K.B. 2069; 113 L.T. 895.
- (6) *Property Holding Co., Ltd. v. Clark*, [1948] 1 All E.R. 165; [1948] 1 K.B. 630; [1948] L.J.R. 1066; 31 Digest (Repl.) 671, 7682.
- (7) *City Permanent Building Society v. Miller*, [1952] 2 All E.R. 621; [1952] Ch. 840; 3rd Digest Supp.

Appeal and Cross-appeal.

The tenant appealed and the landlord cross-appealed against an order of His Honour JUDGE REID, at West London County Court, dated July 29, 1954. By an underlease dated Nov. 4, 1952, the landlord demised to the tenant the premises known as Flat 4, 5 Cornwall Gardens, Kensington, for a term of fourteen years determinable at the expiration of seven years. The flat was a dwelling-house within the meaning of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. The tenant paid to the landlord a sum of £850 before the underlease was executed and later brought the proceedings in the county court to recover the £850 on the ground that it was a premium within the meaning of the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1). The landlord counterclaimed for the rectification of the underlease. As on Mar. 24, 1954, the landlord conveyed his interest in the underlease to John Thomson and Winifred Thomson, he joined the assignees as defendants to the counterclaim. The county court judge dismissed the claim and the counterclaim and both parties appealed.

W. A. Fearnley-Whittingstall, Q.C., and *S. N. Bernstein* for the tenant.

M. Ahern for the landlord.

D. H. Wild for the defendants to the counterclaim.

Cur. adv. vult.

Mar. 2. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: The tenant's claim to recover £850 (which was expressed, as will hereafter appear, as part of the consideration for

A the demise) is based on an allegation of its being a "premium" within the meaning of the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), and the definition section, s. 18 (2) of the same Act. If the £850 was in truth such a premium, then it is recoverable by virtue of s. 2 (5) of the same Act.

To dispose first of one point, the learned judge said that if he had decided for the tenant he would have given judgment for half the sum claimed, namely, B £425, on the ground that she herself had, in fact, provided only half. The relevant facts are that one Boggis, who was a friend of the tenant, gave or advanced to her £425 towards payment of the £850; but the whole £850 received by the landlord from the tenant was paid, in fact, by a cheque drawn by the tenant after certain deductions in respect of matters of account between them. So far as Mr. Boggis came at any stage into contact with the landlord, he was acting C as the tenant's agent in any event, and, as I have already stated, the whole sum of £850 in suit was paid by the tenant to the landlord, who gave her a receipt therefor. The deed itself, further, so records, and the landlord would appear to be bound by the deed. I, therefore, differ on this point from the judge. If the tenant succeeds in the action she can, in my judgment, succeed for the whole sum of £850.

D The underlease, dated Nov. 4, 1952, is expressed to be made between the landlord, "which expression shall where the context so admits include the person for the time being entitled to the reversion immediately expectant on the determination of the term of the one part", and the tenant, of which term there is a corresponding definition. The first clause was as follows so far as material:

E "In consideration of the sum of £850 paid by the tenant to the landlord on or before the execution hereof (the receipt of which said sum the landlord hereby acknowledges) and of the rent and covenants by the tenant hereafter reserved and contained the landlord hereby demises to the tenant . . . To hold the demised premises unto the tenant for the term of fourteen years from Nov. 1, 1952 (determinable nevertheless as hereinafter mentioned) F paying therefor yearly during the said term the rent of £190 by equal quarterly payments."

Clause 2 contains the following tenant's covenants:

"(1) To pay the rents on the days and in the manner aforesaid."

It will be noted that the word is "rents" in the plural.

G "(15) Not to assign underlet or part with the possession of the said premises or any part thereof for all or any part of the said term without first giving one month's previous notice in writing to the landlord and offering to surrender to the landlord the said premises and in the event of the landlord giving notice in writing to the tenant within four weeks of the service of any such notice by the tenant of his desire to take a surrender of the said premises H the tenant will forthwith surrender the said premises to the landlord or as he may direct. In the event of the landlord taking a surrender of the said lease at any time he shall upon completion of such surrender repay to the tenant such portion of the said £850 paid hereunder by the tenant calculated on the basis that the said £850 so paid as aforesaid was commuted rent I covering a period of fourteen years so that for each year of the term re-assigned to the landlord shall render the landlord liable to repay to the tenant the sum of £60 14s. 3d."

and there was then a proviso to take effect in the event of the landlord not choosing to accept a surrender, which I can pass over. Clause 3 contains the landlord's covenants, and para. (2) provides that the tenant

"paying the rents hereby reserved and performing and observing the several covenants",

shall peaceably enjoy the premises (rents again plural). Clause 4 (3) contains the following not unimportant provision: A

"If either party shall desire to determine the term hereby created at the expiration of the seventh year and shall give to the other party six months previous notice in writing of such his desire then immediately on the expiration of such seventh year the present demise and everything herein contained shall cease and be void but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant." B

I will now turn to the relevant terms of the Landlord and Tenant (Rent Control) Act, 1949. Section 2 is in these terms:

"(1) A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent. (2) Subject to the provisions of Part 2 of Sch. 1 to this Act, a person shall not as a condition of the assignment of a tenancy to which this section applies, require the payment of any premium." C

Part 2 of Sch. 1 is entitled, and the title is sufficient reference to it:

"Premiums allowed on assignment where before commencement of Act premium paid on grant of tenancy." D

Section 2 (3) provides:

"This section applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts* apply, such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply." E

I have already said that there is no question as to the application of that sub-section. Section 2 (5) is as follows:

"Where, under an agreement made after Mar. 25, 1949, any premium has been paid which, or the whole of which, could not lawfully be required under the foregoing provisions of this section . . . the amount of the premium . . . shall be recoverable by the person by whom it was paid." F

It is under that sub-section that the tenant claims in the present action. Section 2 (6) imposes criminal liability:

"A person requiring any premium in contravention of this section shall be liable on summary conviction to a fine not exceeding £100, and the court by which he is convicted may order the amount of the premium, or so much thereof as cannot lawfully be required under this section, to be repaid to the person by whom it was paid." G

Then sub-s. (7) provides:

"Section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is hereby repealed." H

Section 18 (2) contains, as I have indicated, definitions, of which the material definition is:

"the expression 'premium' includes any fine or other like sum and any other pecuniary consideration in addition to rent." I

It will be noted that the vital sub-section, s. 2 (1), speaks of a premium being "required" by a person "as a condition" of the grant of a tenancy. In that respect the Act of 1949 follows s. 8 (1) of the Act of 1920, which, as I have just indicated, was by the Act of 1949 repealed. That sub-section combined, in

* I.e., the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, see s. 18 (3) of the Landlord and Tenant (Rent Control) Act, 1949.

A effect, the terms of s. 2 (1) of the present Act and the definition in s. 18 (2) and was in the following terms:

“A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent, and, where any such payment or consideration has been made or given in respect of any such dwelling-house under an agreement made after Mar. 25, 1920, the amount or value thereof shall be recoverable . . .”

B Section 8 (2) imposed the criminal liability now to be found in s. 2 (6) of the present Act. The Act of 1920 substantially changed the form of the language which had previously been used in dealing with this problem. I turn to the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 1 (2) which read:

“A person shall not in consideration of the grant, renewal, or continuance of a tenancy . . . require the payment of any fine, premium, or other like sum”,

D and went on to provide that such a sum should be recoverable. It will be observed that in the Act of 1920 there was a change from “consideration” to “condition” and the imposition of criminal liability for infringement of the prohibition. To that point I must refer hereafter.

E I now turn to the conclusion of the learned judge in the present case, which was that the sum of £850 paid as recorded in the underlease was outside the scope of the Act because the £850 was in truth not a premium but part of the rent expressed and recovered, as the judge observed “in rather abnormal form.” The learned judge said:

“In the result I conclude that the landlord thought throughout, rightly or wrongly, that the standard rent of the flat was £263 10s. He thought, therefore, that if he let for fourteen years he would be entitled to collect in all fourteen times that amount, and further that he could take some of that rent in advance so that if he let at a yearly rent of £190 he could take by way of rent in advance fourteen times £73 10s. That amounts to £1,029, so that if he let for £190 a year he had something over £1,000, so to speak, to turn round on.”

G After referring to the fact that he was sure the landlord was alive to the advantage of collecting some rent in advance, the learned judge went on to say:

“I think that he had no intention of getting more from the flat than the Rent Acts allowed him to take but that he thought that by approaching the matter in the way I have described he was keeping on the right side of the law.”

H Later the judge said:

“I think that I must endeavour to determine without any assistance from the meaning of the term ‘rent’ whether the £850 here falls within the mischief of the Act as a premium. So far as the general policy of the Acts is concerned the material sections replace and extend corresponding provisions of the Act of 1915, s. 1 (2), and the Act of 1920, s. 8 (1), and I think it plain that Parliament has been trying to protect tenants under conditions of housing shortage against the rapacity of landlords. I do not think Parliament intended to expose landlords to the rapacity of tenants, and the real crux seems to me to be whether in any given case of doubt the landlord is seeking to make out of the tenant more than the Rent Acts allow him to take. I am fortified in this view by observing that a landlord who requires a premium exposes himself to criminal proceedings. This is rather a borderline case. I am satisfied that the landlord in the present case was not

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endeavouring to obtain from the tenant more than the Acts allowed, but that he was trying to obtain that amount in a rather abnormal form. Of course if he had been so ill advised as to describe the £850 as a premium, or as a fine or as other pecuniary consideration in addition to rent, he would have brought himself within the mischief of the Act of 1949, s. 2 (1). But he did not do that. The £850 is simply described as a sum and in cl. 2 (15) of the underlease part of the sum is made in certain circumstances repayable on the basis that it is commuted rent. In my judgment it escapes (but only just) from the sub-section . . . I think that commuted rent, which is what the payment here was, remains a payment in the nature of rent though it is, so to say, capitalised, and since it remains in the nature of rent, it is rent and not a premium which is demanded."

It appears reasonably clear (apart, at any rate, from the effect of cl. 4 (3) of the underlease which I have read) that on the judge's findings the transaction was not the sort of thing at which the legislation really aimed, that is, the getting of some further consideration for the demise over and above the permitted rent. Nevertheless, the question is one of the meaning of the Act. Was this sum a premium of the character made recoverable by the Act?

The point as stated is really a short one, though I have found it difficult, and it has led to no little argument. The tenant says: "Whatever was in the landlord's mind, and however the sum was arrived at, according to the ordinary sense of the bargain as expressed in the underlease, and also according to the evidence and the judge's findings, the £850 was a 'premium', and a premium which the landlord required as a condition of the demise. It was something different and distinct from that which was agreed as 'rent'. In the terms of the deed it was 'commuted rent'; that is, something pro tanto substituted for rent." The landlord, on the other hand says: "No; the terms of the deed and the evidence—particularly the contemporary correspondence—and the findings show that the £850 was not a premium or fine or some consideration over and above rent, but was essentially part of the rent quantified as such and satisfied in a particular way. Accordingly, if it still retained the essential attributes of rent, it would not be a premium. In any case it was not required by me as a condition of the grant." There was a good deal of discussion of the question whether it was permissible for the court to hear extrinsic evidence of the bargain as made, or whether the court in this matter was confined to the deed.

It is convenient for me to deal first with that point, and I conclude that extrinsic evidence was clearly admissible, though, as will later appear, the result of so concluding is far from decisive of the case. I note that the present is not an action on the deed; the question here is whether the tenant has a statutory right of action under s. 2 (5) of the Act of 1949. Moreover, if she has, then *prima facie* the landlord has done that which was illegal, and for which he is liable to criminal proceedings. As a matter of principle, therefore, evidence must be admissible to prove the true nature of the transaction. But, further, the evidence is required not to vary the deed, but with a view to explaining and proving what was in truth the consideration. For this purpose extrinsic evidence has always been admissible.

In *NORTON ON DEEDS* (2nd Edn.) 219, the principle is thus stated:

"If the consideration is stated inaccurately, or is not stated at all, or if part only of the consideration is stated, evidence is admissible to prove the true consideration, so as it be not inconsistent with the consideration stated in the deed."

That matter was also dealt with by *ROMER, L.J.*, in *O'Connor v. Hume* (1), in a passage ([1954] 2 All E.R. at p. 306) which was cited to us in argument and is as follows:

"I am satisfied that the court has no right to resort to correspondence

A and oral evidence for the purpose of striking out, for that is what it comes to, an important provision which the parties agreed on and expressed in the agreement. The general rule with regard to extrinsic evidence is that such evidence is not admissible to add to, vary, modify, or contradict a written instrument."

B I refer also to *Regor Estates, Ltd. v. Wright* (2), and since that case also has some bearing on a later part of my judgment, I will read two passages from the leading judgment of COHEN, L.J. That was a case in which a premium had been charged on the grant of a tenancy at a time when, in the circumstances of the case, the lease being for a term of years, the requirement of a premium was not unlawful. The question in that case was whether, in the events which had later happened, the action by the landlord for payment of one of the instalments of the premium was an unlawful demanding or requirement of a premium for the continuance of the tenancy, and the court, among other things, considered the argument put forward by the tenant that although the sum in question had been expressed as a premium, it was in truth a disguised part of the rent and as such in excess of the recoverable standard rent. The relevance for present purposes of that argument is obvious. The learned lord justice said ([1951] 1 All E.R. at pp. 223, 224):

E "Looking at the lease in the present case purely by itself, for the reasons I have given, I should come to the conclusion that it was an agreement for the payment of a premium so far as the £360 was concerned and not an agreement for the payment of additional rent. In dealing, however, with a matter of this class and the effect of a document relating to the Rent Restrictions Acts, we are not confined to the terms of the document, and we are bound to look at the transaction as a whole and consider whether it is within the prohibition of the Acts. In a different connection UTHWATT, J., made some observations in *Samuel v. Salmon & Gluckstein, Ltd.* (3), in which he makes it clear that we are not bound by the vocabulary the parties have chosen to use. In that case he held that the premium was rent."

F The learned lord justice then cited a passage from UTHWATT, J.'s judgment, and went on (*ibid.*, at p. 224):

G "Counsel for the tenant referred us to the decision in *Rush v. Matthews* (4), where the parties had plainly attempted to evade the Rent Restrictions Acts by providing for weekly payments and calling them premiums in a separate document. On the facts of that case the court had no hesitation in coming to the conclusion that there was a pure evasion of the Acts, within the mischief of the Acts, and, therefore, the premium could not be enforced."

I conclude, therefore, that the learned judge was right to admit evidence in the present case, but, as I have indicated, the difficulties of it are by no means at an end.

H I must now refer back to the judge's summary of the evidence. For the sake of brevity I will take a limited number of extracts:

I "The landlord said he told the tenant that the rent was £263 10s. a year for a fourteen year lease. She said she would like a flat at a lower rent as she did not want so large a yearly commitment. She asked if she took a lease for fourteen years whether she could pay a sum of commuted rent so that her annual rent would be about £200. The landlord said he would think it over. He did, and then rang her up and said that if she was taking a lease for fourteen years and wanted to pay a rent of about £200, the balance would come to £1,000 over £190 a year . . . The tenant said that the landlord started negotiations by telling her that the rent was £150 and £50 rates and that she must pay £1,000 key money. She said she hadn't got £1,000 but would go and see the flat. This she did and said that she liked it and would make an offer. Next she and Mr. Boggis saw the landlord at the flat. They

offered him £250 each and after some hard bargaining settled at £850. Later the tenant and Mr. Boggis went to the landlord's flat when the tenant tried to get the landlord to take off the £850 an amount of £148 which the landlord's wife owed the tenant and succeeded to the extent of £100. That was the tenant's account of the matter."

It is clear from what I have said that there was an acute conflict, and, further, the judge placed no particular reliance on either the tenant or the landlord as witnesses of truth. The judge said:

"The landlord called his wife as a witness to support him and the tenant called Mr. Boggis. Of the four I consider Mr. Boggis the only reliable witness."

The pity was that Mr. Boggis could only give evidence covering so little of the material ground. Of Mr. Boggis the judge said:

"He knew nothing of premiums or their illegality but was aware that the landlord was asking £190 a year and £1,000 down. Having seen the flat he said to the landlord 'Too much money'. The landlord showed them out. On the doorstep Mr. Boggis said 'I'll give you £500.' The landlord said 'No', but the ice was broken and in a few minutes the figure of £850 was agreed."

Finally, there is a point on which the judge naturally relied:

"She (the tenant) had got in touch with her solicitors and Mr. Hulkes, an experienced managing clerk, was there to represent them. Neither the landlord's wife nor Mr. Boggis was there, but the tenant was supported by Mrs. Poole her secretary . . ."

After referring to a letter to which I shall also have to allude, the judge said:

"I attach a good deal of importance to that letter. In the first place it emanates from the tenant's side; in the second place it must have been the result of the instructions received by Mr. Hulkes at the meeting at the shop, and so shows quite plainly that the idea of commuted rent is no afterthought conceived only when the trouble had arisen but was already in contemplation before the deposit was paid."

The effect, as I have already indicated, of the acceptance of Mr. Boggis' evidence was limited as his participation in the transaction was limited. But that does not involve the rejection of all the landlord's evidence, for otherwise the learned judge must have held that the sum was a premium. For such would inevitably have been the result if he accepted the tenant's story that the sum was demanded as key money.

Therefore, as I construe the learned judge's findings, he held: (i) that the landlord regarded the £850 as a capitalised amount of part of the rent which he could lawfully demand; (ii) that the actual figure of £850 represented a discounted calculation, reached by bargaining, of the full amount which the landlord regarded himself as entitled to claim on account of rent; and (iii) whether or not the tenant fully apprehended what the landlord said or had in mind, she at least understood that the £850 was "commuted rent"; for as appears in the passage to which I have just referred in the evidence, Mr. Hulkes got that phrase and got that idea from her. This last-mentioned view is strongly borne out by the correspondence on which, as I have said, the judge relied, and I will read three letters from it.

The first is from the tenant's then solicitors to the solicitors for the landlord:

"We have been instructed to act for [the tenant] who is proposing to rent an unfurnished flat from your client [the landlord] and we shall be glad to receive draft lease for approval at your early convenience. Our client has already paid to yours the sum of £85 being ten per cent. of a sum

- A which our client is paying to yours by way of commuted rent and it was arranged that you would let us have your client's receipt for this sum."

That was acknowledged, and the solicitors for the landlord say:

"... we note that £85 has been paid as deposit and we will obtain a receipt from our client."

- B That they did, and on Oct. 29, 1952, they wrote:

"We thank you for your letter of the 20th inst., and we now send you herewith the draft lease with a copy for your use. We also enclose our client's receipt for the sum of £85 in respect of the deposit on the payment of £850 which is to be paid at completion by way of commuted rent. The standard rent for this flat must be taken at £263 10s. which was the rent at which it was first let but you will find on your search that the maximum rent at which this flat can be let as fixed by the Kensington Borough Council is £300 per annum . . ."

- C These findings of fact by the learned judge are, of course, conclusive. It follows, in my judgment, that if it be the fact that the tenant did not fully understand the nature of the £850 and the basis on which it was calculated, that is, even if she thought she was paying key money, the consequence is still not fatal to the landlord, since a recoverable premium must be a sum in fact "required" as such by the landlord. The first question, however, is, was the £850 a "premium" at all within the Act? We were referred to *King v. Earl of Cadogan* (5), where WARRINGTON, L.J., in the course of his judgment, said ([1915] 3 K.B. at p. 492):

- E "I need not say anything about the meaning of the word rent, but 'premium', as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained."

- F In that case the question at issue related to the right of a lessee of licensed premises to recover a certain amount of licence duty that was proportionate to the increased rent or premium payable in respect of the premises being let as licensed premises. It was a case in which none of the conceptions with which we are now familiar underlying the Rent Acts had any application at all. Nevertheless, the words used by the learned lord justice are in truth very wide, and if they are applicable to the present case, they would indubitably cover the £850 with which we are concerned.

- G Counsel for the defendant conceded that if, before the Rent Acts were ever thought of, a bargain had been made between a prospective landlord and a prospective tenant substantially of the kind and in the manner alleged by the landlord in his evidence in the present case—that is, the periodic rent being reduced on terms that a lump sum were paid on or before the execution of the lease calculated so as to represent the value of the reduction in the rent originally proposed—the lump sum would naturally and properly be regarded as a "premium". But the landlord's case was that, in what may be called "Rent Act cases", the presence of special and important considerations vitally affects the matter and may produce a different result. Thus it is, in the first place, significant that Parliament has not been content to leave the word "premium" to be construed, according to its ordinary sense, as a well-known word, but has applied special words of definition:

"The expression 'premium' includes any fine or other like sum and any other pecuniary consideration in addition to rent."

(See s. 18 (2) of the Act of 1949.) According to counsel for the landlord, the effect and purpose of the definition are to distinguish a premium from anything which, properly speaking and for the purposes of the Rent Acts, is "rent", and to

confine the meaning of premium accordingly to considerations or money payments which are not, properly speaking, "rent" or part of the "rent". In cases under the ordinary law, unaffected by the Rent Acts, the question, how much rent should be payable under, and what other considerations there should be for, a demise were matters for free bargaining. A landlord might charge any sum that he could get for rent. If he preferred, he could charge a low rent and demand a "premium" or lump-sum payment. There was no purpose such as now exists in any attempt to disguise the one in the shape of the other. In these circumstances the word "rent", even though not confined to the old common law meaning of that for which distress might be levied, would naturally and ordinarily be used to signify the periodic payments under a demise in contrast to lump-sum or other kinds of consideration. The question in *King v. Earl of Cadogan* (5) was one which arose under the Finance Act, 1912, and did not (as do the Rent Acts) involve any limit on the amount of rent which might be charged; and the language of WARRINGTON, L.J., should be read against that unrestricted background.

In the case of "rent restricted dwellings", on the other hand, it is of the essence of the matter that there is a strict limit on the amount which the landlord may lawfully charge for rent; and it is a further purpose of the Rent Acts, as counsel for the landlord emphasised, to prevent landlords avoiding the statutory prohibition on excessive rents by disguising in other forms that which is, in truth and in fact, the rent (see, for example, the observations of this court in *Property Holding Co., Ltd. v. Clark* (6)). Notwithstanding these considerations, counsel for the tenant was at one time inclined to go to the length of saying that any "lump-sum" payment was a premium even though it was shown to be nothing more than a payment of rent in advance; and he referred to *City Permanent Building Society v. Miller* (7), and particularly to the judgment of HODSON, L.J., in that case. In my judgment, it is in any event unnecessary, for the purposes of the present case, to go to that length. On the other side, it was suggested by counsel for the landlord that, if the tenant were entitled to succeed in the present case, an easy way would be provided for avoiding the Rent Acts; all a landlord would have to do would be to reduce the rent to a figure below two-thirds of the rateable value of the premises and then he could charge, by way of "premium", any lump-sum figure that he liked, or could obtain, with impunity. I cannot for my part think that the arm of the law would be so short as to disable it from dealing appropriately with such a case as that last suggested, if it appeared that the so-called premium was, in truth and substance, nothing more or other than the rent quantified and provided for in "an abnormal form". In *Regor Estates, Ltd. v. Wright* (2), the tenant attempted, unsuccessfully on the facts, so to establish. But where, on the facts, such a quantification of the rent was established and found, after due apportionment, to exceed the permitted rent, it seems to me that the court would have no difficulty in providing the appropriate remedy.

It is against this background, which I have thought it right to state at some length, that counsel for the landlord says that the present case must be judged; and, so judged, he says, the £850 is properly found not to have ceased to be "rent", and, therefore, not to be a "premium" at all within the meaning of the Act of 1949. I have stated the nature of the argument, but it is, of course, necessary to have regard to the terms of the underlease itself. For I agree with counsel for the tenant that whatever may have been in the minds of the two parties in arriving at the figure of £850, the terms of the deed might convert it, inevitably, into a "premium" within s. 2 (1) of the Act. The elaborate provisions of cl. 2 (15) of the deed do, however, support, in my judgment, the view that, according to the substance of the matter (and in cases of this kind the court will always look at the substance of the matter) the sum of £850 was not intended to lose its quality and identity as a computation of, and provision for, part of

- A the permitted rent. I have already read cl. 2 (15)*, and I shall not read it again, but merely state by way of reminder that it was that clause that gave to the landlord a right in certain circumstances to require a surrender on terms that he then recouped a proportionate amount of the £850 described as "commuted rent". On the other hand, it is the fact that no corresponding provision was added to cl. 4 (3) of the deed. This gave to either party a power to determine at the end of seven years. If there had been added to this clause words corresponding to those found in cl. 2 (15) it would, as it seems to me, have been difficult for the tenant to deny that the sum of £850 had retained throughout its character of rent. As cl. 4 (3) stands, however, it may be said with great force that in some circumstances at least the £850 has lost this character of rent; and I am not satisfied that the answer given by the learned judge (namely, that in the event of termination of the lease by the landlord the tenant would have remained as a statutory tenant) suffices to meet the point. On the other hand, it is plain from the extrinsic evidence, which I have already held to be admissible, that the point having been raised on the tenant's behalf was treated as covered by the terms of cl. 2 (15).

In the inquiries before contract No. 25 was this:

- D "If the landlord is to have the right to terminate the lease at the end of seven years it is difficult to understand how he can also claim that the £850 to be paid is for commuted rent on a fourteen year term"

to which the answer was:

"Your amendment to draft lease covers this"

- E and that amendment was the insertion into what is now cl. 2 (15) of the provision for recoupment of the proportionate part of the £850 in the event of surrender. The answer given, though accepted, appears to me to have been plainly inadequate. But it does not, in my judgment, follow that if the landlord should determine the underlease in accordance with cl. 4 (3) the tenant would not in all the circumstances have a valid right to a return of an appropriate part of the £850, or, at least, would not have an answer, after becoming a statutory tenant, to any attempt to increase the periodic rent above the existing figure of £190. Counsel for the tenant also in this connection drew attention to the fact that a payment of £85 had been made by way of deposit. As to this, however, I refer to the terms of the letter written by the tenant's solicitors on Oct. 20, 1952, and to the answer of Oct. 29.

- G I have dealt at length with the point which was mainly argued before us; and on it there is, as it seems to me, great force in counsel for the tenant's contention. I do not, however, find it necessary to express a conclusion on it, for there is a further point which, in the circumstances of the case, is to my mind decisive in the landlord's favour. The language of s. 2 (1) of the Act of 1949 is:

- H "A person shall not, as a condition of the grant . . . require the payment of any premium."

As I follow s. 2 (5), the right of the tenant to recover the £850 depends on her establishing that that sum was a premium "which could not lawfully be required" under sub-s. (1); that is, that it was a premium required by the landlord as a "condition" of the grant.

- I It will be realised that in the short original Act of 1915 the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915—it was provided by s. 1 (2):

"A person shall not in *consideration* of the grant, renewal, or continuance of a tenancy of any dwelling-house to which this Act applies require the payment of any fine, premium, or other like sum in addition to the rent . . ."

The sub-section went on to provide that any such "premium" should be recoverable from the landlord. In its context in s. 1 of the Act, the provision was

* See p. 769, letter G, ante.

plainly intended, in my judgment, to prevent evasion of the prohibition of unauthorised increases of rent by means of the device of a so-called "premium". The Act of 1915 was repealed and replaced by a more elaborate Act, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in which restrictions on premiums found its place in s. 8 (1) which provided:

"A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent, and, where any such payment or consideration has been made or given in respect of any such dwelling-house under an agreement made after Mar. 25, 1920, the amount or value thereof shall be recoverable by the person by whom it was made or given . . ."

Sub-section (2) rendered a person requiring a premium in contravention of the section liable to criminal proceedings.

It will be seen, then, that the Act of 1920, s. 8, which combined, in effect, s. 2 (1) of the Act of 1949 and the definition in s. 18 (2) of that Act, (i) for the first time made the requiring of an unauthorised premium a criminal offence; but (ii) changed the original formula from "in consideration of the grant" to "as a condition of the grant". It is true that the prohibited "requiring" covers—formerly by the terms of s. 8 (1) of the Act of 1920 and now by the effect of the definition in s. 18 (2) of the Act of 1949—a pecuniary "consideration"; and see also in the case of an assignment the terms of Part 2 of Sch. 1 to the Act of 1949. Even so, however, that which is prohibited by s. 2 (1) of the Act of 1949 must be "required" as a "condition" of the grant. In my judgment, the change of language from the Act of 1915 cannot be regarded as without significance. The conception of "requiring" some money payment as a "condition" of the grant of a tenancy is well understood. To my mind, there is a real distinction between such a requirement as a condition precedent to the grant of a tenancy (on any terms) on the one hand, and, on the other hand, the provision in the lease or contract of tenancy for payment of some lump sum by way (as in the present case) of compounding of rent and in addition to the periodic rent. It is the former, and the former only, which is prohibited and made the subject of criminal proceedings. The latter, for reasons which I have already stated, if not in truth a disguised premium required as a condition of the grant, might, at least, be properly regarded as a disguised part of the rent.

Whatever the reasons for the change of language, the question in the present case is whether the tenant has proved that the payment of the £850 was "required" of her by the landlord as a "condition" of the grant of the tenancy. If the tenant's evidence had been accepted—that is, to the effect that the landlord required this or some similar sum as "key-money", as a condition precedent to the grant of any tenancy at all—then I should have thought she would beyond doubt be entitled to succeed. The same would, *prima facie*, be true if the £850 was arrived at as a lump-sum payment without reference to, and derivation from, the permitted rent; for in such case the natural inference would be that the sum had in truth been required as a condition of the grant. As I understand the findings of the judge, however, the landlord agreed to the sum of £850 being inserted as part of the consideration representing a compounding of the sum of £73 10s., part of the total rent which he, at any rate, honestly believed that he could exact, and as part of an arrangement whereby the periodic rent was reduced from £263 10s. to £190 per annum. Why the arrangement took this form it is not necessary to say. It may well have arisen from the circumstance that the tenant was fortunate enough to have a friend who was willing to provide her with a lump sum, but who might well have been unwilling to pledge himself to payment of the whole or part of a periodic rent. However that may be, and

A whatever may have been in the tenant's mind beyond the fact that to her the sum represented "commuted rent", I am unable to see that the £850 has been shown by the tenant to have been a premium required by the landlord "as a condition of the grant".

On this question, as on the question whether the sum of £850 was a "premium" at all, the terms of the underlease itself must also be considered. I do not repeat
B what I have already said as regards cl. 2 (15) and cl. 4 (3) and as regards the "deposit". In my judgment, these matters do not suffice to outweigh the other considerations to which I have referred so as to produce the result that if the £850 was a premium it was a premium required by the landlord as a condition of the grant. In all the circumstances, therefore, I have come to the conclusion, on the special facts of the present most difficult case, that the tenant failed to
C prove the facts necessary to bring her case within s. 2 (5) of the Act of 1949, and I would dismiss the appeal.

There remains the cross-appeal for rectification. According to the counterclaim, the landlord asked that the underlease should be rectified by inserting between the words "rent of" and the words "£190" in cl. 1 thereof the words

"£263 10s. per annum payable as to £73 10s. thereof by a single commuted
D payment of £850 on or before the execution hereof being the sum hereinbefore referred to and as to the remainder thereof that is to say the sum of."

In my judgment, the answer given by the learned judge to this claim is conclusive. He said:

"In my judgment the counterclaim fails. The landlord's solicitor on
E one side and Mr. Hulkes on the other, gave evidence that they were satisfied with the form of the document as executed. Neither lay client was capable of formulating the matter as it was sought to be formulated by the defence. The landlord has therefore failed to establish any common intention contrary to the terms of the underlease . . ."

It is, in my judgment, clear on the facts that the bargain made by the tenant
F and the landlord or their respective solicitors was, in this respect, accurately represented by the underlease which they signed; and that, in any event, the landlord wholly failed to prove any different bargain in the terms claimed in his counterclaim. I shall, I hope, be forgiven for dealing thus shortly with the matter. In my judgment, the counterclaim fails and must be dismissed.

BIRKETT, L.J. (read by SIR RAYMOND EVERSHED, M.R.): I agree with
G the decision that the appeal should be dismissed, and that the cross-appeal should also be dismissed. It is a decision based on the special and peculiar facts of the case, as they must be presumed to have been found by the learned county court judge. SIR RAYMOND EVERSHED, M.R., has stated the facts of the case, the contentions of counsel, the relevant statutes, and has construed
H what he regards as the findings of fact by the learned judge, so that I may add all that I desire to say in a very much shorter form.

The questions to be decided were whether the payment of £850 was a premium within the meaning of s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and s. 18 (2) of the same Act, and whether the landlord as a condition of the grant to the tenant of the underlease in question had required the
I payment of the £850.

The learned county court judge, without using precise language, seems to have decided: (i) the £850 was not a premium within the meaning of the Act, because it never lost its character as rent, and the standard rent was never exceeded; (ii) the £850 was "commuted rent" to the knowledge of the tenant, and therefore not a premium. He made no express finding whether the landlord had made the payment of the £850 a condition of the grant, or whether the landlord had required it. When the learned judge says that the £850 "escapes, but only just escapes, from the sub-section" he must mean, I think, that the

£850 had difficulty in escaping from the definition of "premium", and once he had decided that the £850 was not a premium, the tenant's case failed. I think the following three passages from the learned judge's judgment embody the substance of his decision:

"This is rather a border-line case. I am satisfied that the landlord in the present case was not endeavouring to obtain from the tenant more than the Acts allowed, but that he was trying to obtain that amount in rather an abnormal form.

"I am sure that the defendant was alive to the advantage of collecting fourteen years rent in advance . . . I think that he had no intention of getting more from the flat than the Rent Acts allowed him to take but that he thought that by approaching the matter in the way I have described he was keeping on the right side of the law.

"I think he must have said something to the tenant about a payment of rent in advance, indeed it may have been she who suggested it. I doubt, however, whether with their combined knowledge of English any elaborate discussions had taken place, but it seems to be plain that commuted rent or rent in advance must have been discussed before Mr. Hulkes [the managing clerk of the solicitors acting for the tenant] came on the scene."

The tenant was a Belgian with a limited knowledge of English, and the landlord came from Czecho-Slovakia and, apparently, spoke English fluently but imperfectly. How the phrase "commuted rent" originated in these circumstances is a little obscure, but there is no doubt it was in existence when Mr. Hulkes came on the scene; and the learned judge was naturally much impressed by this fact.

The history of the Rent Act legislation shows that one of the primary purposes was to make sure that the landlord could not wreck the whole design by obtaining in one way or another sums of money from the tenant in addition to the permitted or standard rent. The learned judge appears in the present case to have examined the wording of s. 18 (2) of the Act of 1949 and then said: "This landlord has not received any fine or other like sums or any other pecuniary consideration in addition to rent", and therefore the contention that the £850 was a premium within the definition failed. But the learned judge appears to have made another finding of fact which appears to me to make it impossible for this court to disturb his judgment, and that finding was that whether or not the landlord originated the idea of "commuted rent", she certainly agreed to the sum of £850 being made part of the consideration, that sum representing a compounding of an agreed part of the total rent which the landlord genuinely believed he was justified in taking. Some discussion took place whether or not the judge could listen to the oral evidence of the parties, but, in my opinion, he was clearly right in admitting it. He found the evidence of the tenant and the landlord to be unreliable, and the only witness on whom he could place any reliance added nothing to the solution of the real problems in the case.

What the landlord did in the present case was to calculate the standard rent of the flat, divide it into two portions of £73 10s. and £190, calculate the sum of £73 10s. paid in advance for fourteen years, allow a discount because the sum is being paid at once instead of being spread over the years, and thus arrive at the sum of £850 in respect of that portion of the rent. The remaining portion of the rent, £190, was to be paid as periodic rent in the ordinary way. The learned county court judge said this method was abnormal but quite legal, inasmuch as the landlord had never received, or attempted to receive, more than the standard rent to which he was entitled. It is not necessary for the decision of this appeal to decide whether the learned judge was right in saying that in the circumstances of the present case the £850 was not a premium within the definition section. The matter was concluded for him when he found that

A the landlord would not get more than the standard rent. He never considered whether the lump sum made up in the way I have indicated could yet be a "premium" despite the fact that the total amount to be received would not have exceeded the standard rent legally permissible.

On the facts in the present case the landlord would have received in the first year of the tenancy the sum of £263 10s., whereas in fact he received £1,040, some of which in the ordinary way would not have been payable for many years. Most important questions at once arise. Was this "commuted rent" in the circumstances of the present case still to be regarded as rent within the meaning of s. 18 (2) of the Act of 1949, or had it changed its character? Was it not to be regarded as a sum, calculated, no doubt, on what the standard rent might have been, but, nevertheless, no longer rent in the meaning given to it in the definition? If, for example, the learned judge had found that the landlord required the payment of this sum of £850, calculated in the way it was as "commuted rent", as a condition of the grant of the tenancy to the tenant, would it not be regarded as a premium within the meaning of s. 18 (2) of the Act of 1949, and recoverable under s. 2 (5)? It is not necessary for the decision in the present appeal that an answer should be made to these questions, for the second point in the appeal seems to me to be conclusive on the learned judge's finding. The prohibition laid on the landlord is that he shall not require the payment of a premium as a condition of the grant, and if he does so, the tenant under s. 2 (5) can recover any sum so paid as a premium, because it could not lawfully be required. In the three passages from the learned judge's judgment which I cited in an earlier part of this judgment it is plain that the landlord "was alive to the advantages of collecting fourteen years' rent in advance", and "must have said something to the tenant about a payment of rent in advance", yet the whole effect of the learned judge's judgment is to make it plain that in his opinion the £850 was never "required" by the landlord as a condition of the grant of the tenancy of the flat, but, on the contrary, the initiative may well have come from the tenant and the agreement was in accordance with her wishes.

The tenant's case before the learned county court judge was that the £850 was demanded by the landlord as "key money", as a condition of the grant of the tenancy, but the judge rejected this evidence entirely, and after listening to the oral evidence and considering the underlease and the correspondence, he came to the conclusion that the tenant's case failed. I would decide this appeal on the ground that it was not shown that the landlord required the payment of a premium as a condition of the grant of the tenancy of the flat. With regard to the counterclaim, I agree with what SIR RAYMOND EVERSHERD, M.R., said and have nothing to add.

ROMER, L.J.: The consideration expressed in the underlease of Nov. 4, 1952, from the landlord to the tenant was twofold and consisted first of "the sum of £850 paid by the tenant to the landlord on or before the execution" of the lease, and, secondly, "of the rent and covenants by the tenant" thereafter reserved and contained. The main issue on the appeal is whether the sum of £850 is recoverable by the tenant by virtue of s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, notwithstanding that it formed an important part of the consideration for the term of years which was granted to her, and which she is still enjoying.

As a preliminary to this question the point arises whether the tenant's claim to recover this sum as being an illegal premium falls to be determined solely according to the terms of the lease, or whether extrinsic evidence as to the intention of the parties is also admissible. The learned county court judge admitted oral and other evidence of intention, and in my opinion he was plainly right in doing so. As he pointed out, the tenant is in substance charging the landlord with committing a criminal offence, and the landlord is, in my judgment,

clearly entitled to prove that the agreement between himself and the tenant was innocent, and to show what the mutual intention of the parties really was. If this were not so a mere copying error of a clerk in a document might result in a quite unwarranted finding of criminal intent on the part of the persons who had executed it—for example, the mistaken substitution of £250 for £150 in an agreement for purchase of some article of which the maximum controlled price is the latter figure. Moreover, the extrinsic evidence is not sought to be introduced in the present case with a view to contradicting anything that is expressed in the lease, but in order to show what was the true nature of the £850, which, it is to be observed, is nowhere described in the lease as a “premium”. The evidence, accordingly, may properly be considered, but inasmuch as the judge found himself able to place but little reliance on what the tenant or the landlord or the landlord’s wife told him when they were in the witness-box, their testimony (which was the principal evidence on the main issue) does not advance the matter very far. The judge obviously rejected the tenant’s evidence that the landlord demanded “key money”, for that, if true, would have been the end of the case. But he finds, I think, that the landlord throughout thought that he was entitled to receive commuted rent, and that description of the £850 was used both by the landlord and by the tenant at the interview which Mr. Hulkes, the tenant’s legal adviser, attended on Oct. 18 or 20, 1952. Further, the £850 was also referred to as “commuted rent” in Mr. Hulkes’s letter to the landlord’s solicitors on Oct. 20, 1952, and was similarly described in their reply of Oct. 29. Mr. Boggis’ evidence, which the judge accepted, does not appear to me to be in any way conclusive as to the nature of the payment which the tenant agreed to make. It does little more than elucidate the way in which it was eventually quantified. I accordingly conclude that the sum in question was regarded by both parties to the lease as being “commuted rent” (whatever the phrase may mean), and it was, indeed, on that very basis that the calculations which were envisaged by cl. 2 (15) of the underlease were to be made in the event of the tenant surrendering the premises.

There was considerable discussion before us whether, on this basis, the £850 ought properly to be regarded as a “premium” for the purposes of s. 2 (1) of the Act of 1949. There can, I think, be little doubt but that a payment which is made on the grant of a lease and which represents a discounted payment of rent in advance would in most cases fall within the judicial explanations which are to be found in the reports of what constitutes a “premium”. (See, for example, per WARRINGTON, L.J., in *King v. Earl of Cadogan* (5) ([1915] 3 K.B. at p. 492).) Counsel for the landlord, however, submitted that in s. 2 (1) of the Act the word “premium” is used in a special sense, namely, in contra-distinction to rent, and, therefore, that so long as a landlord of rent-controlled premises receives no more in all than the standard rent a pre-payment of part of that rent does not constitute a “premium”; for the payment is referable, and referable only, to a part of the standard rent. On the other hand, said counsel for the landlord, if and to the extent that the landlord receives a payment which is in excess of the total standard rent of his premises calculated over the period of any lease which he grants, that excess is not rent or in any way referable to rent and is accordingly an illegal premium and recoverable by the tenant. It may be that in certain circumstances and to a limited extent the demand of some pre-payment of rent as a condition of granting a lease may be lawfully demanded by a landlord; but as the point does not, in my view, arise in the present case for decision, I would prefer to express no concluded opinion on it. If, however, this appeal depended on the alleged right of the landlord to demand £850 “commuted rent” as a condition of granting the tenant a fourteen-year lease in 1952, I should have felt the greatest difficulty in deciding in his favour—and apart altogether from the fact that the lease contained no provision for the return of any part of this sum to the tenant in the event of the lease being determined by the landlord at the end of the

- A seventh year under cl. 4 (2). If the landlord could lawfully have demanded this payment, then I can see no logical reason why a landlord should not require payment of substantially the whole of the standard rent in advance as a condition of granting a lease for fourteen years, or twenty-one years, or any other term of years. In my judgment, such a payment would be clearly within the scope and object of s. 2, and none the less because if it were added to the rent reserved by the lease *eo nomine* and spread over the demised term it would not exceed the aggregate standard rent for the period. It seems to me that, although the primary object of s. 2 (1) was to prevent landlords from circumventing the disadvantages of the standard rent by demanding a premium in addition to it, a subsidiary object, and one within the language of the sub-section, was to prevent the exaction of payments of a capital nature from tenants who would, in many cases, be unable to raise them.

- As I have indicated, however, the question of what does and what does not constitute an illegal premium does not, in my opinion, fall for decision on the present appeal. The reason for this is that the tenant failed to prove, in my judgment, an essential ingredient of her claim under s. 2 (5) of the Act of 1949, namely, that the landlord required payment of the £850 as a condition of granting the lease. That she had to establish this is apparent, I think, from the language of the sub-section which, so far as material, is in the following terms:

- “Where, under an agreement made after Mar. 25, 1949, any premium has been paid which, or the whole of which, could not lawfully be required under the foregoing provisions of this section . . . the amount of the premium, or so much thereof as could not lawfully be required or have been required, as the case may be, shall be recoverable by the person by whom it was paid.”

- In order to determine the effect of this sub-section it is necessary to ascertain what premiums cannot lawfully be required under the earlier provisions of the section; for it is only those premiums that can be recovered under sub-s. (5). The prohibited premiums are (so far as lessors, as distinct from assignors, are concerned) those which a landlord requires, in addition to the payment of rent, “as a condition of the grant, renewal or continuance of a tenancy” of a dwelling-house, being a tenancy to which the principal Acts* apply, such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply. It is an essential feature of these unlawful premiums that their payment has been “required as a condition of the grant”, and it follows that premiums which do not possess this characteristic are not within the section. Further, the onus is on the tenant, in my opinion, to prove that a premium does possess that offending characteristic before he can recover it. Did the tenant establish this by her evidence in the present case? She sought to do so by saying, in effect, that the landlord demanded the £850 as key money for the grant of the lease, and if the judge had accepted her evidence the sum would have plainly qualified for repayment on the ground that its payment had been “required”. The landlord, on the other hand, said that so far from requiring it the tenant herself had suggested an initial payment in order to obtain a lower rent, and if this were true, then, clearly, the payment did not possess the prohibited feature of having been required by the landlord. But the judge did not accept the tenant’s evidence, nor do I think that he accepted the landlord’s evidence. He did accept Mr. Boggis’ evidence, but this gentleman had no testimony to offer on this particular point. There was no other evidence on it, and, therefore, in my opinion, the tenant failed to discharge the onus which lay on her of proving that the £850 came within the prohibited category of premiums.

A breach of s. 2 (1) of the Act of 1949 is an offence and can be visited with penal consequences. It follows from this, in my judgment, that the courts

* I.e., the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939; see Landlord and Tenant (Rent Control) Act, 1949, s. 18 (2).

should not attribute to it a scope beyond which its language reasonably requires. The sub-section does not say (as it presumably would have said if such had been the intention of Parliament) that "a person shall not receive the payment of any premium in addition to the rent". Had it been expressed in those terms, then a premium would be illegal even if the intending tenant himself desired to pay one in consideration of obtaining a rent lower than the standard rent—as, indeed, the landlord said that the tenant desired in the present case. The sub-section is not, however, so expressed, and, in my judgment, a landlord does not infringe its provisions or lay himself open to penalties by receiving a premium which has not been required by him as a condition of granting (or renewing or continuing, as the case may be) a tenancy; but subject, of course (as was pointed out by SOMERVELL, L.J., in his judgment ([1954] 2 All E.R. at p. 303) in *O'Connor v. Hume* (1)) to the transaction not being a "sham". The question in any given case of whether the landlord so required a premium which he had received would be one of fact for the trial judge to determine on the evidence which was adduced before him. The onus would be on the tenant, however, to establish that the sub-section had been infringed, and the learned judge did not find that the tenant had discharged this burden in the present case. I am, therefore, of opinion that her action was rightly dismissed, and for the above reasons and those stated by my brethren I agree that this appeal must fail. I agree, further, that the cross-appeal for rectification should also be dismissed.

Appeal dismissed; cross-appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Cohen & Cohen* (for the tenant); *J. Rothwell Dyson & Co.* (for the landlord); *Pengelly & Co.* (for the defendants to the counterclaim).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

CHANCERY DIVISION.

PRACTICE DIRECTION.

Infant—Guardian—Appeals from county courts or courts of summary jurisdiction—Guardianship of Infants Acts, 1886 and 1925.

Infant—Marriage—Consent—Appeals from county courts or courts of summary jurisdiction—Guardianship of Infants Acts, 1886 and 1925.

Order 55A, r. 6 (4), of the Rules of the Supreme Court provides that within ten days after service of the notice of motion which originates an appeal from an order made or refused under the Act of 1886 or the Act of 1925, the appellant shall obtain an appointment for the purpose of obtaining the judge's directions as to the hearing of the appeal.

Before giving such directions and deciding (inter alia) whether the parties shall be permitted to adduce further evidence, the judge will require to see and consider the reasons on which the county court judge, or the justices, made the order under appeal.

The appellant's solicitors should therefore apply for a statement of the reasons for the decision complained of, and lodge it with the judge's clerk when obtaining the above mentioned appointment.

By direction of ROXBURGH, J.

W. S. JONES,
Chief Registrar.

March 14, 1955.

AGLIONBY v. COHEN.

[QUEEN'S BENCH DIVISION (Harman, J., sitting as a judge of the Division), February 22, 23, 1955.]

Landlord and Tenant—Recovery of possession—Judgment for possession—Tenant ejected by landlord without intervention of sheriff.

B A tenant of a furnished room in the landlord's dwelling-house was given a valid notice to quit. He refused to vacate his room, and the landlord brought an action for possession. The tenant entered no appearance, and the landlord signed judgment against him in default. The landlord did not sue out the writ of possession, but himself removed the tenant's property from the room and took possession without the aid of the sheriff.

C **Held:** the landlord's right to evict a trespasser from his property, using only so much force as was necessary, was not ousted by his successful action at law for possession: as the tenant had not been caused to change his position by reason of the landlord's taking the court proceedings, the landlord was entitled, notwithstanding his judgment for possession, personally to evict the tenant.

D Dictum of PATTESON, J., in *Doe d. Stevens v. Lord* (1839) (6 Dowl. at p. 266) not applied.

Dictum of SIR EDWARD COKE, C.J., in *Harris v. Austin* (1615) (1 Roll. Rep. at p. 213) applied.

[As to Expulsion of a Trespasser, see 33 HALSBURY'S LAWS (2nd Edn.) 15, para. 22; and for cases on the subject, see 43 DIGEST 395, 177-189.]

E Cases referred to:

(1) *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720; 89 L.J.K.B. 744; 122 L.T. 479; 43 Digest 395, 179.

(2) *Harris v. Austin*, (1615), 3 Bulst. 36 (81 E.R. 31); 1 Roll. Rep. 211 (81 E.R. 438); 19 Digest 385, 2091.

(3) *Lacy v. Berry*, (1659), 2 Sid. 155; 82 E.R. 1308.

F (4) *Doe d. Stevens v. Lord*, (1839), 6 Dowl. 256; 7 Ad. & El. 610 (112 E.R. 600); 8 L.J.Q.B. 97; 21 Digest 464, 446.

Action.

G The plaintiff claimed possession and mesne profits in respect of a room in his dwelling-house which had been let to the defendant, and on May 29, 1952, signed judgment in default of the defendant's appearance. He did not sue out the writ of possession, but on June 11, 1952, took possession of the room, removing the defendant's property. On Aug. 28, 1952, the judgment for possession was set aside on the application of the defendant, who then filed a defence and counterclaim alleging that no valid notice to quit had been served and that the plaintiff's entry was wrongful and in respect of damage suffered by the defendant by reason of his ejectment from the room.

H *H. L. P. A. Sieghart* for the plaintiff, the landlord.

R. N. Hales for the defendant, the tenant.

I **HARMAN, J.:** The plaintiff was the landlord of the defendant who occupied a furnished room in a house and had certain rights to share in the kitchen and garden at a weekly rental. Having given what he alleged to be an adequate notice to quit, the plaintiff brought this action in ejectment by writ dated May 6, 1952. The writ was personally served on the defendant on May 9, 1952, and, he entering no appearance, judgment in default was signed on May 29, 1952. Subsequently there were proceedings before the master to assess the mesne profits.

For some reason not apparent to me, the solicitors then acting for the plaintiff did not take further steps to enforce the judgment by calling in the help of the sheriff. It would have been better had they done so. The plaintiff,

becoming apparently impatient of the law's delays, took the matter into his own hands and by his wife as his deputy entered the property on June 11, 1952, put the defendant's chattels outside the room and thereafter retained possession of it against the defendant.

[His LORDSHIP stated the subsequent course of the proceedings, viz., that the defendant obtained an order on Aug. 28, 1952, setting aside the judgment of May 29, and filed a defence and counterclaim alleging that no valid notice to quit was served and that the plaintiff had wrongfully broken and entered the defendant's premises and had ejected him causing him special damage. His LORDSHIP reviewed the evidence concerning the notice to quit and, having found that the defendant had been given on Apr. 6, 1952, valid notice to quit on May 3, 1952, turned to the question whether the entry was wrongful, and continued:] It seems to me that the judgment of May 29, 1952, was a good judgment for possession when it was given and that it was set aside on Aug. 28, 1952, by reason of the untruths deposed to by the defendant, although the plaintiff is largely himself to blame because he did not contradict those untruths or cross-examine the defendant about them, as he could have done. Therefore, the plaintiff was entitled to sue out his writ for possession, but he did not do that. He chose to take the law into his own hands and to enter himself. It has been well known to be the law ever since the celebrated case of *Hemmings v. Stoke Poges Golf Club* (1), that, if no more force be used than is necessary, a man may turn a trespasser off his property and put his chattels out of the house, but it occurred to me, in the course of the hearing, that if the plaintiff had already invoked the process of law and obtained a judgment, that might amount to some kind of election which ousted him from his common law rights and made it necessary that he should carry the law through to the logical conclusion for which he had invoked it.

I put this matter to counsel for the plaintiff who was, I am glad to say, fully alive to it and he addressed me on the subject. It appears to be a matter on which there is very little modern authority. In the ANNUAL PRACTICE (1955) at p. 842, in the notes under R.S.C., Ord. 47, r. 1, which deals with the writ of possession for recovery of land, it is stated:

"A plaintiff having a judgment for possession may, it seems, enter at his own risk without suing out a writ of possession, if he can do so without force. See CHITTY'S ARCHBOLD 1229."

Reference to this passage shows it to be based on RUNNINGTON'S EJECTMENT, p. 424 and 2 CROMPTON'S PRAC. (Sellon), p. 121. I find also in the 2nd edition of WOODFALL ON LANDLORD AND TENANT (1834), at p. 805, these words:

"The plaintiff having judgment to recover his term may enter without issuing out a writ of execution—which is called habere facias possessionem—for where the land recovered is certain the recoverer may enter at his own peril: and the assistance of the sheriff is only to preserve the peace."

This is clearly based on the passage in SIDERFIN mentioned below.

Two authorities were cited in support of this proposition, first an observation by SIR EDWARD COKE, C.J., in *Harris v. Austin* (2) (1 Roll. Rep. at p. 213) whereby it appears that the learned chief justice thought it was clear that a man, if he does not wish to avail himself of the services of the sheriff, might dispense with them. It was nothing more than an obiter dictum, because the subject-matter there was the presentation of a clerk to the bishop, but the chief justice thought that a good analogy with the case before him was that of a man who employed what used to be called self-help when he might have had the services of the sheriff, and the chief justice thought it quite clear that he was entitled to do so.

Second were the observations in SIDERFIN referred to above, but, like a good many of these old observations, they are merely the reporter's note. At the

- A** end of the report of *Lacy v. Berry* (3) is the following (2 Sid. at p. 156): "*Nota, que apres tiel recovery l'un poet enter sans le ric*"—that is the sheriff, as I understand it—" *car son assistance est forsq. a preserver le peace*"; that is to say, the reporter thought that the presence of the sheriff was only for the purpose of preserving the peace and even after the writ was obtained one might enter if one so wished. The note continues: "*& ceo per curiam*". In other words, that
- B** was the opinion of the whole court. One does not know what the judges said, but only the reporter's notion of what the court thought.

One authority, *Doe d. Stevens v. Lord* (4), tends against that view. It was a case arising out of an entry by a mortgagee or a lessor which had been set aside because he made his entry more than a year after he had got his order. The point was not decided, but PATTESON, J., did give utterance to a view, after

- C** hearing argument about it, in these words (6 Dowl. at p. 266):

"... I desire that it may not go forth that I, for one, assent to the doctrine which has been contended for, that a party having recovered in ejectment may, by his own act only, and without the authority of the process of the court, enter upon and retain possession of the land so recovered."

- D** So there is that rather weighty opinion that the doubt which I expressed at least has justification.

On the whole, however, I think that the view which I am entitled to take in that state of the law is the one I should take apart from authority, viz., that a man does not lose his common law rights because he invokes the law up to a certain point. The plaintiff did not cause the defendant to change his position in reliance on the plaintiff's call on the law and, therefore, it is not really a case of putting him to his election and I do not see why, if he chooses to take the risk, though it may be a very unwise thing to do, he should not do so. He did that in this case and, in my judgment, was entitled to enter as he did.

- E**

Judgment for the plaintiff. Counterclaim dismissed.

Solicitors: *Thornton, Lynne & Lawson* (for the plaintiff); *Webb-Prosser & Co.* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re GROTRIAN (*deceased*). COX AND ANOTHER v. GROTRIAN AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), March 2, 1955.]

Will—Condition—Gift taking effect when the present “war with Germany shall terminate” and “peace be declared”—Coincidence of termination of war and declaration of peace—Rule against perpetuities.

Perpetuities—Rule against perpetuities—Gift taking effect when the present “war with Germany shall terminate” and “peace be declared”.

By his will dated Sept. 25, 1939, a testator devised and bequeathed real and leasehold property to his trustees and declared in relation to that property (by cl. 8 of his will): “. . . if my son [F.] shall survive me and subsequently the present war with Germany shall terminate and peace be declared my said son shall thereupon become absolutely entitled to my said properties . . . or to the proceeds of any part thereof which may in the meantime have been sold or the investments representing such proceeds and my trustees shall thereupon transfer to my said son such properties proceeds and investments accordingly”. The testator declared similar trusts in relation to a share of his residuary estate. On Nov. 10, 1939, the testator died, and on June 17, 1954, his son F. died. On July 9, 1951, a notice was published in the London GAZETTE that “It is notified that the formal state of war with Germany is terminated as from 4 p.m. today, July 9, 1951”. The notice further stated that the United Kingdom High Commissioner in Germany had notified the Federal Government of Germany of the termination of the formal state of war in a communication which mentioned, among other things, that it had proved impossible to conclude a treaty which would dispose of questions arising out of war with the German Reich and that the termination of the formal state of war was without prejudice to the Occupation Statute or to the decision of questions the settlement of which must await the conclusion of a treaty.

Held: (i) F. became absolutely entitled under cl. 8 of the testator’s will on July 9, 1951, because the termination on that date of the state of war between the United Kingdom and Germany also brought about a state of peace, and, therefore, the condition for which the will provided was satisfied.

Dictum of LORD MACNAGHTEN in *Janson v. Driefontein Consolidated Mines, Ltd.* ([1902] A.C. at p. 497) applied.

(ii) the gifts did not transgress the rule against perpetuities because, on the true construction of the will, the testator did not contemplate the properties being transferred to F.’s legal personal representatives, but intended that F. should take only on the specified event happening during F.’s lifetime, and, therefore, the gifts would take effect only during a life in being.

[As to the Prerogative of the Crown to Declare War and Peace, see 7 HALSBURY’S LAWS (3rd Edn.) pp. 290, 291, paras. 610, 612; and for the statutory instruments relating to peace treaties, see 5 HALSBURY’S STATUTORY INSTRUMENTS 88 et seq.]

As to Period allowed for the Suspension of Vesting, see 25 HALSBURY’S LAWS (2nd Edn.) 86, 87, paras. 173, 174; and for cases on the subject, see 37 DIGEST 55, 56, 1-12.]

Cases referred to:

- (1) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 11 Digest (Repl.) 638, 618.
- (2) *Kotzias v. Tyser*, [1920] 2 K.B. 69; 89 L.J.K.B. 529; 122 L.T. 795; 29 Digest 420, 3275.
- (3) *Lloyd v. Bowring*, (1920), 36 T.L.R. 397; 29 Digest 420, 3276.

A Adjourned Summons.

The plaintiffs as trustees of the will of the testator, Frederick Grotrian, applied to the court by originating summons for the determination of the question whether on the true construction of the will of the testator, and in the events which had happened, the investments which represented the property devised and bequeathed by cl. 7 of the will and one half of the residuary estate (a) were

- B** held by the plaintiffs on the trusts declared in cl. 7 (c) and (d) of the will; or (b) ought to be transferred to the personal representatives of the testator's son Frederick Stephen Brent Grotrian. By cl. 7 of his will the testator devised and bequeathed his freehold and leasehold properties in Yorkshire to his trustees on trust for his said son absolutely if he should be living at the date of the testator's death and if the then present war with Germany should have been
- C** terminated and peace should have been declared but if his said son should predecease him or if such peace should not have been declared at the date of the testator's death then his trustees should hold the properties on trust (a) for sale and to invest the proceeds of sale and (b) to pay the income of such investments to his said son during his life and (c) after his death to pay to such son's wife if she should survive him during the remainder of her life and so long as she
- D** should not have re-married the sum of £300 p.a. out of such income. By cl. 8 of his will the testator declared that if his said son should survive him and subsequently the then present war with Germany should terminate and peace be declared his said son should thereupon become absolutely entitled to his said properties in Yorkshire or the proceeds of sale thereof. The facts appear in the judgment.

E *G. T. Hesketh* for the plaintiffs, trustees of the will.

S. G. Maurice for the first defendant, the widow of the testator's son, Frederick.

J. A. Wolfe for the second to the fourth defendants, children of the testator's son.

R. Cozens-Hardy Horne for the fifth and sixth defendants, the personal representatives of the testator's son.

- F** **DANCKWERTS, J.:** The testator made his will on Sept. 25, 1939, after hostilities had broken out between this country and Germany. He made a codicil dated Oct. 3, 1939, but that is not material to the point which I have to decide. The testator died on Nov. 10, 1939. The testator's son died on June 17, 1954.

- G** By cl. 7 of his will the testator devised and bequeathed his properties in the county of York known as Bingley Moor and Burley and Hawkesworth Moors and all other if any his freehold or leasehold property in the county of York to his trustees on trust for his son Frederick Stephen Brent Grotrian absolutely if he should be living at the date of the testator's death, and "... if the present war with Germany shall have been terminated and peace have been declared", and added:

- H** "but if my said son shall predecease me or if such peace shall not have been declared at the date of my death my trustees shall hold the said property upon the following trusts",

and those trusts included a trust for conversion and a settlement of the property which he had, in the other event, given to his son absolutely. He proceeded

- I** by cl. 8:

"I declare that if my said son Frederick Stephen Brent Grotrian shall survive me and subsequently the present war with Germany shall terminate and peace be declared my said son shall thereupon become absolutely entitled to my said properties in Yorkshire or to the proceeds of any part thereof which may in the meantime have been sold or the investments representing such proceeds and my trustees shall thereupon transfer to my said son such properties proceeds and investments accordingly."

By cl. 10, the testator devised and bequeathed the residue and remainder of his estate of every kind to his trustees on trust for conversion and the usual administrative trusts, and directed his trustees to hold the residue (which he called his "residuary estate") A

"as to one half part thereof upon the same trusts as are hereinbefore declared concerning my property in Yorkshire and as to the other half part thereof upon trust for my said daughter absolutely." B

On July 9, 1951, a notice was published in the London GAZETTE in these terms: "It is notified that the formal state of war with Germany is terminated as from 4 p.m. today, July 9, 1951", which was before the death of the testator's son. The declaration then proceeds as follows:

"On the instructions of His Majesty's Principal Secretary of State for Foreign Affairs the United Kingdom High Commissioner in Germany addressed on July 9, 1951, a communication to the Federal Government of Germany in the following terms: 'His Majesty's Government in the United Kingdom, bearing in mind that on Sept. 3, 1939, a state of war was notified with the German Reich, that active hostilities were ended by the declaration regarding the surrender of the German Reich issued on June 5, 1945, but nevertheless the formal state of war with Germany has continued to subsist so far as the municipal law of the United Kingdom is concerned, and will so continue until the appropriate action is taken by His Majesty's Government to terminate it, that through circumstances beyond German control it has as yet proved impossible to conclude a treaty which would dispose of questions arising out of the state of war with the German Reich, have determined that, without prejudice to the Occupation Statute, or to the decision of questions the settlement of which must await the conclusion of a treaty, the formal state of war between the United Kingdom and Germany shall be immediately terminated. A notification is, therefore, being published that the formal state of war with Germany has terminated as from 4 p.m. on July 9, 1951'." C

Then there are two paragraphs reserving the effect of the trading with the enemy legislation, and certain provisions as regards contracts concluded before the war. D

LORD MACNAGHTEN, in the well-known case of *Janson v. Driefontein Consolidated Mines, Ltd.* (1), said ([1902] A.C. at p. 497): E

"I think the learned counsel for the respondent was right in saying that the law recognises a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war. In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war." F

If that statement by LORD MACNAGHTEN applies accurately to the present case, it seems to me plain that the declaration or proclamation of July 9, 1951, not only terminated the state of war between the United Kingdom and Germany, but it also brought about coincidentally a state of peace between the two countries. It is argued, however, on behalf of those who oppose the claim of the personal representatives of the son, that, in the somewhat different circumstances which have prevailed since the breaking out in September, 1939, of the last war, the statements by LORD MACNAGHTEN are no longer applicable to the present situation. G

Reference has been made to cases decided as a result of the end of the war of 1914-18, *Kotzias v. Tyser* (2), and *Lloyd v. Bowring* (3), in aid of the arguments on behalf of both parties. Those cases, however, seem to me to have nothing whatever to do with the problem which I have to decide today. Both those cases depended on a situation which was essentially different, and in particular it is to be noted that there was a statute passed specifically for the purpose of deciding the date of the termination of the war of 1914-18 called the Termination of the Present War (Definition) Act, 1918. That Act enabled His Majesty to H

I

- A declare by an Order in Council what was the exact date when the war was to be taken to have been determined. By the Order in Council of Feb. 9, 1920*, the date of the termination of the war with Germany and the substitution of peace was determined by not only the making of a peace treaty between the United Kingdom and Germany, but by the ratification of that treaty in a particular manner, and the date selected as a result was Jan. 10, 1920. That matter was
- B specifically provided for.

- After the cessation of hostilities on May 9, 1945, between the two countries on the occasion of the last war the matter was not dealt with in the same manner. It might have been dealt with in a similar manner, but it was not, and it does not seem to me to follow that the situation could not be determined in some other manner than by statute as in 1918. It seems to me as plain as can be that the
- C termination on July 9, 1951, of the state of war between the two countries also brought about a state of peace.

- It seems to me, therefore, that according to the terms of cl. 8 of the will the condition was satisfied because the war with Germany thereupon terminated and peace was declared. It is true that the notice of termination did not in terms refer to peace, but it is still true to say, at any rate in a situation of that kind,
- D that the termination of war and the declaration of peace are coincident events, and that the declaration of the termination of the war, by inference necessarily declared the state of peace to arise again between the two countries concerned.

- There is, however, another point which has been taken against the personal representatives of the son, that the provisions of cl. 8 offend against the rule against perpetuities, because the termination of the war might be regarded as
- E such an uncertain event when this clause was put into the will, at any rate by pessimists, that the war might continue for a longer period than lives in being and for twenty-one years from the death of the survivor. The pessimistic view is one which must be regarded as a possible view. If, therefore, that is the effect of the clause it would seem that the event to take place before the son's interest came into being might result in his interest being avoided by the rule

- F against perpetuities. It seems, on the face of it, rather a hard and somewhat unnatural situation. But, fortunately, I think that there is a construction which can fairly be put on the clause which prevents that point having any application. Clause 8 concludes, after reference to the event which is to decide the matter, that the son shall thereupon become absolutely entitled to the testator's properties in Yorkshire or to the proceeds of any part thereof which may in the meantime

- G have been sold or the investments representing such proceeds, and that the testator's trustees are thereupon to transfer to his said son such properties proceeds and investments accordingly. It is plain to me from that that the testator did not contemplate the event of the proceeds or property being transferred to the executors or administrators of the son's estate, and I think that it is a fair inference that the testator contemplated that the clause was only to apply
- H on the occasion of the event in question happening during the son's lifetime. That being so, of course, it was an event which was limited to the duration of a lifetime in being and no trouble arises by virtue of the rule against perpetuities. The event, as I have already held, happened in 1951, and the son did not die until 1954.

- I Accordingly, as it seems to me, the conditions of the clause were satisfied, and the testator's son during his lifetime became absolutely entitled.

Declaration accordingly.

Solicitors: *Blyth, Dutton, Wright & Bennett*, agents for *Rawlins, Davy & Wells*, Bournemouth (for the plaintiffs and first defendant); *Nicholl, Manisty & Co.* (for the remaining defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NOTE.

GALLER v. GALLER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), January 31, February 1, 2, 3, 4, 7, 8, 1955.]

Document—Admissibility in evidence—Statement in document—“Person interested”—Petition for divorce on ground of wife’s desertion—Wife alleging as just cause that husband guilty of misconduct with another woman—Whether other woman a “person interested”—Evidence Act, 1938 (1 & 2 Geo. 6 c. 28), s. 1 (3).

Divorce—Evidence—Document—Wife alleging as just cause for desertion that husband guilty of misconduct with another woman—Statement by other woman in document—“Person interested”—Evidence Act, 1938 (1 & 2 Geo. 6 c. 28), s. 1 (3).

[For the Evidence Act, 1938, s. 1 (3), see 9 HALSBURY’S STATUTES (2nd Edn.) 627; and for cases on the subject, see 22 DIGEST (Repl.) 245, 2419-2425.]

Case referred to:

(1) *Holton v. Holton*, [1946] 2 All E.R. 534; 176 L.T. 186; 22 Digest (Repl.) 245, 2420.

J. E. S. Simon, Q.C., and *P. Panto* for the husband.

A. D. Karmel, Q.C., and *G. W. Willett* for the wife.

Petition for divorce.

The husband presented a petition for divorce on the ground of the wife’s desertion as from a date in October, 1948. By her answer, the wife denied that she had been guilty of desertion and alleged that she had just cause for withdrawing from cohabitation; and she cross-prayed for a decree of divorce on the ground of the husband’s cruelty and adultery. As particulars of “just cause”, the wife alleged, inter alia, that on the evening before she left the matrimonial home she had found the husband on a bed with Miss W. in suspicious circumstances. The wife did not allege that the husband had committed adultery with Miss W.

Miss W. was resident in Denmark and was unwilling to attend the hearing of the suit. The husband’s solicitors wrote to Miss W. and then submitted to her a form of questionnaire in which they asked her specific questions, such as “were you on the bed?” Miss W. replied to the questionnaire by letters.

J. E. S. Simon, Q.C., for the husband: I submit that the letters should be received in evidence under the Evidence Act, 1938, s. 1 (1).

D. Karmel, Q.C., for the wife: I object that the letters are admissible on the ground that Miss W. is a “person interested” within the meaning of s. 1 (3) of the Act. I refer to *Holton v. Holton* (1). Miss W. is charged with misconducting herself with a married man. I submit that this makes her materially interested so that the letters are excluded by virtue of s. 1 (3) of the Evidence Act, 1938. The sub-section is directed against persons who have reason for bias (i.e., have a material interest) being allowed to express themselves through a document ex parte. The object of this is that the other side shall have an opportunity of cross-examining. In *Holton v. Holton* (1) your Lordship said, in effect, that the mere fact that a person has a sentimental interest did not matter, but the present case goes further because Miss W. is charged with misconduct. Clearly, in my submission, if she was charged with adultery she would have a material interest and you could not have a woman named in that way making a statement and having it put in under the Evidence Act, 1938, s. 1 (1). It is equally clear in my submission, that it would be wrong to have a written statement from a woman who has been named in the petition not as an adulteress, but as a person who has misconducted herself by lying on the bed in circumstances in which adultery might be inferred; for the statement would thus be admitted in a manner which I could not challenge.

A **BARNARD, J.:** All the things you are saying now I would expect you to say on the question of the weight to be attached to the statement, but it does not seem to me to justify shutting the statement out.

D. Karmel, Q.C.: In my submission the present case is quite different from that before your Lordship in *Holton v. Holton* (1), where your Lordship allowed the document to be put in.

B *J. E. S. Simon, Q.C.:* Miss W. is neither charged with adultery nor is it said that the conduct was such as to give rise to a reasonable suspicion of adultery. In *PHIPSON ON EVIDENCE* (9th Edn.), p. 287, it is stated:

“It will not be sufficient to exclude the statement to show merely that he had a bias in favour of one party rather than another. Section 2 (1) [of the Evidence Act, 1938,] makes it quite clear that an ‘incentive to conceal or misrepresent facts’ goes to the weight of the evidence only.”

C I appreciate that Miss W. may have an incentive to conceal or misrepresent the facts, but that is dealt with separately in s. 2 (1) of the Act, and goes to weight only, and in my submission this is clearly admissible.

BARNARD, J.: I think that I ought to let this statement in.

D *Rule accordingly.*

[At the conclusion of the evidence, HIS LORDSHIP granted a decree nisi in favour of the husband, and rejected the prayer in the answer.]

Solicitors: *Bernard Oberman & Co.* (for the husband); *Walmsley & Stansbury*, agents for *E. W. Marshall, Harvey & Dalton*, Bournemouth (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

E

JOHN v. HUMPHREYS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Gorman, JJ.), March 10, 1955.]

F *Street Traffic—Driving without licence—Holder of licence—Onus of proof—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 4 (1).*

Criminal Law—Evidence—Facts peculiarly within knowledge of accused—Driving without licence—Onus of proof—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 4 (1).

G The driver of a motor vehicle was summoned for driving without a licence contrary to s. 4 (1) of the Road Traffic Act, 1930, which provides: “A person shall not drive a motor vehicle on a road unless he is the holder of a licence . . .” The driver did not appear at the hearing of the summons but sent a letter saying that he was guilty. It was not proved that the letter had been written by him and there was no evidence before the justices whether the driver did or did not hold a licence when he drove the motor vehicle. The justices dismissed the information.

H **Held:** the burden of proof that the defendant had a licence lay on him because that fact was peculiarly in his own knowledge, and in the absence of proof on his part that he had a licence the justices ought to have convicted.

R. v. Oliver ([1943] 2 All E.R. 800) applied.

I [As to the Burden of Proof of facts peculiarly within knowledge of opponent, see 13 HALSBURY'S LAWS (2nd Edn.) 545, para. 615 (2); and for cases on the subject, see 22 DIGEST (Repl.) 38, 180-186 (civil cases), 14 DIGEST 430, 4550 et seq. (criminal cases).]

For the Road Traffic Act, 1930, s. 4 (1), see 24 HALSBURY'S STATUTES (2nd Edn.) 575.]

Case referred to:

(1) *R. v. Oliver*, [1943] 2 All E.R. 800; [1944] K.B. 68; 113 L.J.K.B. 119; 170 L.T. 110; 108 J.P. 30; 2nd Digest Supp.

Case Stated.

This was a Case Stated by the justices for the county of Bedford in respect of their adjudication as a magistrates' court sitting at Dunstable. On Oct. 6, 1954, an information was preferred by the appellant, William John, a police officer, against the respondent, George William Joseph Humphreys, that he, not being the holder of a licence, drove a motor vehicle contrary to s. 4 (1) of the Road Traffic Act, 1930. On Nov. 2, 1954, the magistrates heard the information and found the following facts. On Aug. 14, 1954, the respondent drove a motor vehicle, of which he was the owner, along High Street, Dunstable. The respondent did not appear in answer to the summons, but a letter to the court purporting to be written by the respondent was read in which the respondent admitted the offence and requested the court to accept a plea of guilty. It was contended by the appellant that (i) s. 4 (1) of the Road Traffic Act, 1930, constituted an absolute prohibition against a person driving a motor vehicle on a road unless he was the holder of a licence; (ii) that having proved that the respondent was the driver on the occasion in question no further evidence by the prosecution was required, and that the burden of proving that he was the holder of a licence was then on the respondent since it was a fact peculiarly within his own knowledge. The magistrates were of the opinion that this contention was wrong in law and that before the burden of proving that he was the holder of a licence passed to the respondent the prosecution must establish a *prima facie* case against him and that mere proof of driving a motor vehicle on a road (that not being *prima facie* a wrongful act) did not establish such a case against him. If the contention were correct, the penalty could not properly be assessed, as proof would be absent as to the date of expiry of the driving licence previously held or whether he had in fact ever held such a licence. The magistrates therefore dismissed the information. The question for the High Court was whether the determination of the magistrates was correct in law.

Peter Lewis for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J.: At the present moment there is no machinery for enabling a plea of guilty to be entered by letter by a defendant before a court of summary jurisdiction. In the present case, the police had no further evidence. The respondent having admitted the offence, the police did not call any evidence except that the police officer said that he had seen a man driving a car in Dunstable. The justices refused to convict because they had no evidence that the respondent had not a licence. The police said that it was for him to prove that he had a licence. The justices were right, as the law is at present, in ignoring the respondent's letter, though, if the police could have proved that he was the person who had written the letter, that would have been evidence on which they could have convicted.

Counsel for the appellant points out that s. 4 (1) of the Road Traffic Act, 1930, provides:

"A person shall not drive a motor vehicle on a road unless he is the holder of a licence . . ."

and when an Act of Parliament provides that a person shall not do a certain thing unless he has a licence, the onus is always on the defendant to prove that he has a licence because it is a fact peculiarly within his own knowledge: *R. v. Oliver* (1). In theory, I suppose, a police officer who sees a car being driven in the street can always summon the driver of the car and leave it to the driver of the car to prove that he had a licence. It is not to be contemplated for a moment, however, that police officers would act in such a way; if they did, not only would they have costs given against them, but I should think that very severe steps would be taken. In the present case nothing of that sort happened.

A Although it is not stated in the Case, we were told, quite rightly in the very unusual facts of the present case, that a police officer saw the respondent nearly run over a child on a pedestrian crossing, and that he took his number but could not stop the car. The car was registered in Shropshire, where inquiries were made. It could not be found that the respondent had a licence and so he was summoned for driving without a licence. If he had a licence, he could have sent the licence to the clerk of the court and said: "Here is my licence, you can see it." The justices thought that, as he was not there, they could not convict him because there was no evidence. They said:

B "If the appellant's contention is correct, the penalty could not be properly assessed as proof would be absent as to the date of expiry of the driving licence previously held or whether he had in fact ever held such a licence."

C All those things the respondent could have proved if he wanted to. He did not, and, therefore, I think this Case must go back to the justices with an intimation that there was evidence that an offence was committed, and, as the onus was on the respondent to prove that he had a licence, they were bound to convict. D We are satisfied that he was driving without a licence, and if he did not choose to tell the police he had a licence, he must take the consequences and a proper penalty must be imposed. It is not to be supposed that police officers will take these proceedings merely because they see somebody driving in the street and without having made proper inquiries.

E ORMEROD, J.: I agree, though I come to the decision with some reluctance, as it does seem an extraordinary position that if a police officer sees somebody driving in the street, he can at once summon him and put him to proof that he has a licence. There is some ground for my reluctance in s. 4 (5) of the Road Traffic Act, 1930, which provides that the police may demand a licence, and if the person has not got it, gives him an opportunity to produce it in the next five days. My first view was that reading the section as a whole, F there must be some evidence to prove that the respondent did not possess a licence. However, having regard to the decision in *R. v. Oliver* (1), it appears to me that there is no alternative but to say that the appeal must be allowed, and, therefore, I agree.

G GORMAN, J.: I agree.

Appeal allowed.

Solicitors: *Turner & Evans*, agents for *John Q. Clayton & Co.*, Luton (for the appellant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

YOUNG v. YOUNG AND KOHLER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), March 7, 1955.]

Legal Aid—Costs—Taxation—Counsel's fee—Undefended divorce suit heard at assize town—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), Sch. 3, para. 1 (1)—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 18 (3).

On Mar. 25, 1954, the petitioner, who was in receipt of legal aid under the Legal Aid and Advice Act, 1949, filed a petition for divorce on the ground of the respondent's adultery with the co-respondent. On June 24, 1954, counsel whose chambers were in London and who was a member of the Oxford circuit appeared on an undefended divorce petition before a special commissioner sitting at Reading to represent the petitioner. The commissioner granted a decree nisi and ordered (i) that the co-respondent be condemned in costs "to be taxed as between party and party" and (ii) that the "costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949." On taxation, the registrar reduced the fee on counsel's brief from seven to five guineas, on the ground that since Reading was both a divorce and an assize town the petitioner had the right to make his choice from among the counsel on the Oxford circuit who were on the panel of those willing to undertake legal aid divorce cases. On a summons to review the registrar's decision,

Held: the registrar in taxing off the two guineas had acted on a wrong principle, and the sum of two guineas would be reinstated in the bill of costs both as between solicitor and client and as between party and party; and the costs of the summons should be "costs in the cause."

Self v. Self ([1954] 2 All E.R. 550) followed.

[**Editorial Note.** In this case the decree nisi directed a taxation of the petitioner's costs in the cause as between party and party and also a taxation of the petitioner's costs as between solicitor and client in accordance with the Legal Aid and Advice Act, 1949, Sch. 3. The form of bill proper to be adopted, therefore, contained columns for the amount taxed off and for the amounts disbursed or charged both as between solicitor and client and as between party and party (for the form, see BUTTERWORTHS' COSTS, Vol. 1, p. 999; and for examples of general charges, see Supplement, Divorce, Form No. 29). After taxation the bill was certified to the effect that the costs in the cause had been taxed as between solicitor and client, although the amount of two guineas taxed off counsel's fee of seven guineas was entered in the column appropriate to amounts taxed off party and party items. The court regarded the taxation as intended to be both between solicitor and client and between party and party, but viewed the certificate as not complying with the decree as it specified only taxation between solicitor and client (see p. 798, letter E, post).

As to Solicitor and Client Costs, see 31 HALSBURY'S LAWS (2nd Edn.) 212, para. 236; and as to Party and Party Costs, see *ibid.*, p. 214, para. 239; and for cases on the principle of taxations as between party and party or solicitor and client, see DIGEST (Practice) 948, 4878-4882.

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 1 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 565.

For the Legal Aid (General) Regulations, 1950, reg. 18 (3), see 5 HALSBURY'S STATUTORY INSTRUMENTS 218.]

Cases referred to:

(1) *Self v. Self*, [1954] 2 All E.R. 550; [1954] P. 480.

(2) *Reed v. Gray*, [1952] 1 All E.R. 241; [1952] Ch. 337; 3rd Digest Supp.

Summons for review of taxation.

A decree nisi for divorce, granted on an undefended petition heard at Reading

- A which was both a divorce town and an assize town, condemned the co-respondent in the petitioner's costs of the cause and ordered them to be taxed as between party and party. The petitioner was an assisted person and the decree nisi further ordered the petitioner's costs to be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, 1949, Sch. 3. The petitioner's bill of costs was carried in for taxation. The bill included a
- B disbursement for a fee of seven guineas to counsel for the petitioner, whose chambers were in London. In the party and party column of the bill the sum of two guineas was entered as taxed off this payment and the bill was certified to the effect that the costs in the cause had been taxed as between solicitor and client. The petitioner carried in objections to the partial disallowance of the fee and applied for a review of the taxation. The nature of the objections and the
- C registrar's answer to them by letter appear in the judgment (see pp. 798, 799, post).

R. J. A. Temple, Q.C., and T. G. Guest for the petitioner.

Cur. adv. vult.

- Mar. 7. WALLINGTON, J., read the following judgment: This summons was issued for the purpose of obtaining a review of taxation of costs of the petitioner against the co-respondent. The review is sought in respect of only
- D one item, namely, the sum of two guineas by which the fee of counsel appearing for the petitioner in the suit was taxed off the charge (included in the party and party costs) of £7 12s., being seven guineas plus 5s. counsel's clerk's fee on the brief for the petitioner in the suit. It is said that the decision of this summons is a matter of public importance, as well as of importance to both solicitors and counsel, and on this ground I am invited to deliver my judgment in open court, although, of course, I heard the summons in chambers.
- E

- The petition was that of a husband, signed on Mar. 24, 1954, and filed on Mar. 25, against the wife, and was based on charges of adultery by her with the co-respondent, who was duly served with the petition. Neither the wife nor the co-respondent filed any answer. The petition had been filed in the
- F Oxford District Registry, and the case was heard by Mr. Commissioner GALLOP at Reading on June 24, 1954. Neither the wife nor the co-respondent took any part in the trial, and the learned commissioner found the charge of adultery proved against both the wife and the co-respondent and granted a decree nisi, which was made absolute on Aug. 9, 1954. The decree nisi contained the usual order as to costs, including the words

- G "and condemn the co-respondent in the costs incurred on behalf of the petitioner in this cause and such further costs to be incurred on behalf of the petitioner as the court shall direct to be costs in the cause, such costs incurred and to be incurred to be taxed as between party and party."

The petitioner was legally aided under a certificate issued under the Legal Aid and Advice Act, 1949,

- H "in connection with the following proceedings—prosecuting a suit for divorce in the High Court of Justice, Probate Divorce and Admiralty Division (Divorce) . . . and enforcing any order for costs."

- The local legal aid and advice committee by their certificate assessed the petitioner's contribution at a maximum of £79, and ordered that his minimum contribution should be £65 payable by instalments. The effect of the civil aid certificate
- I is that both the petitioner and the legal aid fund have an interest in the question of costs. The decree nisi, in these circumstances, further ordered that the

"costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949."

The petitioner's solicitors in due course carried in their bill of costs for taxation, and the learned registrar in the district registry at Oxford taxed the bill on Oct. 8, 1954. It is this bill as taxed which is the subject of the present application.

The form of the bill provides for particulars of the charges, with their dates, between red ink lines in the centre of the sheet. On the right-hand side of the space for particulars of charges there are four money columns, two of them headed "solicitor and client" and the other two "party and party". One of these two columns under each heading is for the insertion of payments, and the other of charges. On the left-hand side of the centre of the sheet there are four similar money columns which are prepared to receive separate indications of any amounts for payments or charges which may be disallowed on taxation in respect of either solicitor and client or party and party items. On p. 3 of the bill the registrar, when taxing the bill, inserted in the disallowance column on the left-hand side of the sheet "£2 2s." opposite the charge in the party and party payments column for "paid his fee and clerk £7 12s." At the end of the bill of costs the registrar has left blank and struck out the form of certificate in which provision is made for the insertion of (i) the amount of the party and party taxation and (ii) the amount of the solicitor and client taxation. Following this, on the same page, there is a typewritten form of certificate which has been completed by the registrar as follows:

"I certify that the costs in this cause have been taxed as between solicitor and client and account as follows:—

Disbursements	£14	18s.	4d.
Counsel's fee	£12	6s.	0d.
Profit costs	£48	16s.	9d.
Total	£76	1s.	1d."

These amounts are all "after certificate", indicating that they have included taxation and allocatur and order fees, and the taxation fee. I suppose that this taxation on its face is intended by the registrar to be treated both as between solicitor and client and between party and party; in fact the order contained in the decree nisi provides for the taxation of costs both as between party and party and solicitor and client, and in my view it has not been complied with, in that the taxation is certified as being between solicitor and client.

The co-respondent did not appear before me on the hearing of the summons, but proof of personal service of the summons on him was before me on affidavit. His name was called outside the court, but he did not attend. I therefore proceeded to hear the summons in his absence. Counsel relied on the three following submissions: (i) That the registrar failed to tax counsel's fee on the brief on the basis of a solicitor and client taxation, but restricted himself to a party and party basis, which, he argued, is wrong in principle. (ii) That the registrar failed to recognise and give effect to the general and proper practice of including in counsel's fee in a country case something for time and expense. (iii) That the registrar attempted to draw a distinction between counsel attending at a divorce court and counsel attending at an assize town. For this distinction, he argued, there is no warrant in practice or principle. In the objection to the registrar's taxation the three reasons set out were as follows:

"(i) That counsel had to travel to Reading from London to deal with the case which was in the list at Reading. (ii) That there is no local Bar at Reading. (iii) That *Self v. Self* (1) lays down the principle that in cases where the above conditions exist counsel is [in an undefended divorce suit] entitled to charge and to be allowed on taxation a fee of £7 7s. plus clerk's fee."

The answer of the learned registrar to these objections is contained in a letter

A from him dated Dec. 13, 1954, to the petitioner's solicitors, and is in the following terms:

"Dear Sirs,

George Henry Young v. Evelyn Constance Young. — Divorcee.

B "In reply to the objections in this case, it may be more convenient if I put my answers in the form of a letter.

"In the first place, I am satisfied that on the merits of this particular case which was a short undefended case, a fee of £5 5s. and £2 7s. is adequate, and I understand that there is no contention to the contrary, the objection to the reduction I have made being based entirely on the decision in *Self v. Self* (1).

C "With all due deference, I submit that a distinction can be drawn between the circumstances in this case and those in *Self v. Self* (1). One of the grounds on which SACHS, J., based his decision was that, owing to the limited number of counsel practising at Brighton, a litigant was deprived of his right of choice of counsel from the panel. Brighton is a divorce town, not an assize town, Reading is both and I submit that this being so the petitioner was not limited to a choice of three counsel, but had the right to make his choice from any one of the counsel on the Oxford circuit who are on the panel of those willing to undertake legal aid divorce cases.

"As SACHS, J., points out, the reference to no local Bar is irrelevant, the action being tried in the High Court.

E "If there is substance in my suggestion that a counsel accepting a brief in a divorce case tried at an assize town does so as a member of the circuit which comprises that town, I submit it is relevant to inquire, in the interest of uniformity, what is the practice on circuit as to the assessment of fees by clerks of assize and clerks of the peace. Is the distance from London travelled by counsel taken into consideration? For instance, is a counsel, a member of a circuit, who travels from London allowed a bigger fee at say Gloucester or Hereford than he is at Reading or Oxford, on the ground of the extra expense of travel from London, and is it contended that a counsel on the Oxford circuit who undertakes an undefended divorce case at Shrewsbury is entitled to more than £7 7s. because of the greater distance from London? I submit that these are matters to be taken into consideration in order that a uniform scale of fees may be arrived at. It is right to add that since the decision in *Self v. Self* (1) I have had several bills of costs brought in for taxation in which a fee of no more than £5 5s. and £2 7s. on the brief has been asked for.

H "I shall welcome a ruling not only for the sake of uniformity but so that I may on taxation allow adequate remuneration for counsel while not laying an undue burden on those who have to pay the costs wholly or in part, in a great many instances the general public who are not interested parties to the proceedings. I am much obliged to you for the loan of your papers and the report of *Self v. Self* (1), which I return herewith.

Yours faithfully, J. M. Eldridge, Registrar."

I It follows from what I have said that on this taxation the learned registrar has made no distinction between the two forms of taxation, namely, that for the purpose of the Legal Aid and Advice Act, 1949, as between solicitor and client, and party and party taxation. In my opinion, the difference between a solicitor and client taxation and one between party and party is well established. In my view, counsel was amply justified in relying on the decision of ROXBURGH, J., in the case of *Reed v. Gray* (2). I doubt whether the learned registrar in an ordinary case (that is to say, one in which there is no legal aid) would dissent from the proposition which I accept, that, shortly and broadly put, a "solicitor and client taxation . . . is substantially a party and party taxation on a more generous scale" (per ROXBURGH, J., [1952] 1 All E.R. at p. 244). Counsel

also relied on the judgment of SACHS, J., in *Self v. Self* (1). SACHS, J., in that case dealt with a similar question of counsel's fees in relation to a divorce case tried at Brighton by a special commissioner in divorce. In that case, as in the present, the petitioner in the suit was represented by counsel whose chambers are in London. Strangely enough, the reduction in that case was from seven guineas to five guineas, and the registrar in that case made it on the ground that there were counsel with chambers in Brighton willing to accept briefs on undefended petitions, and that it would be wrong to allow a higher fee because counsel came from London. With great respect to the learned registrar my opinion is that he has misunderstood the effect of the judgment of SACHS, J., in the case to which I have just referred.

I have reached the clear conclusion that the learned registrar in taxing off the two guineas to which I have already referred in the present case has acted on a wrong principle, and I am, therefore, bound to undertake a review of the taxation. Having done so, I reinstate the sum of two guineas in the bill of costs as between solicitor and client. I respectfully identify myself entirely with the judgment of SACHS, J., and fully agree with all the reasons on which his decision is based. Moreover, I conceive it to be my duty to review the taxation from the party and party standpoint, having regard to the order for party and party costs contained in the decree nisi, and accordingly I reinstate the sum of two guineas which the learned registrar has taxed off the party and party bill of costs. I direct that the costs incurred in and about this application be "costs in the cause", which means that the co-respondent must pay them. The case is fit for counsel for the petitioner.

Order accordingly.

Solicitors: *Burton, Yeates & Hart*, agents for *Andrew Walsh, Lightfoot & Co.*, Oxford (for the petitioner).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

WEST v. NATIONAL MOTOR AND ACCIDENT INSURANCE UNION, LTD.

[COURT OF APPEAL (Singleton, Hodson, and Romer, L.JJ.), March 7, 1955.]

Insurance—Burglary—Claim—Repudiation of claim without repudiation of policy by insurance company.

The claimant, intending to insure the contents of his house, made a proposal for insurance against burglary in which he declared that the full value of the contents was £500. The proposal form required an intending assured to state the value of jewellery if it exceeded one-third of the declared value, but the claimant made no statement as to this. The insurance company accepted the proposal and issued to the claimant a policy of insurance against, among other risks, loss by burglary, and the policy provided that the proposal and declaration should be the basis of the contract and should be considered as incorporated therein. A burglary took place at the claimant's residence and the claimant's loss was agreed at £530 5s. in respect of jewellery, £26 17s. 6d. in respect of personal effects and £56 in respect of cash. The claimant having claimed for this loss, which was a loss within the terms of the policy, the insurance company repudiated the claim on the ground of material mis-statement or non-disclosure relating to the value of the contents of the residence, but did not repudiate the policy.

Held: the insurance company could not repudiate the claim without repudiating the policy, and therefore, although it might have been open to the insurance company to repudiate the policy if they had wished to do so, the claimant was entitled to recover.

Appeal dismissed.

A [As to Non-disclosure or Mis-statement as Avoiding a Policy, see 18 HALSBURY'S LAWS (2nd Edn.) 410, para. 588; and for cases on the subject, see 29 DIGEST 415, 3249 et seq.

As to Election to Accept Repudiation of a Contract, see 8 HALSBURY'S LAWS (3rd Edn.) 204, para. 344; and for cases on the subject, see 12 DIGEST (Repl.) 377, 2960 et seq.]

B Appeal.

The insurance company appealed from a judgment of LORD GODDARD, C.J., dated Nov. 16, 1954, on a Special Case stated by an arbitrator, to whom differences arising under an insurance policy against burglary, among other risks, had been referred.

C The agreed facts were as follows: On May 19, 1949, the National Motor and Accident Insurance Union, Ltd. issued to the claimant a policy whereunder certain household goods and personal effects at Westville Bungalow, Cheetham Hill Road, Dukinfield, Lancs., were insured against loss and damage by, among other risks, burglary, housebreaking, or any attempt thereat in the sum of £500 subject to the conditions indorsed thereon. The policy contained a condition that all differences arising out of the policy should be referred to the decision of a single arbitrator. The policy was based on a proposal form submitted by the claimant which declared the full value of the contents at £500. The proposal form also required the assured to state the value of the jewellery if the same exceeded one-third of the declared value; and the claimant made no statement as to this. The form contained a declaration that "the above amounts represent the full value of the property to be insured". The policy provided that the proposal and the declaration should be the basis of the contract and should be considered as incorporated therein. The policy granted by the insurance company, so far as material, was in these terms:

F "Now the company agrees that in consideration of the payment to the company of the amount above designated 'first premium', and subject to the terms, exceptions, conditions, and memoranda herein contained or indorsed or otherwise expressed hereon, all of which are to be read as part of the policy and shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the insured to recover hereunder in the event of any of the said contingencies happening within the period from Apr. 13, 1949 to four o'clock in the afternoon of Apr. 13, 1950 both days inclusive, and during any subsequent period in respect of which the insured shall have paid and the company have accepted payment for the renewal of this policy, the company will by payment reinstatement or repair indemnify the insured against loss, damage, and liability as set out in the schedule hereto."

H The schedule, in the part which dealt with contents, covers loss or damage to household goods and personal effects other than certain ones excluded under condition 2,

I "including cash, Treasury notes, and bank notes to an amount not exceeding £25, or 5% (five per cent.) of the full value of the contents as herein declared, whichever is the less . . . The total value of gold and silver articles, jewellery, and furs shall be deemed not to exceed one-third of the full value of the contents as above declared, unless specially agreed herein."

On Feb. 21, 1953, a burglary took place at Westville Bungalow, and goods estimated by the assessor and the insurance company to be worth £530 5s. in respect of jewellery, £26 17s. 6d. in respect of personal effects, and £56 in respect of cash were stolen. These figures were agreed by the claimant. The insurance company did not repudiate the policy but repudiated the claim made by the claimant on the grounds that there was a material mis-statement or non-

disclosure in the proposal form relating to the value of the contents. The insurance company's assessor valued the contents at the date of the burglary at some £2,000 and the claimant agreed the figure. As appeared from the claim form, dated Mar. 4, 1953, every item therein mentioned was acquired by the claimant or members of his household long before the completion of the proposal form. A

It was admitted before the arbitrator by counsel for the claimant that the insurance company could have repudiated the policy on the ground of misrepresentation or non-disclosure of a material fact by the claimant, and it was agreed that the insurance company had not repudiated the policy but only the claim. B
The question stated by the arbitrator for the consideration of the court was whether the insurance company was entitled to repudiate the claim while affirming the policy.

LORD GODDARD, C.J., held that the insurance company was not so entitled. C
The insurance company was not represented at the hearing before the Lord Chief Justice.

B. H. Gerrard for the insurance company.

I. D. L. Glidewell for the assured.

SINGLETON, L.J., stated the facts and continued: Before the arbitrator D
the insurance company took up the position that they did not repudiate the policy, as they might have done; they recognised the policy as a policy in force, but they declined to pay a claim under that policy. In this court counsel submitted that the insurance company were entitled to repudiate the claim because the proposal was the basis of the contract, and there was a material under-statement in the proposal form. He added that the insurance company had not E
repudiated the policy. That submission led ROMER, L.J., to ask him whether he was relying on any particular condition in the policy, and counsel replied that he was merely relying on the general principle that a claim could be repudiated when the proposal form contained a material under-statement or a material non-disclosure. In other words, there is nothing material in the conditions contained in the policy; but the submission is that although the policy appears to give an F
indemnity to the assured, and although it is recognised as good, the insurance company need not pay a claim under that policy.

A case may arise in which an insurance company can refuse to pay a particular claim, if, for example, the goods or the jewellery in the house do not belong to a person whose goods are covered by the policy; but nothing of that sort arises here. The insurance company's case is that this proposal form contained an G
under-statement of the value of the goods; that it is the basis of the contract, and that, therefore, the insurance company are entitled to say that they will not pay a claim. In my judgment, they are not entitled to adopt that attitude if they recognise the policy as a good policy and one in force at the material time. They might, as the Lord Chief Justice said, have repudiated the policy. I do not know whether they would have succeeded, although there is a considerable H
difference in the amounts. They did not endeavour, however, to repudiate the policy and it remained in force. I do not know the reason for the course which they have adopted. It may be that the insurance company does not wish it to be said that they repudiated the policy because of an under-statement of the value of the goods in the house; but if they do not wish that to be said and so accept the policy as good, they cannot be heard to say that the claim made I
under the agreement contained in the policy is bad for a reason which would have enabled them to repudiate the policy.

The Lord Chief Justice had before him only the argument of one side. His judgment on this point seems to me to cover the whole case, and I am content to say that I agree with it, and that the appeal should be dismissed.

HODSON, L.J.: I also agree with the judgment of the Lord Chief Justice. The claim falls within the clear terms of the policy, and the insurance company

- A cannot repudiate the claim without repudiating the policy. It is quite true the basis of the contract of insurance was the proposal made by the assured, and that proposal contained a considerable under-valuation of the contents of the house. It was agreed between the parties that, in view of that under-valuation, it was open to the insurance company to repudiate the contract altogether. That they did not do; they did not take advantage of the fact that the contract
- B had lost its basis, but proceeded on the footing that the basis remained, and in those circumstances, in my judgment, they cannot resist this claim.

ROMER, L.J.: I agree. I would only add for my part that I share the distaste with which the Lord Chief Justice regarded policies of this kind, which entitle an insurance company to repudiate all obligations under the policy if it

C turns out that the assured has under-valued, which he might very well do by mistake, the property which is the subject of the cover.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Shaw, Smith & Co.*, Manchester (for the insurance company); *Robbins, Olivey & Lake* (for the assured).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

D

TRICKERS (CONFECTIONERS), LTD. v. BARNES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Gorman, JJ.), March 10, 1955.]

- E *Weights and Measures—Bread—Weight—Ascertainment of deficiency—“Inconsiderable variation”—Wrapped sliced loaf—Deficiency due to person outside control of defendant—Bread Order, 1953 (S.I. 1953 No. 1283), art. 2, art. 3 (1), (2), (a) (b).*

The appellants were the occupiers of a shop where they sold bread baked by persons over whom they had no control. Some of the bread was sliced and wrapped. Twenty-four of the loaves displayed for sale in the shop which purported to be fourteen ounce loaves were weighed and all were found deficient in weight. In ascertaining the deficiency of the wrapped sliced bread the weight of the wrapping was not taken into account. Seven summonses were taken out, each in respect of a single loaf and charging the appellants with having in their possession for sale a loaf deficient in weight, contrary to the Bread Order, 1953, art. 3 (1), the deficiency in weight varying between eight and ten drams. The appellants contended (i) that art. 3 (1) of the Bread Order, 1953, did not apply to a deficiency in weight of a single loaf of bread, and that, if proceedings were to be taken a number of loaves should be weighed, the average should be taken and a single summons should be issued; (ii) that the variations in the present case were not considerable; and (iii) that the deficiency was due to the action of some person over whom they had no control, namely, the baker. The appellants were convicted on all summonses. On appeal,

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Held: (i) it was only if an inconsiderable variation were found in the weight of a single loaf that art. 3 (2) (a) of the order of 1953 made it necessary to have regard to the average weight of a number of loaves and as, in the present case, the variation in weight of each loaf was not inconsiderable, there could have been a conviction in respect of each single loaf; but the deficiency in weight was in fact due to the action of a person over whom the appellants had no control, within the terms of art. 3 (2) (b) of the order of 1953, and accordingly the conviction should be quashed.

I

M'Intyre & Son v. Laird (1943 S.C. (J.) 97) followed.

(ii) even if the conviction had not been quashed on the ground stated above, the weight of the wrapping of a wrapped sliced loaf should have been taken into account, on the true construction of art. 3 (1) of the order

of 1953, in determining whether there had been a deficiency in weight of a wrapped sliced loaf.

Appeal allowed.

[**Editorial Note.** The Bread Order, 1953, S.I. 1953 No. 1283, has been amended in a manner not material to the decision in the present case by the Bread (Amendment) Order, 1955, S.I. 1955 No. 221. During the continuance of the Bread Order, 1953, s. 6 (2) (3) of the Sale of Food (Weights and Measures) Act, 1926, do not have effect (see art. 3 (4) of the order of 1953). The Bread Order, 1953, is continued in force until Dec. 10, 1955, by virtue of the Supplies and Services (Continuance) Order, 1954, S.I. 1954 No. 1559.

For the Sale of Food (Weights and Measures) Act, 1926, s. 6, see 26 HALSBURY'S STATUTES (2nd Edn.) 1297.]

Cases referred to:

- (1) *M'Intyre & Son v. Laird*, 1943 S.C. (J.) 97; 2nd Digest Supp.
- (2) *Whittaker v. Collings*, (1938), unreported.

Case Stated.

This was a Case Stated by the stipendiary magistrate for the City of Cardiff in respect of his adjudication at a magistrates' court at Cardiff. On Aug. 30, 1954, at a court of summary jurisdiction an information was preferred by the respondent, Clifford Stroud Barnes, chief inspector of weights and measures, against the appellants, Trickers (Confectioners), Ltd., that on July 28, 1954, they had in their possession for sale a certain loaf or roll of bread its weight not being fourteen ounces or a multiple of fourteen ounces, viz., ten drams deficient of fourteen ounces contrary to art. 3 (1) of the Bread Order, 1953. On the same day six further informations in similar terms were also preferred of which two alleged that two other fourteen ounce loaves were each ten drams deficient, one fourteen ounce loaf was nine drams deficient, and three other fourteen ounce loaves were each eight drams deficient. The informations were heard on Oct. 20, 1954, and the magistrate found the following facts. The appellants were the occupiers of a retail shop where they sold bread, cakes and confectionery. On July 28, 1954, at 7.30 a.m. a bakery delivered 228 loaves of which 102 loaves purported to be fourteen ounce loaves. The manageress did not carry out her usual routine of weighing a number of specimen loaves on account of the rush of customers. At 11.15 a.m. on the said date a duly appointed and qualified inspector of weights and measures entered the shop and weighed twenty-four of the fourteen ounce loaves which were then in the shop for the purpose of sale. Six were wholemeal, eleven were wrapped and sliced wholemeal, seven were wrapped and sliced white loaves, and all loaves were found to be deficient in weight. The deficiency in weight for the six wholemeal loaves averaged twelve drams per loaf; for the eleven wrapped sliced wholemeal loaves the average deficiency was $7\frac{1}{2}$ drams per loaf; for the seven wrapped sliced white loaves the average deficiency was eleven drams. The weight of the wrappers, which was $3\frac{1}{2}$ drams for each wholemeal, and four drams for each white loaf, was not included in the weight of the wrapped bread. The appellants had no control over the baking of the bread.

It was contended by the appellants: (i) Article 3 of the order did not apply to a deficiency in weight of a single loaf of bread. The article provided for the standardisation of an integral weight for bread and if proceedings were to be taken under the article a number of loaves should be weighed and the average taken and a single summons issued. The order in effect replaced s. 6 (2) of the Sale of Food (Weights and Measures) Act, 1926, except that the integral weight was now fourteen ounces and not one pound and proceedings for sale of a single loaf deficient in weight could and should be taken under s. 1 of that Act. The appellants' contention was confirmed by art. 3 (2) (a) of the order which directed the court to disregard any inconsiderable variations in weight. (ii) Even if art. 3 of the order were applicable to those proceedings, the seven informations should

A be dismissed having regard to the provisions of art. 3 (2) (a) as the variations in the present case were not considerable. (iii) Having regard to art. 3 (3) (b) of the order, the appellants were entitled to be discharged from the prosecution as the deficiencies were due to the action of some person over whom the appellants had no control, to wit, the bakers. It would be unreasonable and impracticable to expect retailers to weigh all bread received by them from bakers and if retailers
B had to weigh bread received by them it would cause retailers to cease to sell bread as it would not be worth the trouble involved. Further, in admitting that he would only expect retailers to weigh one loaf in every six or eight, the respondent was admitting that art. 3 of the order did not apply to single loaves, as a check of one in eight might well disclose one loaf of correct weight and not reveal seven deficient, or vice versa, and such weighing is not necessary on the true construction
C of art. 3 (2) (b) if the deficiency was proved to be due to the action of some person over whom the appellants had no control and had occurred in spite of all reasonable precautions being taken and all due diligence exercised by the appellants.

It was contended by the respondent: (i) The seven informations were laid against the appellants in respect of seven loaves, on the ground that each of these loaves was less than fourteen ounces in weight contrary to the provisions of
D art. 3 (1) of the order. The order of 1953 replaced s. 6 (2), (3) of the Sale of Food (Weights and Measures) Act, 1926, and a distinction could be drawn between the provisions of s. 6 and s. 1 of that Act in that under s. 1 the bread had to be sold, whereas under s. 6 (2) it was sufficient for the bread to be in the possession of the retailer for sale. If s. 1 were the only method by which the weights and measures inspectors could verify the weight of bread and prosecute offenders
E the Act would become unworkable, in that the inspectors would be forced to buy a large number of loaves in order to get a fair average, whereas under s. 6 of the Act, and under that section as amended by the order*, the inspectors had the right to enter a shop and weigh loaves of bread at random without buying them. (ii) Section 6 (2), (3) related to deficiencies in the weight of bread and therefore the order which had now been substituted for s. 6 (2), (3) also related to deficiencies
F and did not merely prescribe an integral weight for the size of the loaves. The deficiencies found showed considerable variation amongst the loaves weighed and the retailer had had ample time between 7.30 a.m. when the loaves were delivered and the inspection at 11.15 a.m. to have weighed some of the loaves. (iii) The appellants had not endeavoured to prove to the satisfaction of the court, in accordance with art. 3 (2) (b) of the order, that the deficiency was due to a bona
G fide mistake or accident, or to other causes beyond their control, and, in the absence of such evidence, the appellants could not rely on due diligence having been exercised.

The magistrate was of opinion that (a) The effect of the Bread Order, 1953, was not limited to prescribing integral weights for loaves generally, but an information in respect of an alleged deficiency of weight in a single loaf might
H properly be laid thereunder, since art. 3 (2) (b) of the order expressly referred only to such deficiency, in contrast with art. 3 (2) (a) which referred to a variation, presumably to include a surplus. (b) He had to interpret art. 3 (1) of the order in the light of the cases relating to the interpretation and effect of s. 6 of the Sale of Food (Weights and Measures) Act, 1926, since the order suspended the operation of s. 6 (2) and (3) of the Act and substituted the provisions of art. 5 of the
I order, and accordingly he was not permitted to follow or apply the reasoning of the High Court of Justiciary in *M'Intyre & Son v. Laird* (1). (c) Seven of the deficiencies proved corresponded to the deficiencies alleged in the seven informations, and as it was not possible to disregard any of these deficiencies as an inconsiderable variation of a single loaf, no question arose regarding the average

* Section 6 (4) of the Sale of Food (Weights and Measures) Act, 1926, 26 HALSBURY'S STATUTES (2nd Edn.) 1298, confers on purchasers and inspectors the right to have bread weighed in their presence; the sub-section is unaffected by the Bread Order, 1953, which supersedes only sub-ss. (2) and (3) of the section.

weight of a reasonable number of other loaves. The weight of the wrapper should be excluded in weighing a wrapped loaf. (d) There was no evidence of a bona fide mistake or accident, and, in so far as any such deficiency was due to other causes beyond the appellants' control, the appellants had not proved to his satisfaction either that they had taken all reasonable precautions or that they had exercised all due diligence. (e) The appellants had not proved to his satisfaction that any such deficiency was due to the action of some person over whom they had no control, as the presence of some deficiencies could and should have been detected by the manageress, thereby giving her warning and enabling her to put all deficient loaves on one side, had she carried out the routine which she admitted was her usual practice.

Accordingly the magistrate convicted the appellants on each of the seven informations and fined them 10s. on each and ordered them to pay half a guinea costs on each.

S. H. Noakes for the appellants.

A. P. Roberts for the respondent.

LORD GODDARD, C.J.: Article 3 (1) of the Bread Order, 1953, provides:

"No person shall sell or have in his possession for sale any loaf or roll of bread (including any bap) unless its weight is fourteen ounces or a multiple of fourteen ounces or is ten ounces or less."

Article 3 (2) provides:

"Where in any proceedings a person is charged with a contravention of this article in respect of the weight of any bread (a) the court shall disregard any inconsiderable variation in the weight of a single loaf or roll of bread, and shall have regard to the average weight of a reasonable number of loaves or rolls of the same kind (if any) sold by the person so charged, or in his possession for the purpose of sale, on the same occasion, and generally to all the circumstances of the case."

The first point which arises is whether the magistrate was right in convicting with regard to individual single loaves of bread. The answer, in my opinion, is "Yes"; because, taking the first information as an example, it was found that the particular loaf of bread was deficient by ten drams. Ten drams is over half an ounce, and the learned magistrate has held that he cannot regard that as an "inconsiderable variation". If it were a matter for this court I should agree with him. Only "an inconsiderable variation in the weight of a single loaf . . . of bread" can be disregarded, and the court must then have regard to the average weight of a reasonable number of loaves. In other words, if you find a loaf which has some small variation, say two or three drams, then you weigh many other loaves and see whether they all vary or whether it just so happens that the first loaf was what I may call "the luck of the draw". I think that the magistrate in the present case was entitled, subject to what I am going to say with regard to another point, to convict on individual loaves.

Another point has arisen in the present case, on which we ought to express an opinion. In considering whether or not there was an inconsiderable variation, the magistrate had to consider wrapped sliced loaves, that is to say, loaves which have been cut into slices and wrapped in paper; and in considering whether there was a deficiency in weight in those loaves he ignored the wrapping. I think, with respect to the learned stipendiary, that that is wrong, for the reason that in the order, which now [by art. 3 (4)] takes the place of s. 6 (2) and (3) of the Sale of Food (Weights and Measures) Act, 1926, the expression "net weight" no longer appears. "Net", of course, would rule out any question of wrapping. By art. 2 of the order "loaf" includes "wrapped sliced bread", and therefore when art. 3 (1) says:

"No person shall sell or have in his possession for sale any loaf . . . unless its weight is fourteen ounces . . ."

A you must read:

“No person shall sell or have in his possession for sale any wrapped sliced bread . . . unless its weight is fourteen ounces . . .”

B Wrapped sliced bread is sold in that way to avoid handling, and I have no doubt that the authorities would like to encourage the wrapping of bread because it tends to eliminate the chances of infection. If either the inspector when he comes, or the retailer when he receives it from his wholesaler, unwraps the bread, the object of wrapping sliced bread goes by the board. That is recognised by the department which is entrusted with legislating on this matter by statutory instrument, because they have omitted from this order the word “net” which appeared in s. 6 (2) of the Act. Therefore, if we took a different view on the third point, to which I am coming, we should have had to send the Case back to the magistrate for him to re-consider at any rate those cases where the informations referred to wrapped sliced bread.

C There is, however, another point taken by counsel for the appellant which seems to me to be unanswerable. Article 3 (2) (b) of the order says:

D “if the person so charged proves to the satisfaction of the court that such deficiency was due to a bona fide mistake or accident, or to other causes beyond his control, and that it occurred in spite of all reasonable precautions being taken and all due diligence being exercised by him to prevent its occurrence, or that it was due to the action of some person over whom he had no control, the person so charged shall be discharged from the prosecution.”

E It seems to me clear, when you recognise that the words

“or that it was due to the action of some person over whom he had no control”,

F are entirely disjunctive, and that “it” relates to the deficiency. If the deficiency is due to a bona fide mistake or to other causes beyond the control of the person charged, then he has to show that he took all reasonable precautions and used due diligence. If it is due to the action of some person over whom he has no control, he does not have to show those things. That was the view taken by the High Court of Justiciary in *M'Intyre & Son v. Laird* (1), and there seems to be an unreported case in England, *Whittaker v. Collings* (2), on which their Lordships relied, although we have only the Case and the indorsement on it with the result. In any case, if there is a decision of the High Court of Justiciary which deals with these matters on the other side of the Border, we in this court always try to decide in the same way. It would be undesirable if bakers on one side of the Border could do a thing and bakers on the other side of the Border could not. It seems to me that the decision in *M'Intyre & Son v. Laird* (1) is precisely in point. The Lord Justice-Clerk, LORD COOPER, said (1943 S.C. (J.) at p. 104):

H “Further, in view of the finding that the appellants had no connection with the manufacturers of the loaves except as purchasers from them, and that they had no control over the actions of these manufacturers in the baking of the loaves, I am unable to understand the later finding that the appellants did not exercise due diligence to prevent the occurrence of the deficiency in weight, or the further finding that the deficiency in weight was not due to a cause beyond the control of the appellants. Indeed, the case of *Whittaker v. Collings* (2) shows that, if the present case were to be disposed of on the basis adopted by the English courts, the conviction could not stand, for it was held in that case that s. 12 (2) [of the Sale of Food (Weights and Measures) Act, 1926] was satisfied by a finding that the retailer had no control over the baking of bread.”

I It seems to me that their Lordships had the advantage of a fuller report of *Whittaker v. Collings* (2) than we have. I think we ought to decide in the same

way so as to keep the decisions in line. That ground alone would be enough to upset the conviction. The consequence is that the appeal must be allowed and the conviction quashed. A

ORMEROD, J.: I agree.

GORMAN, J.: I agree.

Appeal allowed. B

Solicitors: *Rhys Roberts & Co.*, agents for *Hornby, Baker, Jones & Wood*, Newport (for the appellants); *Theodore Goddard & Co.*, agents for Town clerk, Cardiff (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.] C

MASON v. WILLIAMS AND WILLIAMS, LTD. AND THOMAS TURTON & SONS, LTD. D

[CHESTER WINTER ASSIZES (Finnemore, J.), February 14, 1955.]

Master and Servant—Liability of master—Accident to servant—Tools bought from reputable manufacturers—Latent defect—Whether duty to examine tools—Dangerous goods—Negligence—Liability of manufacturers—Tools supplied for use in trade—Burden of proof. E

The plaintiff's eye was injured by a splinter of metal which flew off a cold chisel which he was using at his work; the cause of the accident was that the head of the chisel was dangerously hard. The chisel had been manufactured by the second defendants and had been supplied by them direct to the plaintiff's employers, the first defendants, who had issued it to the plaintiff. The chisel was a new one when issued to the plaintiff two or three weeks before the accident, and was not examined by the employers either before being issued to him or subsequently after use. In an action for damages for personal injuries to the plaintiff caused by the negligence of the first defendants or the second defendants or both, F

Held: (i) an employer who buys tools from a reputable manufacturer to be put to uses for which the tools are intended by the manufacturer is not under a duty either to examine the tools before issuing them to employees or to institute frequent inspections of tools after use, unless there is something which suggests that the tools are defective; and, accordingly, the plaintiff had not proved negligence on the part of his employers. G

(ii) the plaintiff, having established that the chisel came direct from the manufacturers and having shown that the excessive hardness had not been produced at his employers' factory, had discharged the burden of proving negligence on the part of the manufacturers and was entitled to recover damages against them. H

[As to the Liability of the Manufacturer of Dangerous Goods, see 23 HALSBURY'S LAWS (2nd Edn.) 632, para. 887; and for cases on the subject, see 36 DIGEST (Repl.) 85-88, 455-470.]

As to the Duty of an Employer to Inspect Equipment, see 22 HALSBURY'S LAWS (2nd Edn.) 189, para. 317; and for cases on the subject, see 34 DIGEST 197, 198, 1618-1621.] I

Case referred to:

- (1) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

Action.

The plaintiff sued the first defendants for damages for personal injury caused to the plaintiff by the negligence of the first defendants. The second defendants

A were brought in by third-party proceedings and subsequently were added as defendants. The facts appear in the judgment.

D. Pennant for the plaintiff.

N. G. L. Richards for the first defendants.

W. L. Mars-Jones for the second defendants.

B **FINNEMORE, J.:** This case has taken some considerable time and it has raised some important issues, especially questions of fact which have not been at all easy to decide.

On Apr. 7, 1953, Albert Mason, the plaintiff, using a cold chisel supplied by the first defendants, his employers, and made by the second defendants, the manufacturers, was injured when a bit of the chisel flew off striking him in the eye, and the eye subsequently had to be removed. Nobody suggests that the plaintiff did anything wrong or was in any way negligent. Certainly there is no evidence that he was, and he was working in the ordinary way and he had no reason to suppose that the chisel provided for him was other than a proper chisel. It was suggested that he should have worn goggles, and as against that it was said that in doing that work one did not normally wear goggles. The head of this chisel was in fact dangerously hard. There was some question at one time whether the bit which flew off was from the chisel or from the hammer, which, of course, was also hard; but that would not matter because it is the hardness of the chisel which is the unexpected and wrong thing. Hammers should be hard, and even if this hammer had been harder than usual nothing would have happened if it had been used on the ordinary soft-headed chisel. Further, on the evidence of the witnesses, it seems quite plain that the bit which flew off was in fact from the chisel head, and evidence was given that that was seen by at least one witness immediately after the accident. The real case is whether the first named defendants, the man's employers, or the second named defendants, the manufacturers of the chisel, are responsible.

I will deal first with the question of examination. Counsel for the manufacturers said that it would not be obvious that there was anything wrong with the head of the chisel when it was taken into stores, but he argues that after it had been used for some time, the way in which the head lost pieces would have been obvious on inspection and would have shown that there was something wrong. I take the view that employers, if they buy reputable tools from reputable manufacturers, are not bound to make an examination, either before issuing a tool or after it has been in use for days or weeks or even months, unless there is something which suggests that there is something wrong. Employers have to act as reasonable people and take reasonable care, but if they buy their tools from well-known makers, such as the manufacturers in this case are, they are entitled to assume that the tools will be proper for the purpose for which both sides intended them to be used, and will not require daily, weekly or monthly inspection to see that in fact all is well. I think, therefore, there is no point that becomes material to be laid against the employers that they did not in fact examine this chisel after it had been put into use, nor do I think there will be anything, therefore, in the argument which might have been laid that the manufacturers in putting this chisel into circulation, did so with the reasonable expectation that there would be an intermediate examination. I am quite sure they expected no such thing, and they would be probably rather affronted at the mere suggestion.

I. Now, how did this chisel head get too hard? There are two theories put forward. The manufacturers say that it must have been done in the factory of the employers, that this was an old chisel which must have left their premises before some date in 1948, that it had been in use for a long time, and whether long or short it had been reconditioned in the employers' factory. They say: "The state of the head is due to what one of their people did, and not to anything which we did before we sent it". The employers turn the argument round the

other way and say: "We never touched that chisel at all; we never applied any heat to it of any kind, and therefore as we did not heat it or quench it we could not have affected in any way the hardness of it after we received it from the manufacturers". That, I think, is what this case now really comes to. A

[His LORDSHIP reviewed the evidence and continued:] Doing the best I can, giving full weight to the technical evidence on all three sides, and to the witnesses whom I saw and heard, I am satisfied that this was a new chisel which had been taken out of stores two or three weeks before; and that it had been used by the plaintiff as it had come from the manufacturers, and had chipped before anything at all had been done to it in the employers' factory. B

I appreciate that I am faced with another problem, as was indicated in the case of *M'Alister (or Donoghue) v. Stevenson* (1), that *res ipsa loquitur* does not apply and that the court has to be satisfied, and therefore the plaintiff has got to prove, that there was negligence on the part of the manufacturers. Of course that cannot be proved normally by saying that on such and such a date such and such a workman did this, that or the other. I think that when you have eliminated anything happening in this case at the employers' factory, whither, as is undisputed, this chisel came direct from the manufacturers—and when it came from the manufacturers the head was too hard, and that undue hardness could have been produced only while it was being manufactured by them, and could have been produced by someone there either carelessly or deliberately to make a harder and more durable head—that is really as far as any plaintiff can be expected to take his case. What the plaintiff says here is:—"This is your chisel, you made it and I used it as you made it, in the condition in which you made it, in the way you intended me to use it, and you never relied on any intermediate examination; therefore I have discharged the onus of proof by saying that this trouble must have happened through some act in the manufacture of this chisel in your factory, and that was either careless or deliberate, and in either event it was a breach of duty towards me, a person whom you contemplated would use this article which you made, in the way you intended it to be used." He is entitled to succeed against the manufacturers. C D E

I come to the question of damages. The plaintiff has lost his eye and has been somewhat troubled with watering since his artificial eye has been inserted, and while he will always be a one-eyed man there are many one-eyed men about the world who are able to do useful work. When one loses one's eye comparatively late in life, of course it takes time to get adjusted. There are certain, maybe fine, movements to which one would never be fully accustomed, but broadly and substantially a man who has lost an eye, within a reasonable time for all effective and normal purposes, becomes as good as a man with two eyes. On the other hand he has to carry with him no slight risk that if an accident does happen again it may destroy his remaining eye, and then he is completely blind. That is a matter to which the court have to pay attention as well. Taking into account his present loss of earnings which may continue for some time, but which I do not think is likely to be permanent, I award him £1,900 general damages, and there are agreed special damages of £59. F

Judgment for the plaintiff against the second defendants.

Solicitors: *Rowley, Ashworth & Co.*, Manchester (for the plaintiff); *Laces & Co.*, Liverpool (for the first defendants); *Neal, Scorah, Siddons & Co.*, Sheffield (for the second defendants). G H

[Reported by SEYS LLEWELLYN, Esq., Barrister-at-Law.]

A **WELCH v. BANK OF ENGLAND (FRANCIS & PRAED AND OTHERS, Third Parties).**

[CHANCERY DIVISION (Harman, J.), January 20, 21, 24, 25, 26, 27, 28, February 1, 24, March 4, 7, 8, 1955.]

B *Bank—Bank of England—Register of securities—Removal of name—Bank acting on forged transfers—Forgery by one of two joint tenants of stock—Liability of bank to second joint tenant—Necessity to join transferees of stock—Negligence of second joint tenant—Limitation of action—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 2 and s. 21 (1), since repealed.*

C *Bank—Duty of customer—Negligence of customer—Availability as defence by bank—Estoppel—Ratification of forged signature—Government Stock Regulations, 1943 (S.R. & O. 1943 No. 1), reg. 9 (b).*

Public Authority—Limitation of action—Bank of England—Register of securities—"Person"—Act done in intended execution of an Act of Parliament—Removal of name from register—Refusal to restore—Date from which time runs—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 21 (1), since repealed.

D The plaintiff and H.W.M. were the trustees of a settlement and were registered as joint holders of £10,002 four per cent. consolidated stock which formed part of the settled funds. By forging the plaintiff's signature to seven deeds of transfer and to other documents, H.W.M. disposed of the consolidated stock for his own purposes. The Bank of England accepted the transfers as genuine and altered the register accordingly. H.W.M. having died, the plaintiff brought an action against the bank for an order that her name be restored to the register as the holder of £10,002 four per cent. consolidated stock. In order to obtain possession of the stock or the proceeds of sale for his own purposes, H.W.M. had carried out seven separate transactions falling into three categories as follows: (a) He sold to a purchaser by means of a transfer bearing his own and the plaintiff's signatures (the plaintiff's signature having been forged by H.W.M.), and the purchasers drew a cheque in favour of both trustees. H.W.M. indorsed the cheque with his own and the plaintiff's signatures and attempted to pay it into his private account. The bank into which he attempted to pay the cheque telegraphed to the plaintiff for confirmation of her signature. The plaintiff telegraphed in reply: "I agree what H.W.M. wishes done," and the amount of the cheque was credited to H.W.M.'s private account. (b) H.W.M. sold stock to a purchaser by means of a transfer to which he forged the plaintiff's signature. He produced a forged authority from the plaintiff to enable the proceeds to be paid to him alone, and the purchase price was paid in compliance with it. (c) H.W.M. forged the plaintiff's signature to transfers and the proceeds were paid into the trust banking account standing in the joint names of both trustees. On the following day, H.W.M. withdrew the proceeds by means of cheques which had been signed in blank and which were intended to enable H.W.M. to withdraw income.

E None of the plaintiff's signatures appearing on the relevant documents (apart from those on the blank cheques) was genuine, and she had not authorised the signatures to be made. The transaction in category (a) and one transaction in category (b) took place more than six years before the action was brought, and all transactions took place more than one year before the action was brought; but the action was brought within a year after the refusal of the Bank of England to restore the plaintiff's name to the register.

I **Held:** (i) as the stock had been standing in the plaintiff's name, though jointly with that of H.W.M., she had a prima facie right in equity to have corrected on equitable terms an error in the registration of the joint holding, resulting from the forged transfers which were a nullity, without joining the transferees of the stock (*Davis v. Bank of England* (1824) (2 Bing. 393),

Barton v. London & North Western Ry. Co. (1888) (38 Ch.D. 144) and *Sloman v. Bank of England* (1845) (14 Sim. 475) followed); and the fact that the plaintiff and H.W.M. had been joint tenants of the stock did not place the plaintiff in the same position as H.W.M. vis-à-vis the bank (*Brewer v. Westminster Bank, Ltd.* ([1952] 2 All E.R. 650) not applied).

(ii) although the plaintiff was in the relationship of a customer to the bank and owed to the bank a duty accordingly, no negligence on the part of the plaintiff could disentitle her to relief unless either her conduct was such as to give rise to an estoppel or amounted to a ratification of H.W.M.'s conduct, and the loss must be a direct result of the negligence: *Young v. Grote* (1827) (4 Bing. 253), *Swan v. North British Australasian Co.* (1863) (2 H. & C. 175), and *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (1855) (5 H.L. Cas. 389) applied: accordingly the plaintiff must be taken to have received the proceeds of the transaction falling in category (a) because she had ratified H.W.M.'s conduct, and to have received the proceeds of the transactions falling within category (c), and in the latter transactions the plaintiff's negligence in signing the blank cheques was the direct cause of the loss; and, therefore, as regards the stock which was the subject of the transactions in categories (a) and (c), her claim failed; but as regards the transactions in category (b), the plaintiff's conduct neither gave rise to estoppel nor amounted to ratification, a direct cause of the loss being H.W.M.'s forgery, and, therefore, in respect of the stock the subject of these transactions the plaintiff was entitled to an order on the bank to procure her name to be registered in the books as owner of an equivalent amount of stock and to payment of dividends lost to her in respect of the stock which was the subject of these transactions.

(iii) on the facts, the plaintiff was not negligent in not warning the bank after she was made aware (in connection with the transaction in category (a) by the telegraphed inquiry) that H.W.M. had indorsed her name on a cheque; and it was not her duty to act as a watchdog over H.W.M. by watching the bank pass-book, nor was it negligent of her to permit him to be in possession of the stock certificates.

Cottam v. Eastern Counties Ry. Co. (1860) (1 John. & H. 243) applied.

(iv) it was not shown by the evidence that the notices which might have been sent to the plaintiff by the bank on each transfer of stock pursuant to the Government Stock Regulations, 1943, reg. 9 (b), were received by the plaintiff or even sent by the bank, but, even if receipt had been proved, that would constitute no defence for the bank by way of estoppel.

Barton v. London & North Western Ry. Co. (1889) (24 Q.B.D. 77) applied.

(v) the bank was a person within the Limitation Act, 1939, s. 21 (1) (which dealt with the limitation of actions against public authorities), and was not (having regard to the Bank of England Act, 1946) as now constituted a profit-making company (*A.-G. v. Margate Pier & Harbour (Company of Proprietors)* ([1900] 1 Ch. 749) considered): and, as the keeping of the register and the removal of the plaintiff's name from the register were acts done by the bank directly in intended execution of an Act of Parliament, viz., the Finance Act, 1942, s. 47, the bank was within the terms of s. 21 (1) of the Act of 1939; but time did not run against the plaintiff until the bank refused to restore the plaintiff's name to the register, and, on the facts, therefore, the action was not barred by lapse of time.

Barton v. North Staffordshire Ry. Co. (1888) (38 Ch.D. 458) applied.

(vi) similarly, as a forged transfer was a nullity, s. 2 of the Act of 1939 was no bar to the plaintiff's action in respect of the removal of her name from the register following one of the transactions more than six years before the action was brought.

A *Costs—Third party—Indemnification of defendant—Plaintiff succeeding on some issues and failing on others—Scale of costs to be paid by third party—Liability of third party not appearing.*

The plaintiff brought an action against the Bank of England claiming to have her name restored to the register of securities in respect of a holding of consolidated stock the transfer of which had been registered by the bank on a series of seven forged transfers. The bank joined and claimed indemnity from five third parties on the ground that in respect of some one or more of the transactions each third party had presented to the bank forged transfers. All the third parties appeared except J. Bros., and denied, until the hearing began, that they were liable to indemnify the bank. The plaintiff succeeded in respect of three of the seven transactions and the bank was ordered to pay four-fifths of the plaintiff's costs. In respect of the transactions as regards which the plaintiff succeeded, two of the third parties, A.T. & Co. and M.H. & Co., were ultimately responsible, and it was agreed that they must indemnify the bank against the cost of replacing the appropriate amount of stock. On the question of the liability of each of the third parties for costs,

D **Held:** (i) the four-fifths of the plaintiff's costs which the bank was ordered to pay must, when taxed, be recouped to the bank by A.T. & Co. and M.H. & Co., who would be jointly and severally liable for them.

E (ii) the bank's costs of the action must be borne by the four third parties who appeared, subject to the limitation that they ought not to be liable for more than they would have had to pay if the action had been against them severally; and, therefore, one-fifth of those costs, taxed as between solicitor and client (and not on an indemnity basis), must be borne by each of them.

F (iii) the bank's costs of the third-party proceedings taxed as between party and party, must be borne by the third parties except J. Bros., whose liability would be limited to such costs as they would have had to pay on a motion for judgment in default of defence.

[As to Transfers of Government Stock in the Books of the Bank of England, see 2 HALSBURY'S LAWS (3rd Edn.) 153, para. 281; and for cases on the subject, see 3 DIGEST 123-126, 3-25.

G As to Duty of Customer and Ratification of forged Signature, see 2 HALSBURY'S LAWS (3rd Edn.) 206, para. 382; and for cases on the subject, see 3 DIGEST 168-173, 272-298.

For the Limitation Act, 1939, s. 21, see 13 HALSBURY'S STATUTES (2nd Edn.) 1180.]

Cases referred to:

- H** (1) *Davis v. Bank of England*, (1824), 2 Bing. 393; 3 L.J.O.S.C.P. 4; 130 E.R. 357; *reversd. on another point* sub nom. *Bank of England v. Davis*, (1826), 5 B. & C. 185; 3 Digest 124, 17.
- (2) *Battley v. Faulkner*, (1820), 3 B. & Ald. 288; 106 E.R. 668; 32 Digest 328, 143.
- (3) *Short v. M'Carthy*, (1820), 3 B. & Ald. 626; 106 E.R. 789; 32 Digest 342, 249.
- I** (4) *Brown v. Howard*, (1820), 2 Brod. & Bing. 73 (129 E.R. 885); 4 Moore, C.P. 508; 32 Digest 335, 197.
- (5) *Barton v. North Staffordshire Ry. Co.*, (1888), 38 Ch.D. 458; 57 L.J.Ch. 800; 58 L.T. 549; 10 Digest 1143, 8083.
- (6) *Coles v. Bank of England*, (1839), 10 Ad. & El. 437; 9 L.J.Q.B. 36; 113 E.R. 166; 3 Digest 126, 25.
- (7) *Brewer v. Westminster Bank, Ltd.*, [1952] 2 All E.R. 650; 3rd Digest Supp.

- (8) *Sloman v. Bank of England*, (1845), 14 Sim. 475; 14 L.J.Ch. 226; 5 A L.T.O.S. 326; 60 E.R. 442; 20 Digest 247, 126.
- (9) *Barton v. London & North Western Ry. Co.*, (1888), 38 Ch.D. 144; 57 L.J.Ch. 676; 59 L.T. 122; on appeal C.A., (1889), 24 Q.B.D. 77; 59 L.J.Q.B. 33; 62 L.T. 164; 10 Digest 1144, 8091.
- (10) *Young v. Grote*, (1827), 4 Bing. 253; 5 L.J.O.S.C.P. 165; 130 E.R. 764; 3 Digest 232, 640.
- (11) *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A.C. 777; 119 L.T. 387; 3 Digest 172, 293.
- (12) *Swan v. North British Australasian Co.*, (1863), 2 H. & C. 175; 32 L.J.Ex. 273; 159 E.R. 73; 21 Digest 291, 1036.
- (13) *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees*, (1855), 5 H.L. Cas. 389; 25 L.T.O.S. 272; 10 E.R. 590; 21 Digest 400, 1605.
- (14) *Cottam v. Eastern Counties Ry. Co.*, (1860), 1 John. & H. 243; 30 L.J.Ch. 217; 3 L.T. 465; 70 E.R. 737; 10 Digest 772, 4831.
- (15) *Goldney v. Bower*, (circa 1828), cited in 30 L.J.Ch. at p. 217; 35 Digest 606, 3437.
- (16) *Midland Ry. Co. v. Taylor*, (1862), 8 H.L. Cas. 751; 31 L.J.Ch. 336; 6 L.T. 73; 11 E.R. 624; 10 Digest 1143, 8082.
- (17) *A.-G. v. Margate Pier & Harbour (Company of Proprietors)*, [1900] 1 Ch. 749; 69 L.J.Ch. 331; 82 L.T. 448; 64 J.P. 405; 10 Digest 1111, 7818.
- (18) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 38 Digest 110, 784.
- (19) *Parker v. London County Council*, [1904] 2 K.B. 501; 73 L.J.K.B. 561; 90 L.T. 415; 68 J.P. 239; 38 Digest 103, 739.
- (20) *Knox v. Gye*, (1872), L.R. 5 H.L. 656; 42 L.J.Ch. 234; 32 Digest 511, 1702.
- (21) *Re Severn & Wye & Severn Bridge Ry. Co.*, [1896] 1 Ch. 559; 65 L.J.Ch. 400; 74 L.T. 219; 32 Digest 493, 1546.
- (22) *Penny v. Pickwick*, (1852), 16 Beav. 246; 51 E.R. 773; 9 Digest 593, 3961.
- (23) *Taylor v. Midland Ry. Co.*, (1860), 28 Beav. 287; 54 E.R. 376; *affd.* H.L. sub nom. *Midland Ry. Co. v. Taylor*, (1862), 8 H.L. Cas. 751; 31 L.J.Ch. 336; 6 L.T. 73; 11 E.R. 624; 36 Digest (Repl.) 508, 735.
- (24) *Cinema Press, Ltd. v. Pictures & Pleasures, Ltd.*, [1945] 1 All E.R. 440; [1945] K.B. 356; 114 L.J.K.B. 368; 172 L.T. 295; 2nd Digest Supp.
- (25) *Sheffield Corpn. v. Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 3 Digest 276, 862.
- (26) *Dugdale v. Lovering*, (1875), L.R. 10 C.P. 196; 44 L.J.C.P. 197; 32 L.T. 155; 26 Digest 223, 1751.

Action.

The plaintiff claimed against the Bank of England (i) a declaration that the plaintiff's name was wrongfully removed by the bank from the register of holders of consolidated stock in respect of a holding of £10,002 four per cent. consolidated stock which had stood in the joint names of the plaintiff and Hubert William Maude as trustees of a settlement; (ii) a declaration that the bank wrongfully refused to restore the plaintiff's name to the said register in respect of the said sum of stock; (iii) an order that the bank rectify the said register by restoring thereto the name of the plaintiff in respect of the said stock and issue to the plaintiff certificates for the said stock and pay to the plaintiff the amount of the dividends accrued or to accrue in respect of the said stock from the dates of the wrongful removals until the date when the name of the plaintiff was restored to the register in respect of the said stock; or, in the alternative, (iv) an order that the bank pay to the plaintiff the value of the said stock together with a sum equal to the amount of the dividends payable thereon from the dates of the said wrongful removals to the date of the order prayed for.

The bank defended the action on the grounds referred to in the judgment, and

A also claimed to be indemnified by five separate third parties who had presented to the bank transfers which were forged. Some of the third parties, in their turn, claimed to be indemnified by fourth parties. Similarly, one of the fourth parties claimed an indemnity against a fifth party.

P. Ingress Bell, Q.C., C. T. B. Leigh and H. A. Kershaw for the plaintiff.

B *Sir Andrew Clark, Q.C., and Peter Foster for the defendant, the Bank of England.*

Leonard Caplan, Q.C., and L. Lewis, Harold Brown, N. N. McKinnon, G. G. Honeyman, S. W. Templeman for third, fourth and fifth parties.

Cur. adv. vult.

Feb. 24. **HARMAN, J.**, read the following judgment: In this action the plaintiff seeks an order on the Bank of England to restore her name to the register as holder of £10,002 four per cent. consolidated stock. The facts are not now in dispute and may be summarised as follows. In 1890 one James Johnston, on the occasion of his marriage to Rebecca Maude, settled certain real estate including in particular his residence, Kinlough House, in the county of Leitrim, to uses under which his wife received a rentcharge and a jointure with remainder, in the events which happened, to the settlor. He died on May 16, 1929, leaving his widow Rebecca him surviving and having made a will whereby she and three other persons became trustees. Under this last instrument the real property formerly included in the settlement and also a large group of investments stood limited to the widow for life with remainder to her son for his life with a remainder over which has not yet come into effect, the son being still alive. He unhappily is weak in his intellect and was at his father's death left in residence with his mother at Kinlough House. It appears that she invited a cousin of hers, one Hubert William Maude, to reside there and help to look after the place and the young man.

Two of the trustees died in 1935 and the widow retired from the trusts and by an instrument of June 2, 1935, appointed the Rev. Thomas Hutcheson Martin, her sister the plaintiff in this action, and Hubert William Maude already mentioned, to be new trustees. The main holding among the investments at this time was the sum of £10,002 four per cent. consols, the subject of this action, and this investment with the others was duly registered in the names of the then trustees, viz., Christopher Hugh Maude and the three new trustees.

The widow died in August, 1935, leaving her son as tenant for life in possession and, by what appears to have been a family arrangement, Hubert William Maude remained in charge at Kinlough House. Christopher Hugh Maude died in November, 1942, and in May, 1943, the surviving trustees appointed one William Kemmis, a retired army officer living in the county of Tipperary, to be a new trustee. It is at this point that irregularities appear to begin, for in September, 1943, the trust solicitors, acting on Mr. Maude's instructions, sent to the defendant bank a request to have the names of the three appointed trustees, viz., Mr. Martin, the plaintiff and Mr. Maude entered on the register, and the name of Christopher Hugh Maude removed, but no request to add the name of Mr. Kemmis the new trustee. This document which is before me bears the true signature of the plaintiff and gives her address as Bridgnorth in Shropshire, which was her permanent home, though she was at the time by reason of the war living at Kinlough House.

Mr. Martin died in 1945, and in February, 1946, a request was sent to the defendant bank for the removal of his name from the register, but still none to add the name of Mr. Kemmis. This document also was signed by the plaintiff, but her address is now given as Kinlough House, though she had in fact by this time ceased to reside there, and I cannot doubt that this was part of Mr. Maude's plan. As a result, a stock certificate in the names of the plaintiff and Mr. Maude described as both of Kinlough House in the county of Leitrim was issued on Mar. 13, 1946 and came into Mr. Maude's hands. The same document shows that

dividends are to be sent to a joint account at the Provincial Bank of Ireland at Bundoran. This was the trust income account and stood in the names of the plaintiff and Mr. Maude alone. A copy of it, which is before me, shows that almost the entire income was in fact paid out to Mr. Maude, no doubt to maintain the tenant for life and the Kinlough property. A

The stage being thus set, Mr. Maude embarked on a course of fraud by means of which between 1946 and 1951 he abstracted from the trust the whole of the holding of £10,002 consols, and converted the proceeds to his own use. This he did by forging the plaintiff's signature to seven deeds of transfer and to other documents. All the transfers were accepted by the bank as genuine and they altered the register accordingly. Mr. Maude employed in each case Messrs. Jobson Bros., Dublin stockbrokers, as selling agents, but the circumstances differ and must be stated in further detail. B

(1) The first transaction was a sale of £2,000 to Francis & Praed (Nominees), Ltd., a company representing Dublin jobbers. This was comprised in a transfer bearing the date Mar. 21, 1947 and pretending to bear the plaintiff's signature, though in fact a forgery; and a cheque for the proceeds, £2,274 16s., was drawn by Jobson Bros. in favour of the plaintiff and Mr. Maude. This cheque Mr. Maude indorsed with his own name and that of the plaintiff and attempted to pay it into his private account at Enniskillen but the bank there, being familiar with the plaintiff's signature, did not accept the indorsement as hers and wired to her in Shropshire for confirmation. She wired back on Apr. 8, 1947 in these words "I agree what H.W.M. wishes done". On the same day she received a letter of explanation from the bank and she then apparently got into touch with Mr. Maude who quieted her anxieties and on Apr. 10, 1947, she wrote to the bank at Bundoran as follows: C

"I have heard from Mr. Maude and it is all right about the cheque going into his private account. I am exceedingly sorry for all the trouble you have had over it. When your wire came I had not heard from him—so was not sure what to reply. I thought it was safe to say—I conformed to his wishes. I quite understand how you were placed over it. Such a large sum too. Thanks for writing to explain about it. Yours truly, Lisalie Welch." D

The story which she accepted from Mr. Maude appears in letters from him to her of Apr. 15 and May 1. The first begins: E

"Zooie Dearest, The poor thing you must be feeling wretched do take care of yourself. Now as to cheque Sweeney told me I could sell certain stocks. There is a legacy and succession duty to pay after all these years. You had just gone when Jobson's cheque came so I signed for you, but if you can say signatures are alright everything is correct. I do not think you will have any letters from the bank as they have accepted your telegram I paid it into my account as otherwise I should have had to send you every small cheque to sign. It has nothing to do with M.C.'s account. I am quite sound again and Kicks has gone to fish today . . ." F

On May 1, he writes again: G

"Zooie dearest . . . The cheque from Jobson's was made out in our names so I indorsed the cheque on your behalf. I now think as you say rightly that I should not have done it. But the money was badly needed." H

(2) The second transaction also involved £2,000 under a transfer of Apr. 27, 1948, to which the plaintiff's name was forged, in favour of a company representing Irish stock jobbers. The proceeds of this fraud went straight into Mr. Maude's own account by a cheque drawn in his favour by Jobson Bros. for £2,161 1s. This was managed by an authority to which again he forged the plaintiff's signature. I

A (3) and (4) This transaction is in two parts being effected by two transfers the first for £359 2s. 4d. dated Feb. 27, 1950, and the second for £1,140 17s. 8d. dated Mar. 2, 1950. The signature of the plaintiff was forged in each case. A cheque for the proceeds amounting to £1,509 3s. 6d. was made out to the two trustees by Jobson Bros. whereupon Mr. Maude returned it with the following letter:

B “Dear Mr. Jobson, I am returning your cheque as Mrs. Welch is on her way to France and I cannot get her indorsement. Would you please, therefore, make the cheque out to me and I can then pay it into our account.”

The brokers were not quite so simple as this, but changed the payees' names to that of the bank at Enniskillen and returned the cheque with the following letter:

C “Dear Mr. Maude, We regret causing you the trouble of returning our cheque, but as we did not realise Mrs. Welch was leaving so soon and had no authorisation letter signed by her as heretofore, and as she is now abroad we enclose in favour of the joint account with your bankers a cheque for £1,509 3s. 6d. Trusting this meets with your approval.”

This money found its way into the trustees' joint income account and was withdrawn by Mr. Maude the following day by means of a cheque signed by the plaintiff in blank and intended to enable him to draw income. Thus, though unknown to her, this money was for a day under her control.

(5) This transaction involved £1,502 of stock under a transfer of July 27, 1950. The plaintiff's signature is forged. The proceeds of £1,524 6s. 8d. went direct into Mr. Maude's account by means of an authority purporting to come from the plaintiff, but manufactured by him.

E (6) This transaction involved £1,000 under a transfer of Nov. 23, 1950, bearing a forged signature of the plaintiff. The proceeds £1,037 7s. were dealt with as in transactions (3) and (4) and were paid into the joint income account of the trustees at Bundoran on Dec. 11, 1950, but were promptly removed by Mr. Maude by another cheque to which he had previously obtained the plaintiff's signature while it was still blank. This money too, though unknown to the plaintiff, passed through her hands.

(7) The balance of £2,000 was sold under a transfer dated Feb. 9, 1951, to which again the plaintiff's signature is forged. The proceeds of this fraud, £2,032 6s., were sent to a London account of the Provincial Bank of Ireland to the credit of another trust known as the Hewson Trust and thence found their way into Mr. Maude's pocket in some way not clear to me, but not involving the plaintiff.

The entire proceeds of this holding had thus passed into Mr. Maude's hands without anyone being the wiser and nothing was discovered until 1952. Civil proceedings were apparently started against Mr. Maude in Ireland, but he died in October, 1953, worth nothing. The first communication made to the Bank of H England was by a letter of Oct. 7, 1952, from the Irish solicitors to the trust in these terms:

I “The above trustees hold £10,002 four per cent. consols which have been sold by degrees from 1947 up to 1952. Serious doubts exist as to the authenticity of these transfers, and indeed the whole question of these trusts will shortly result in an action in the Chancery Division in Dublin. We wonder if it would be possible for you to send us the original transfers on loan for the purpose of comparing the signatures or if this is not possible would you kindly send us photostatic copies?”

On Dec. 9, 1952, the same solicitors wrote to the defendant bank asking whether it was prepared to rectify the register. The letter is in these terms:

“We refer to previous correspondence in this matter. We are advised by counsel to write you with reference to the holdings of four per cent. consols and which were originally in the names of Elise Marie Welch and

Hubert William Maude. We give you the particulars of such consols below and the dates thereon would not exactly correspond with your records as they are the dates taken from the stockbroker's ledger . . . We are advised to inquire if your bank is prepared to replace on your register the above holdings in the names of Mr. Maude and Mrs. Welch. The reason for such request is as you have already been informed that the signature of Mrs. Welch to the various transfers is not, we allege, genuine, consequently transfers are null and void."

To this the defendant bank replied as follows:

"I acknowledge the receipt of your letter (GMcQ/) of Dec. 9, and note that an allegation is being made in the proceedings in Dublin that the signature of Mrs. Welch to the various transfers is not genuine. No evidence to this effect has been produced and there is no reason at the present moment why the bank should take any action to replace the names of Mr. Maude and Mrs. Welch on the register. Yours faithfully, chief accountant."

Thereafter, there was an interval of a year while proceedings were taken in Ireland. On Jan. 25, 1954, the Irish solicitors wrote again in the following terms:

"We have now sent papers to English counsel to settle proceedings against the bank to have our clients' names restored to the register in respect of four per cent. consolidated stock which was sold on foot of transfers on which Mrs. Welch's signature was forged. You have particulars of the transfers in previous correspondence. We take it that, as is usual in these cases, you will nominate your lawyers to accept service of the proceedings and we would be obliged if you would supply us with their full names and address. We have the impression that these particular holdings of consolidated stock were inscribed in your books and we would be obliged if you would confirm that this was so."

The solicitors to the bank replied on Jan. 29, 1954, in these terms:

"The chief accountant of the Bank of England has asked us to reply to your letter to him of Jan. 25, in which you stated that you had sent papers to English counsel to settle proceedings against the bank to have your clients' names restored to the register in respect of an amount of four per cent. consolidated stock. We should be grateful if you would let us know what evidence of forgery it is proposed to put forward so that the bank may have the opportunity of considering the case. The holdings in question were registered stock and not inscribed as you have assumed."

Again they wrote on Feb. 9, 1954:

"We shall be glad if you will let us know whether there has been any conviction on a charge of forgery arising out of this case as we assume that criminal proceedings have been or will be instituted. We note that Mrs. Welch will personally repudiate her alleged signature on the transfers but as at present advised our clients would not feel able to accept a personal repudiation as sufficient evidence of the forgery of the signatures in question."

After this, during further negotiations, the defendant bank through their Irish agents wrote the following:

"We are in receipt of your letter . . . We feel . . . that the bank would not have given us the instructions they did if they had not in mind the careful consideration of their position in the light of the available evidence."

Ultimately on Apr. 5, 1954, they wrote the following letter:

"We have now heard from the solicitors to the Bank of England that they are not prepared to give any written undertaking on the lines suggested and we understand that this matter can now be regarded as closed."

The writ in the present action was issued on Apr. 30, 1954.

- A That an action of this type will lie against the defendant bank without joining the transferees of the stock is shown by a number of cases of which the earliest to which I was referred was that of *Davis v. Bank of England* (1). That was decided in 1824. It was an action at law and it was held by BEST, C.J., that the property in the stocks in question was never transferred from the true owner by being placed in the name of another person in the books of the bank under a forged power of attorney. The sidenote reads (2 Bing. 393):

C “Held, that a party might recover from the Bank of England the dividends arising on his stock in the funds, though at the time the dividends were payable he knew the stock had some months previously been placed, under a forged power of attorney, to the name of another person; omitted to inform the bank of the circumstance; and did not demand payment of the dividends till after the escape of the offender.—Property in stock is not transferred from the owner by being placed, under a forged power of attorney, to the name of another person in the books of the Bank of England.”

BEST, C.J., says (*ibid.*, at p. 402):

- D “The first question we are to decide is, have the stocks which stood in the plaintiff’s name in the books of the bank been transferred out of that name? We think that the plaintiff’s property in the funds has not been transferred; that he is still the legal holder of these funds, and entitled to the dividends payable on account of them.”

Then he goes on to describe the three per cent. consols, and the long annuities, and says (*ibid.*):

- E “Both the consolidated annuities and the long annuities are transferable at the bank. This is not a species of property that could be transferred by delivery; the assent of the owner to part with it must be expressed in writing, and it will be found that it has always been the practice to transfer by writing, and that the case requires such a mode of transfer. I take it to be clear that a transfer in writing not made by the party transferring, or some agent duly authorised, can have no effect. A forged indorsement on a bill of exchange conveys no interest in such bill. Transferable shares of the stock of any company cannot be divested out of the proprietors by any act of the company without the authority of the stockholders. The Bank of England has no more authority to affect the interest of any stockholder, than the most insignificant chartered company has to dispose of the shares of any of the members of such a company. The legislature (so far from allowing any act of the bank to deprive the stockholder of his interest,) has taken care to direct in what manner the interest he has in the public annuities shall be conveyed away, and to declare that no other mode of conveyance shall be legal.”

- H BEST, C.J., then discusses the mode of transfer at some length and says (*ibid.*, at p. 404):

- I “We are not called on to decide whether the bank, the parties who presented the forged power of attorney, or the parties who accepted the stocks under the transfer are to endure the loss. We know that funds will not be issued from the exchequer to pay the dividends on the stock in the plaintiff’s name, and the same stock in other persons’ names. We feel that these circumstances may occasion difficulty and embarrassment to the bank. We think, however, that the bank should be subjected to such difficulty and embarrassment, rather than the stockholder should suffer injustice. It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorised to do so. They may take reasonable time to make inquiries and require proof that the signature to a power of attorney is the writing of the person whose

signature it purports to be. It is the bank, therefore, and not the stockholder who is to suffer, if for want of inquiring, and it does not appear that any inquiry was made in this case, they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority. We cannot do justice to this plaintiff unless we hold that the stocks are still his."

Then he goes on in these terms (*ibid.*, at p. 405):

"Another consequence of the stocks being considered as transferred, will be most alarming to those who live at a distance from London, and receive their dividends by attorney; namely, that their claim to compensation in case their stocks should be transferred without their authority may be barred by the statute of limitations. What has lately occurred has shown us that the forging of powers of attorney to transfer stock may be concealed for more than six years, and the cases of *Battley v. Faulkner* (2), *Short v. M'Carthy* (3), and *Brown v. Howard* (4), prove that the statute of limitations begins to run from the time of the act being done that gives occasion to the action, although it was not known to the party who suffers from it. I can find no case in which the question whether the stock is transferred by the act of the bank has been raised . . . These stocks remaining the property of the plaintiff, and his right to them not being affected by the forgeries, what is to prevent his recovering the dividends due in respect of such stocks? It appears in this case that he did not know of the forgeries until several months after they were committed."

He discusses then whether the fact that the plaintiff because he had allowed the forger to escape from the country before claiming and thus had been guilty, as it was said, of misdemeanour or felony, was disentitled on that account and he held that he was not.

This case was reversed in error (5 B. & C. 185) on a point of pleading which does not affect the ratio decidendi of the chief justice (see the references in *Barton v. North Staffordshire Ry. Co.* (5) (38 Ch.D. at p. 464) and *Coles v. Bank of England* (6)). The plaintiff in *Coles v. Bank of England* (6) lost her action on the finding of the jury that she had ratified each transaction. It appears that she went to the bank with her nephew, the villain of the piece, and signed the warrants for the reduced dividends personally. The question is stated in the argument in these words (10 Ad. & El. at p. 442):

"But the principal question is, whether the Bank of England can be made liable, in this, or indeed in any, form of action, to replace stock transferred by a person professing to act for the proprietor, after the proprietor has repeatedly recognised the transfer by receiving dividends on the reduced amount? The repeated receipt of such dividends is a recognition of the transfer, which binds the party, and is not merely proof of a previous authority, which may be rebutted."

LORD DENMAN, C.J., said (*ibid.*, at p. 448):

"The facts proved on the trial were very remarkable. Benjamin Coles, the nephew of the testatrix, and in some sort her man of business, one of her executors also, and of course one of the plaintiffs, was a clerk in the Bank of England, and was in the habit of accompanying the testatrix when she received her dividends. She signed receipts both in the dividend warrants, and in the bank books. He must have paid her the full amount of dividend that would have been due if the original amount of stock had continued in her name; but he had in fact, in the interval, taken another woman to the bank, who personated the testatrix from time to time, and, as often, forged the signature of the testatrix to several transfers of the stock, till at last a very small sum was left . . . The argument was, that the testatrix had, by gross negligence, brought about, or at least greatly contributed to produce, the loss which has accrued; so that her representatives are precluded from complaining of the bank in respect to it."

- A He then discusses the cases, including, among others, *Davis v. Bank of England* (1), and ends in this way (*ibid.*, at p. 451):

“The facts, then, which have been found by the jury in this case, entitle the defendants to a verdict on the plea of not guilty. They also furnish evidence on the second and third pleas, in which it is alleged that the testatrix was not a proprietor of the stock; for we are of opinion that, notwithstanding the strong words of the stat. 18 Geo. 2 c. 9, a stockholder may so conduct himself as to be precluded from claiming in that character. For example, the transfer is only to be made by underwriting by the parties, or, in their absence, by lawful attorneys appointed with certain formalities. But suppose the proprietor, being present, had not underwritten the transfer, but had connived at the underwriting of his name by another; or, being absent, had expressly requested another to go and sign his name, the Act would not have been complied with, yet the property would have passed from the stockholder. In such a case, indeed, fraud would have been an ingredient, but we apprehend that any culpable conduct, by which the relation of the parties to the property is completely altered, will have the same effect.”

- D The point was taken in the defence that as the interest of the plaintiff and Mr. Maude in the stock was a joint one she could have no better right than he had to complain. I take it that the pleader relied on the recent case of *Brewer v. Westminster Bank, Ltd.* (7), which appears to have been decided on these grounds. I confess I do not follow that decision. None of the cases in equity were cited to the learned judge. It may be, however, that this would be a good defence at law. It is certainly, I think, no defence in equity.

E In *Sloman v. Bank of England* (8) the sidenote reads as follows (14 Sim. 475):

“One of two trustees of a sum of stock sold it out under a power of attorney, to which he had forged the signature of his co-trustee, and some time afterwards absconded. Held, that the Bank of England was compellable, in a court of equity, to reinvest the stock in the name of the other trustee.”

F SIR LANCELOT SHADWELL, V.-C., giving judgment said (*ibid.*, at p. 485):

“... I have not the slightest doubt with respect to the situation in which the bank stands. The liability of the bank is constituted by the Act of 11 Geo. 4 & 1 Will. 4 c. 13, by which the four per cents. were converted into three and a half per cents. ... I notice that with reference only to that singular ground on which the Court of King's Bench rested their judgment in the case of *Davis v. Bank of England* (1), when it was heard in error; namely, that inasmuch as the declaration did not allege that the requisite funds for payment of the dividends had been supplied to the bank by the government, there was no liability on the part of the bank. Now it seems to me that every court of law ought to take it for granted that that which the legislature says shall be done has been done; but, however, the court of error was satisfied to get rid of any difficulty in that case by making that objection ... And my opinion is that if, at any time, there had been stock standing in the name of A., and afterwards that stock did not appear (no matter from what cause), to be standing in his name, A. would, *prima facie*, have a right to say: ‘Let the account stand as it did on a given day.’

I If it can be shown that A. himself has transferred the stock, that is an answer; but the bank account ought to be kept with regard to every individual who ever appeared as a stock proprietor in such a manner as to show what the account really is. If that be so, it follows, as a matter of course, that relief may be had in equity; because the plaintiff in equity has to allege against the bank: ‘You are bound by law to be my book-keeper in respect of my stock, and to show me the true account of it; and if I can show that, upon a given day, stock stood in my name, and now show that it does not stand in my name, and I have not authorised the transfer of

it, you are responsible to me—that is to say, you must make the account stand as it ought to have stood.’ This appears to me to be the true view of the case; and, according to that view, there would be a direct right in every person who was interested in the stock in question to file a bill against the Bank of England to have any error occasioned by the bank corrected.”

He then goes on to the question whether the bank’s defence, which again depended on the fact that there had been connivance between the plaintiff and the forger, who I think was the brother, was good, and the Vice-Chancellor held that there was no defence set up which would avail the bank.

A later case is *Barton v. London & North Western Ry. Co.* (9), where the Court of Appeal affirmed that this form of action is a proper one. COTTON, L.J., says this (38 Ch.D. at p. 149):

“ The plaintiffs by this action seek to impeach transfers of a considerable amount of London and North Western stock. They allege that the deeds of transfer were forgeries, and they bring their action against the London and North Western Railway Company alone, in order to make them answerable for stock not still appearing in the names of the plaintiffs or in the name of their testator. Now, in my opinion, whatever may be the consequence as between the railway company and other persons who now appear on the railway books as the holders of this stock, that was a course which the plaintiffs were at liberty to take, for it is well established that persons, whose stock is transferred out of their names in consequence of a forged deed of transfer, may go against the company whose duty it is to keep the register of stockholders, and say: ‘ It was your duty to keep this stock in our names until it was effectually transferred by a deed of transfer duly executed by us or by persons who had authority to act for us, and as you have transferred it without the authority of a good deed of transfer you must replace it.’ That is the course which the plaintiffs took. If they had sought to have the stock which they could trace into the names of the present appellants re-transferred, then, of course, they must have made the present appellants parties, and, in my opinion, they might have done so if they thought fit, making the railway company a party as the keeper of the books, that the company might be bound by the order to re-transfer the stock in their books. The plaintiffs have not chosen to take that course, but have taken a course which they were fairly entitled to take if they thought fit.”

That case was afterwards sent to law for the question of forgery to be tried.

The first issue at the trial before me was one of fact, namely, whether the signatures appearing on the several transfers and authorities and purporting to be those of the plaintiff were truly hers. On this subject the plaintiff and an expert in handwriting gave evidence and on the third day of the trial counsel for the defendant and for the subsequent parties abandoned their case on this point and admitted that none of the signatures impeached was genuine.

The second point taken by the defence is that granting the signatures not to be in the hand of the plaintiff yet she authorised them to be made. This point was abandoned.

Thirdly it was objected that the negligence and dereliction of duty of the plaintiff as one of the trustees gave Mr. Maude as the other trustee the opportunity of committing the frauds. I do not follow the point as taken like this. The bank is no beneficiary under the trust and is owed no duty by the plaintiff in her capacity as trustee. The argument, however, proceeded on a different ground and was that the conduct of the plaintiff vis-à-vis the bank was so negligent as to disentitle her to relief. It was argued that the plaintiff and the bank stood in the relationship of customer and banker and that she owed to the bank a duty accordingly. I am content to accept this. In my judgment, it is clear from the cases on this subject that no negligence can avail the bank unless it amounts

- A to conduct estopping the plaintiff, or alternatively to ratification of the defaults of her co-trustee. Moreover, the loss must be a direct result of the negligence.
- The leading case on this point is *Young v. Grote* (10) a case much discussed but expressly approved by the House of Lords in *London Joint Stock Bank v. Macmillan & Arthur* (11). An illustration of this principle in connection with share transfers is *Swan v. North British Australasian Co.* (12) where I find in the head-note these words (2 H. & C. at p. 175): "Negligence to operate as an estoppel must be the proximate cause of the loss". See, too, *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (13). In that case certain charity trustees had allowed their seal to remain in the possession of the secretary who by that means misappropriated certain consols. There were proceedings for a new trial of an action by the trustees against the bank to rectify the register in which the judge in Ireland had charged the jury that if the trustees had so negligently conducted themselves as to contribute to the loss the verdict must be for the bank. This was held to be wrong. LORD CRANWORTH, L.C., in his speech after the opinion of the judges had been given by PARKE, B., said (5 H.L. Cas. at p. 412): "There are two points for decision." The first one was one of pleading with which I need not be concerned. Then he said (*ibid.*, at p. 413):
- D "For the reasons which have been so clearly stated on the part of all the learned judges, my opinion is, and I shall move your Lordships accordingly to act upon it, that it is clear that there ought to have been a venire de novo, because the direction of the very learned judge who tried the case was clearly not warranted by law. The direction was, that if the transfer was caused by such negligence on the part of the trustees as that of which evidence has been given, then that the bank was absolved. I apprehend that there is no such principle of law. I think it has been fairly put, that there must be either something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer. Now the case of *Young v. Grote* (10) went upon that ground (whether correctly arrived at in point of fact is immaterial), that the plaintiff there was estopped from saying that he did not sign the cheque for £350; and if the circumstances are such, whether arising from negligence, or from any other cause, that as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that, as between them, is just the same as if he had signed it. Therefore taking that view of the facts, the case may be well sustained, and appears to have been well decided. The other doctrine, that of ratification, is well illustrated by the case of *Coles v. Bank of England* (6). There the Court of Queen's Bench considered that the conduct of the owner of the stock in subsequently signing from time to time receipts for reduced sums, when the sums had been reduced by previous forgery, was in truth a ratification of what had previously taken place. Whether I should have arrived upon the question of fact at the same conclusion, is a matter upon which I do not feel myself called upon to speculate. That certainly seems to me to be rather a strong result. But coming to that result, the consequence naturally and necessarily followed, whether forgery or no forgery, that if the party injured by the forgery chooses subsequently to ratify what has been done, then as between him or her and the person who acts upon it, the ratification would be just as good as if it had been the previous act of the party. Upon these grounds, I conceive that the judgment which the Court of Queen's Bench in Ireland ought to have given, and which ought now to be given, when the exceptions are properly on the record, is, that there should be a venire de novo, and I shall move your Lordships accordingly."
- I

LORD BROUGHAM concurred in that opinion.

The negligence here attributed to the plaintiff was first that in the circumstances I have recited she should have realised after the first transaction that

Mr. Maude had forged her signature to a transfer and should so have informed the bank by way of warning. As to this I am of opinion that she never realised, although she might have done so, that her signature had been forged on a transfer. What she did know was that Mr. Maude had put her name on the back of a cheque, but after his explanation she did not think there was any dishonest intent in this and certainly did not regard it as a criminal offence. She is a lady now eighty-four years of age, brought up with Victorian notions about business, namely, that women have nothing to do with it and should leave it to the men. No doubt, in the circumstances, she ought not to have allowed her sister to appoint her trustee, but she said in the witness-box that she was appointed to "look after the boy" meaning by that the tenant-for-life who was afflicted as I have said. She also said she was content to leave the business side of the trust to Mr. Maude who was her cousin and whom she trusted implicitly, and that she was willing to sign anything he put before her. Presumably he did not put the transfer before her because an attesting witness was necessary and this might have given rise to questions.

Next it was alleged as negligence that if the plaintiff had watched the pass-book of the joint income account she would have noticed that the dividends on the consols were dwindling. As to this there was no evidence that she ever saw the pass-book and I do not think there was a duty on her vis-à-vis the bank to be a watchdog over her co-trustee (see the observations of McNAIR, J., in *Brewer v. Westminster Bank, Ltd.* (7), [1952] 2 All E.R. at p. 656, letter E). It was also suggested that there was negligence in allowing Mr. Maude to be in possession of the stock certificates, but this has been decided not to be negligence in *Cottam v. Eastern Counties Ry. Co.* (14). This also was a case of forged transfers and the sidenote reads as follows (1 John. & H. 243):

"Negligence cannot be imputed to trustees for leaving documents of title in the hands of one of their number and allowing him to receive the income, and no authority to deal with the property can be implied, even in favour of a bona fide purchaser from such trustee."

The transferees were there joined as defendants and the judgment of SIR WILLIAM PAGE WOOD, V.-C., is mostly concerned with that point, but he deals with negligence in these words (*ibid.*, at p. 247):

"There is nothing to point to any implied agency, except the supposed negligence of the plaintiffs in leaving the deeds in Allen's hands, and allowing him to receive the interest. It would be a very serious doctrine if the fact that one of three trustees is allowed to have possession of the title-deeds of the trust should be held to create such an interest in him as to enable him to give a title to any other person with whom he may deposit the deeds. The contrary of this was expressly held by SIR JOHN LEACH, in an unreported case, *Goldney v. Bower* (15), where the title-deeds of a mortgage to trustees were allowed to remain in the hands of one of the trustees, who also received the interest. There it was held that no agency to receive the principal could be implied from the permission to receive the interest, and that no laches could be imputed to the trustees for suffering one of their number to hold the deeds. The reason is that the deeds must be held by some one person, unless they are deposited with bankers, or placed in a box secured by a number of different locks, of which each trustee should hold one of the keys; and negligence cannot be imputed to trustees for not taking such precautions as these."

Another point raised by way of defence and as showing negligence on the part of the plaintiff was that on every transfer a notice in the usual form was sent to her in accordance with reg. 9 (b) of the Government Stock Regulations, 1943 (S.R. & O. 1943 No. 1). An attempt was made to prove the sending of these notices as a fact and it was shown, I think, that in each case a notice was made out to be sent, but it was never shown that notices were actually sent. Still less

A was it shown that the plaintiff received them, for if sent they all went to the Irish address as was probably the design of Mr. Maude when he entered this as the address of the plaintiff in the removal document of 1946, mentioned earlier.

Barton v. London & North Western Ry. Co. (9), shows that even if the notices had been shown to have been sent to the plaintiff and received by her that would have been no answer. In the headnote I find this (24 Q.B.D. 77):

B “Application having been made to a company to register a transfer of stock, the company sent a letter giving notice of it to the holder of the stock on the register, and stating that, unless they heard from her to the contrary, the stock would be transferred in their books. She did not answer the letter, and the company subsequently registered the transfer. Her signature to the transfer being a forgery, she brought an action against the company claiming
C to have her name replaced on the register as holder of the stock: Held, that she was not estopped from alleging that the transfer was invalid, and was entitled to the relief claimed.”

LINDLEY, L.J., says (*ibid.*, at p. 89):

D “I was somewhat struck at first by the point raised by the defendants with regard to the last of the forged transfers, but I think that it will be seen that there is nothing in it, when it is remembered that the plaintiffs in this action are really asserting a legal title. With regard to the suggestion of an estoppel, there appears to me to be no ground for it whatever.”

LORD ESHER, M.R., says (*ibid.*, at p. 87):

E “With regard to the last transfer, of which notice was sent to the plaintiff, it is alleged that, having disregarded such notice, she is estopped from saying that the transfer is bad, or if she is not estopped, that, as she is claiming equitable relief, if she has misled the defendants by not answering their letter, to that extent she is not entitled to such relief. This latter point does not, as it seems to me, arise, because in substance what she is claiming is to have the register made right, which is her legal right as a shareholder;
F and I cannot think that the circumstances bring the case within any kind of estoppel.”

This last case suggests that the plaintiff's right is a legal right. That also was the opinion of the House of Lords in the similar case of *Midland Ry. Co. v. Taylor* (16), on appeal from SIR JOHN ROMILLY, M.R. That is a case which shows that even if the right at law be gone the right in equity will remain—see
G the speech of LORD WESTBURY, L.C., where he says (8 H.L. Cas. at p. 756):

H “The matter rests on the plainest and clearest principles. Certain stock of the Midland Railway Company was standing in the book of the company in the names of two persons, Taylor and Bright. Bright, by a transfer executed by himself in Taylor's lifetime, and to which he forged the name of Taylor, transferred that stock to a third person. Immediately on that act being done, there was a right of action at law in Taylor against the railway company, and there was also a right of suit in equity. The right of suit in equity and the right of action at law were both founded upon a legal title; that legal title vested in Taylor, remained with him, and is now vested in the present plaintiff, his personal representative.”

I LORD CRANWORTH was reported as saying (*ibid.*, at p. 757):

“It is said that the right in equity is dependent on there being a right at law. That is a mistake; it is not dependent on such a right at law. There would have been no right in equity if there had not been a wrong, which would have entitled the party to bring an action at law . . .”

It appears to me that in the case of transactions (2) (5) and (7) a direct cause of the loss was the felonious act by Mr. Maude in forging the defendant's name on the transfers and the authorities to the brokers and that it follows from the authorities that the negligence of the plaintiff not being directly connected

with the loss is no part of her claim. I cannot find in the facts anything to amount to an estoppel or which should be taken as ratification of her co-owner's defaults. But when transaction (1) is examined the position is seen to be different in that it can be said that the plaintiff expressly authorised the broker to pay the proceeds of the sale of £2,000 of stock into Mr. Maude's private account and that this amounted to a ratification of the transaction. In my judgment this is right. It seems to me clear that the plaintiff knew that the cheque for £2,274 16s. did not represent income, but was capital which she allowed Mr. Maude to have because she believed he required it to pay duty as his letter said. She therefore had the opportunity of stopping the money from passing to him in which case no harm would have been done, and allowed it to pass through her hands. She must, I think, therefore, be taken to have received this sum. A B

As to transactions (3) (4) and (6) the proceeds in each case passed into the joint income account of the plaintiff and Mr. Maude and here again no harm was done so far, but Mr. Maude was administering the income in maintaining the estate for the tenant-for-life and the plaintiff was in the habit of giving him from time to time blank cheques signed by her to enable him to draw the income. By means of these he was enabled to withdraw the capital sums resulting from each of these three transactions and therefore the act which produced the harm was the genuine signature of the plaintiff to the blank cheques. In these cases I think the plaintiff must be treated as having come into possession of the proceeds, and that her negligence in providing her co-trustee with blank cheques was the direct cause of the loss. C D

It appears to me moreover that equitable principles must prevail, because even though the right of the plaintiff be a legal one the remedy she seeks is equitable. She asks that the defendant bank shall be obliged to go into the market and purchase sufficient stocks to make good the forgeries, and that, in my judgment, is her right, but in so far as she must be taken to have had the proceeds of these same forgeries in her hands or directly to have caused the loss I think she must contribute to the price the bank would have to pay the amount of those proceeds. No doubt this may be hard on the beneficiaries, but they have other remedies open to them. This line of defence is not open to the bank in respect of transactions (2) (5) and (7) because in each of these cases the proceeds went direct and without her intervention into a banking account not that of the plaintiff. These three transactions amount to £5,502 nominal so that as a short cut the bank must replace stock to that extent unless it is protected by the last line of defence, which is that of the Limitation Act, 1939. This plea was not advanced by the bank in the earlier stages of the action, but was resorted to because the subsequent parties over against whom the bank is claiming indemnity desired to avail themselves of it. The bank just before the hearing put its pride in its pocket and applied to amend by pleading two sections, namely, s. 2 and s. 21. I allowed the amendment on terms. Section 21 was repealed by the Law Reform (Limitation of Actions) Act, 1954, s. 1 (b), but having regard to the terms of s. 7 of that Act the repeal does not affect the present proceedings. E F G H

Section 21 (1) of the Act of 1939 is to be considered first because if it applies, and time runs from the date of the several transfers, the whole action is barred. The section is in these terms:

"No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued: Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this sub-section, until the act, neglect or default has ceased."

The first point taken in reply by the plaintiff was that the bank was not a person I

- A within the meaning of the section and reliance was placed on *A.-G. v. Margate Pier & Harbour (Company of Proprietors)* (17). In my judgment having regard to the terms of the Bank of England Act, 1946, the bank is not a profit making company as now constituted and this case has no application. It has been said that the Public Authorities Protection Act, 1893, s. 1, re-enacted by s. 21 of the Act of 1939 must be limited to "public authorities": see the speech of
- B LORD BUCKMASTER, L.C., in *Bradford Corpn. v. Myers* (18). I take it, however, that by these words LORD BUCKMASTER meant bodies having public or statutory duties to perform.

Secondly, it was objected that the act or default in question was not done or omitted "in pursuance or execution of any Act of Parliament or public duty or authority" and reliance was placed on *Bradford Corpn. v. Myers* (18). LORD

- C BUCKMASTER, L.C., in his speech in that case, said this ([1916] 1 A.C. at p. 247):

"Now it must be conceded that the Act applies only to a definite class of persons and to a definite class of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the courts have pointed out that this cannot be its true interpretation, and that 'any person' must be limited so as to apply only to public authorities. The case of *A.-G. v. Margate Pier & Harbour (Company of Proprietors)* (17) is an excellent illustration of such a case, and this was expressly approved by CHANNELL, J., in *Parker v. London County Council* (19). While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply."

- G In my judgment, however, the keeping of the register of consols is clearly a public duty enjoined on the Bank of England which still answers the description by the Vice-Chancellor in *Sloman's* case (8) (see 14 Sim. at p. 486) of "the Parliamentary book-keepers of this fund". The keeping of the register is now regulated by the Government Stock Regulations, 1943 (S.R. & O. 1943 No. 1) made under the Finance Act, 1942, s. 47, and having statutory force. Section 47 is in these terms:

- H " (1) The Treasury may by regulations provide . . . (b) for the keeping by the Banks of England and Ireland of registers of the holders of such stock and bonds and as to the matters to be entered in the registers . . . (2) As from the date on which the first regulations made under this section come into operation, all such stock and bonds as aforesaid shall be transferable in law in manner provided by regulations so made, and in no other manner . . . "
- I

The Government Stock Regulations, 1943, reg. 2, says:

" (1) There shall be kept in the office of the chief accountant of the Bank of England, and at the principal office at Belfast of the Bank of Ireland, in respect of stock of each description, registers wherein shall be entered the names and addresses of all persons who are for the time being holders of stock of that description, and the amounts of stock of that description of which they are respectively for the time being holders."

In my judgment, the keeping of the register and the removal of the plaintiff's name from it as also the refusal to re-instate it were acts done directly in intended execution of the Act of Parliament. Accordingly I hold that the section does apply to the bank in this capacity. A

The next point is whether the time has run. This depends on the time at which the cause of action accrued. This question was considered in *Barton v. North Staffordshire Ry. Co.* (5), where KAY, J., held that a cause of action was not perfect until the refusal of the company to restore the plaintiff's name to the register. In my judgment there was no such categorical refusal here until the writing of the last letter which I have read on Apr. 5, 1954. If therefore this case be right, time has not run. The headnote reads as follows (38 Ch.D. 458): B

"One of two executors cannot make a valid transfer of railway shares or stock registered in the names of both, under and subject to the provisions of the Companies Clauses Act, 1845. Railway stock was registered in the names of two persons who were executors and trustees of a will. One of them sold and transferred the stock, forging the signature of the other to the transfers, which were registered by the railway company. On the forgeries being discovered by the other executor, a new trustee of the will was appointed in place of the forger, who then left this country. The two trustees informed the company of the forgeries, and applied to be registered as owners of the stock. The company refused to comply with the application, and the two trustees thereupon brought an action for replacement of the stock in their names. Some of the stock was transferred more than six years before the action was brought: Held, that the cause of action was the refusal by the company, when the forgeries were made known to them, to treat the plaintiffs as owners of the stock, and that, therefore, time under the Statute of Limitations would not begin to run against the plaintiffs until such refusal: Held, also, that the plaintiffs were entitled to treat the transfers as nullities, and that the company must be ordered to register the plaintiffs as owners of the stock." C D E

KAY, J., in his judgment says (*ibid.*, at p. 462): F

"The real claim of the plaintiffs is to be treated by the railway company as stockholders. They say, and I agree with the contention, that the forged transfers must be considered as nullities. One defence raised by amendment is a plea of the Statute of Limitations. The actual plaintiffs are Ann Barton and Mrs. Ashe, who was appointed her co-trustee by the deed of July 1, 1886, in the place of Thomas Barton. This suit was instituted on Dec. 10, 1886, more than six years after some of the attempted dealings with this stock. It is settled that, after a partnership has ceased, any claim on simple contract by one former partner against the others in respect thereof is, *prima facie*, subject to be barred after the expiration of six years: *Knox v. Gye* (20). On the other hand, while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of LINDLEY, L.J., is to the contrary (*LINDLEY ON PARTNERSHIP* (4th Edn.), p. 966). In a case of exclusion time would begin to run from the act of exclusion. It has been argued in this case that if a partner does not draw his share of profits or act as partner for six years he, at the end of that time, loses all remedy against his co-partners, and therefore practically ceases to be a partner. And it is urged that this being the case as to a partnership, the analogy ought to be followed in railway companies and other trading corporations, and that a shareholder or stockholder who makes no claim for six years has no remedy in respect of his shares or stock against the company. If this be so, any such company might direct that after six years' silence a pen should be drawn through the shareholder's name on the register, and he would practically cease to be a member of the corporation; and in answer to a question from the court, G H I

- A the argument was pressed to that extent. Such a conclusion shows that there must be a fallacy in the premises. I know of no authority for saying that a partner who does nothing for six years loses all remedies against his co-partners. Time only begins to run against him from an act of exclusion. If the analogy be applicable there must be a similar act in the case of a shareholder to enable the company to avail itself of the statute against him.
- B Nothing of the kind took place here until the resistance by the company to the claim made in this action. The cause of action is, not the invalid transfers of the stock in question, but the refusal of the company, when the forgery was made known to them, to treat the plaintiffs as stockholders. It is an elementary principle that time does not begin to run until there is a complete cause of action, and there was no complete cause of action in this case until such refusal. In *Davis v. Bank of England* (1) there is a judgment of
- C BEST, C.J., in which the question of the Statute of Limitations in a similar case is considered."

He then goes on to read the passage I have read from BEST, C.J., in *Davis v. Bank of England* (1) and cites also *Coles' case* (6) and *Sloman's case* (8).

- D For the bank it was argued that this case ought not to be followed because the partnership analogy mentioned by KAY, J., is not a true analogy. I was referred by Mr. Caplan, who argued this part of the case, to a decision of ROMER, J., in *Re Severn & Wye & Severn Bridge Ry. Co.* (21). The headnote there reads ([1896] 1 Ch. 559):

- E "When a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue at law, and the Statute of Limitations immediately begins to run. The declaration does not make the company a trustee of the dividend for the shareholder, and an entry of the liability in the company's books—at any rate when no special part of its assets is set aside as representing the dividend and no notice of the entry is given to the shareholder—does not take the case out of the statute."

- F ROMER, J., says (*ibid.*, at p. 564):

- G "The liquidators have raised, as they were entitled to do, the defence of the Statute of Limitations in answer to the claims for unpaid dividends, which I have to consider. That defence is, in my opinion, fatal to the claims. The dividends in question were declared and became payable more than twenty years before the present claims were made, and constituted debts due to the shareholders for which they could have sued at law, as was pointed out by LINDLEY, L.J., in the passage in his treatise on Company Law (p. 437), which was cited in the argument before me. Presumably, therefore, the Statute of Limitations began to run in favour of the company from the time the dividends became payable."

- H Then he takes the objections made by the claimants and says (*ibid.*, at p. 565):

- I "In the next place, the claimants contend that the statute did not run, on the ground that the shareholders and the company were in the position of partners, or in an analogous position. In my opinion that contention is untenable. Nor can I see that the reasons upon which the rule is founded, that the Statute of Limitations does not run in respect of a claim between partners during the continuance of the partnership, apply to a claim for unpaid dividends between a shareholder of an incorporated company and the company. The case of *Penny v. Pickwick* (22) relied on by the claimants, was one of a single partnership which LORD (then SIR JOHN) ROMILLY held under the circumstances was a continuing partnership. In the case of *Barton v. North Staffordshire Ry. Co.* (5) KAY, J., decided that where persons entitled as stockholders in a railway company were suing to establish their position as such, their cause of action only arose when the company first

refused to treat them as stockholders, and that the Statute of Limitations did not commence to run before that refusal. He did not say that the case was, in fact, analogous to a claim between partners, but only that, if the analogy were applicable, it would support his view, because the statute only runs against a partner from the time of his exclusion."

It is said that this shows a disapproval of the decision of KAY, J., or at any rate the grounds of it, which I ought not to follow, but this I do not accept. Moreover, the passage I have read from the judgment of BEST, C.J., in *Davis v. Bank of England* (1) (2 Bing. at p. 405) supports the view that the statute does not run until the later date. Both in that case and in *Sloman's* case (8) and in SIR JOHN ROMILLY's decision in *Taylor v. Midland Ry. Co.* (23), the ratio decidendi was that a forged transfer is a mere nullity having no effect on the true owner who still has the property in the stock. If this be the true view, the statute cannot run.

Similar considerations apply, in my judgment, to s. 2 of the statute so as to prevent it from being a bar in respect of the second transaction in which the removal of the plaintiff's name was done more than six years before the writ was issued.

A further point discussed on this part of the case was whether the default in not keeping the register properly was a continuing default on the bank's part so that the proviso to s. 21 applied and the statute had no application at all. Having regard to the decision I have reached I need not further pursue this question.

The result is that in the action the plaintiff is, in my judgment, entitled to an order on the bank to procure her name to be entered in the books as the owner of £5,502 of these four per cent. consols, and in addition to such dividends as have been lost to her by the default of the bank in acting on the forged transfers in the three transactions making up this sum. In my judgment the Limitation Act, 1939, does not run against this latter right either.

So far as the plaintiff has disentitled herself to her rights in respect of the remaining £4,500 stock in dispute, I am of opinion that her right to dividends has similarly gone, for the payment of these dividends to the transferees has been brought about by her own default and she cannot be heard to complain.

[The case was adjourned until Mar. 4, 1955, when HIS LORDSHIP heard argument on costs in the action as between the plaintiff and the bank. HIS LORDSHIP gave judgment on the question of costs and, having referred to *Cinema Press, Ltd. v. Pictures & Pleasures, Ltd.* (24), he ordered the bank to pay four-fifths of the plaintiff's costs.

On Mar. 7, 1955, HIS LORDSHIP heard argument on the question of costs as between the bank and the third parties.]

HARMAN, J. : The plaintiff succeeds against the bank to a degree which I have held entitles the plaintiff to four-fifths of her costs. The bank brought in five separate parties as third parties, alleging the same case against each of them, viz., that in respect of some one or more of the transactions each of them individually had presented to the bank transfers which were forged, and that the presentation by a broker or jobber of a forged transfer to the bank imparts an implied liability in respect of all costs, charges, and expenses which the bank may suffer as a result of acting on that transfer. That is the position having regard to the decision of the House of Lords in *Sheffield Corpn. v. Barclay* (25). In that case, the EARL OF HALSBURY, L.C., citing Mr. Cave in *Dugdale v. Lovering* (26), said ([1905] A.C. at p. 397):

" ' It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to

- A the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.' "

Therefore the bank is entitled to an indemnity against the jobber who requested that they should register the transfer. LORD DAVEY said (*ibid.*, at p. 399):

- B " . . . there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty."

Lastly, at the end of his speech, the same learned Lord describes (*ibid.*, at p. 405) the indemnity as being "against any loss resulting to them from the transaction." Therefore, for such damages as flow from the transaction of registering each forged transfer, the bank is entitled to an indemnity. That was initially

- C contested by the third parties, four out of five of whom severally put in defences denying that the transfers were forged and denying also that, even if they were forged, they were bound to indemnify the bank.

The action comes on for trial. It is evident at an early stage that what is really going to be tried is, first, the question of forgery and, secondly, the question whether any negligence or ratification by the plaintiff disentitles her to relief; and it is also evident that the third parties are vitally interested in both those questions, because in fact they intimate that, when it comes to third-party proceedings, they will have nothing more to say. They agree that *Sheffield Corpn. v. Barclay* (25) makes it inevitable that they should give an indemnity.

- D The bank fought the case in the interests of all the third parties and in the case of three of them with success. In the case of two of them the defences failed. E But in the case of all of them the primary defence failed, viz., forgery, and in the case of all of them the question raised under the Limitation Act, 1939, failed. It is only because, coming to equity, the plaintiff has, as I said in my judgment, to submit to equitable principles that she failed in respect of some of the seven transactions.

- F It is admitted that the parties responsible for those transactions in which the plaintiff succeeds, viz., Alex Thomson & Co., and Matthey Harrison & Co., two in the case of Alex Thomson & Co. and one in the case of Matthey Harrison & Co., must indemnify the bank as to the cost of replacing, as to Alex Thomson & Co., £3,500 worth of stock, and as to Matthey Harrison & Co., £2,000 worth of stock, and as to the dividends appropriate to those two cases. About that there is no dispute. G But there arises the question, very much vexed, of the four-fifths of the plaintiff's costs which the bank has been ordered to pay. I think that it is not disputed by Alex Thomson & Co. and Matthey Harrison & Co. that they are under some liability in that respect. But it is said that the three other third parties were successful. So they were, in the sense that the transfers which they lodged cannot be set aside and stand in spite of the fact they originated in fraud. Therefore, they say: No indemnity.

- H I do not think that that is right, because, unless the bank had fought to the end, it may well have been that the action would not have been fought as it was. But, apart from that, the third parties did deny, right up to the hearing, that they were bound to give any indemnity at all, whatever the result of the suit; and the bank was bound to fight the action, not only to save its own skin but also to justify itself and to claim an indemnity. Therefore, it seems to me that, substantially, the costs which the bank has been bound to incur vis-à-vis the plaintiff I in fighting the main battle must be paid by the third parties.

Then it is said that that is limited by this, that there might be five different actions, or seven different actions, and nobody ought to have to pay more than he would have paid if his action had been a separate one. It seems to me that there is a great deal of justice in that; and the way in which I can deal with it will be made more simple when I go one step further. So far as the four-fifths of the costs of the plaintiff against the bank are concerned, the three third parties who were successful cannot, I think, be asked to pay any part. Therefore,

the liability for those costs must fall on Alex Thomson & Co. and Matthey Harrison & Co. The question is whether they ought to fall on them equally or in proportion to the amount involved, or how otherwise. A

It seems to me that the right way of dealing with those costs is simply to make an order for the amount of the plaintiff's taxed costs paid by the defendant to be recouped by those two third parties to the bank, i.e., they will be jointly and severally liable for that four-fifths of the plaintiff's costs when they are taxed. B

That leaves the bank's own costs of the action. So far as those are concerned, it seems to me that the third parties are liable for them, subject only to the limitation that they ought not to be liable for more than they would have been if the action had been an action against them severally. It seems to me that a rough and ready way of dealing with those is to divide them into five and to order the four third parties (i.e., excluding Jobson Bros. for the reason indicated below) each to pay one-fifth of the bank's costs. C

The next question is the scale of those costs. The bank says: "This is an indemnity case. Therefore I am entitled to costs on an indemnity basis." That does not seem to have been the practice in third-party proceedings. In such proceedings it seems to have been the practice to treat costs for which a third party is liable to indemnify as being solicitor and client costs; and one finds an order on that line in SETON'S JUDGMENTS AND ORDERS (7th Edn.), Vol. 3, at p. 2072, and that I propose to follow. Therefore the bank's costs of the action will be taxed as between solicitor and client, and the four third parties (i.e., excluding Jobson Bros.) will each be ordered to pay one-fifth of them. D

I am leaving out Jobson Bros., the fifth of the third parties, because they were in a different position. They did not deny either that the document in which they were interested had been a forgery or that they were bound to indemnify the bank. In fact, for equitable reasons they have not been bound to pay anything, because, although it was a forgery and although they were bound to indemnify, both of which they admitted, for equitable reasons nothing was payable. Therefore, I shall not order them to pay any part of the costs of the bank. E

There then remain the costs of the third-party proceedings themselves. In my judgment, those were justified. Mr. Caplan urged me to say that the third parties who were, as he said, successful (that is to say they did not have to pay anything on the substantive part of the indemnity) should not have to pay any costs. But I do not think that it is right to treat them as successful. At first, they neither admitted that they were bound to indemnify, nor did they admit the fact of the forgery, but in the upshot they admitted both, although it took at least part of the hearing to make them do so. They also pleaded the Limitation Act, 1939, and obliged the bank to take that point; and that, too, failed. It seems to me that the bank succeeds in its third-party proceedings not only against those from whom it gets substantive sums of money for the stock, but also against those from whom they are entitled to be indemnified against their own costs. Therefore, I see no reason why the third parties, and all of them, should not pay the bank's costs of the third-party proceedings, to be taxed as between party and party. However in the case of Jobson Bros., they did not defend and they did not deny, and therefore Jobson Bros.' liability will be limited to such costs as they would have had to pay on a motion for judgment in default of defence. Subject to that, the party and party costs of the third-party proceedings are, in my judgment, payable by the third parties. F G H

[Discussion followed with regard to the liability of fourth and fifth parties. HIS LORDSHIP delivered no formal judgment on that question.] I

Order accordingly.

Solicitors: *Bower, Cotton & Bower* (for the plaintiff); *Freshfields* (for the defendant); *J. G. Bosman, Robinson & Co.*, and *Chamberlain & Co.* (for third, fourth and fifth parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A HURLEY v. J. SANDERS & CO., LTD. AND ANOTHER.

[LIVERPOOL ASSIZES (Glyn-Jones, J.), February 1, 2, 24, 1955.]

*Master and Servant—Liability of master—At common law—Dry dock—Servant employed to paint ship from altar courses—No safety precautions.**Ship—Repairs—Painting with anti-fouling paint—Whether work of repair—Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), preamble.*B *Dock—Dry dock—Ship under repair—Sub-contractors' employee injured—Notional occupier—Contractors' duty to provide safe means of access—Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), reg. 1.*

C The plaintiff, a ships' painter, was employed by the first defendants, who were sub-contractors to the second defendants, engaged in executing a contract to restore the anti-fouling paint on a ship in dry dock. The sides of the dock consisted of a vertical wall fourteen feet high surmounted by twelve steps (called altar courses), each eighteen inches high by twelve inches wide. The altar courses supported the timber baulks which were used to keep the ship on an even keel after the water had been pumped out of the dock. They had rounded edges and the level part was only eight or nine inches wide. The altar courses were liable to be slippery from slime and oil left behind when the water was pumped from the dock, but it was the duty of men employed by the dock owners to brush this away so far as possible. The method of painting the side of the ship, amidships, involved standing on the altar courses and using a long bamboo rod with a brush attached. While stepping down the side of the dock to his place of work the plaintiff slipped and fell, sustaining injuries. In an action for damages against both defendants,

E **Held:** (i) as working on the altar courses was dangerous and the first defendants had not established that it was impracticable to take some precautions, such possibly as the provision of a safety belt and line, they were in breach of their common law duty to the plaintiff, their servant, to take reasonable care for his safety.

F (ii) the work on which the plaintiff was engaged was work of repair within the meaning of the Shipbuilding Regulations, 1931 (*Day v. Harland & Wolff, Ltd.* ([1953] 2 All E.R. 387) followed), and the second defendants, being the notional occupier of the dock for the purpose of those regulations, were in breach of their statutory duty under reg. 1 to provide a safe means of access; and the facts that the plaintiff's route lay over a part of the dock and that, while at work on painting the ship, he was standing on the dock, not on the ship herself, did not deprive him of the protection of the regulations.

G Per CURIAM: the duty imposed by reg. 1 of the Shipbuilding Regulations, 1931, is absolute, for the words "so far as is reasonably practicable" which qualify the duty imposed by s. 26 (1) of the Factories Act, 1937, do not appear in reg. 1 of the regulations (see p. 839, letter C, post).

H **[Editorial Note.** In this case the plaintiff's fall occurred while he was making his way to his place of work. If he had reached his place of work safely, reg. 1 of the Shipbuilding Regulations, 1931, would, it seems, no longer have afforded him a cause of action (see per TUCKER, J., in *Lovell v. Blundells & T. I Albert Crompton & Co., Ltd.*, [1944] 2 All E.R. at p. 57, letter F).

As to a Master's Liability for the Safety of a Servant at Common Law, see 22 HALSBURY'S LAWS (2nd Edn.) 176, para. 296, text and note (f); and for cases on the subject, see 34 DIGEST, 194-198, 1580-1623.

For the Shipbuilding Regulations, 1931, see 8 HALSBURY'S STATUTORY INSTRUMENTS 141.]

Cases referred to:

(1) *Bath v. British Transport Commission*, [1954] 2 All E. R. 542.

- (2) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; A
[1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109;
2nd Digest Supp.
- (3) *Taylor v. Ellerman's Wilson Lines, Ltd.*, [1952] 1 Lloyd's Rep. 144.
- (4) *Day v. Harland & Wolff, Ltd.*, [1953] 2 All E.R. 387; 3rd Digest Supp.
- (5) *Donovan v. Cammell Laird & Co.*, [1949] 2 All E.R. 82; 2nd Digest Supp.
- (6) *Rippon v. Port of London Authority & Russell & Co.*, [1940] 1 All E.R. B
637; [1940] 1 K.B. 858; 109 L.J.K.B. 369; 162 L.T. 325; 104 J.P. 186;
2nd Digest Supp.
- (7) *Daniels v. F. Leyland & Co., Ltd.*, [1951] 1 Lloyd's Rep. 59.

Action.

The plaintiff claimed damages for personal injury against the first defendants (called in this report "the sub-contractors") on the ground that they, being his employers, had failed in their common law duty to take reasonable care for his safety, and against the second defendants (called in this report "the contractors") on the ground that they had failed in their duty under the Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), reg. 1, to provide a safe means of access for him to his place of work. The facts appear in the judgment.

G. G. Blackledge, Q.C., and *R. Lambert*, for the plaintiff.

R. H. Forrest, Q.C., and *C. M. Clothier* for both defendants.

Cur. adv. vult.

Feb. 24. **GLYN-JONES, J.** : The plaintiff in this action, Mr. James Hurley, is a ships' painter. At all material times he was employed by J. Sanders & Co., Ltd., the first named defendant company (the sub-contractors). On Nov. 9, 1952, the sub-contractors were engaged in executing a contract made between them and C. & H. Crichton, Ltd., the second named defendant company (the contractors) for restoring the anti-fouling paint below the water line of the steamship *Arthemisia* then in dry dock in No. 1 graving dock, West Float, Birkenhead.

The dock is owned by the Mersey Docks and Harbour Board and had been let by the board to the contractors. The contractors had contracted with the owner of the ship to execute the work being done on the ship, and the sub-contractors were their sub-contractors.

The plaintiff on the date mentioned was making his way down the side of the dock to his place of work, taking with him his bucket of paint, weighing with contents some twenty-five to thirty pounds, and his stick or striker, a bamboo rod about eight feet in length, to which his brush was attached, when he slipped and fell some eighteen or twenty feet to the bottom of the dock. By his fall he suffered injury and he now claims compensation from both defendants, alleging that his fall was caused by the failure of his employers, the sub-contractors, to take reasonable care for his safety, and by the breach by the contractors of their statutory duty under the Shipbuilding Regulations, 1931, to provide a safe means of access for him to his place of work.

There is at first sight a conflict of interest between the two defendant companies, but counsel, who appeared for both, told me that any judgment I might give against either would be satisfied from the same fund and that I need not apportion liability between them.

Along the centre of the bottom of the dock is a narrow raised bed a few feet in height made of blocks, on which the keel of a ship is to rest. The bottom of the dock is about sixty feet wide and is bounded on each side by a vertical wall fourteen feet high. From the top of the vertical wall the sides of the dock, which are of concrete, rise in twelve steps or tiers, eighteen inches high and twelve inches wide, to the top of the dock, which is thirty-two feet or thereabouts above the bottom of the dock.

These steps or tiers are called "altar courses", and their purpose is to act as supports for the shores, the baulks of timber, which are used to keep the ship on an even keel when the water is let out of the dock. One end of each shore is

A wedged against the ship's side and the other rests on one of the altar courses and against the side of the dock. The edge of each altar course is rounded, the object being to lessen damage which may be done to the edge of the courses by the shores. The measurement of twelve inches which I have stated as the width of each altar course is taken to the tip of the rounded nose; the level part of each course is no more than eight or nine inches wide. It follows from what B I have said that the slope of the side of the dock is at an angle of sixty degrees from the horizontal.

When a ship is brought into dry dock sufficient water is pumped out to bring the ship's keel to rest on the bed, the supporting shores are fitted and then the rest of the water in the dock is pumped out. The receding water leaves behind on the altar courses a certain amount of debris, including oil and slime, and as C the water level falls men employed by the board walk along the altar courses with brushes and remove the debris as far as they can, but a certain amount of oil or slime remains, making the courses a little slippery in places.

The work of painting the ship near bow and stern is done from staging built on the floor of the dock or suspended from the ship, but amidships, where the side of the ship is close enough to the side of the dock, the painters stand on the D altar courses, and using their strikers paint as much of the ship as can be reached down to a few feet below the level of the top of the vertical wall. This was the work the plaintiff was about to do.

The plaintiff was an experienced ships' painter accustomed to this work, and on the morning of the accident he went down the side of the dock to the altar courses in the usual way, that is to say he stepped or climbed down one or two E courses, leaving his bucket on the top of the dock, and then picked up the bucket and set it down on the first course, and so made his way down course by course towards that one on which he was to work. He slipped when he had reached the fourth or fifth course from the bottom, upsetting his bucket of paint, which marked approximately the place where he fell.

F [His LORDSHIP next considered the allegation that the altar course was out of repair and having found that the plaintiff's fall was not caused by any defect in the surface of any of the courses, continued:] I come then to the question whether or not there was in this case a breach by the plaintiff's masters, the sub-contractors, of their duty at common law to take reasonable care for their servant's safety. In considering this question I need not concern myself with the distinction, which it is sometimes not easy to draw, between the place of G work and the means of access thereto, though this is a distinction which has to be drawn in considering the statutory duty under the Factories Act, 1937, of the occupier of a dry dock.

The master's common law duty of care for his servant's safety extends as well to the servant's working place as to the means whereby the servant has to reach H it. In the present case the servant in the course of his work would have to move up and down the altar courses, for when he had finished painting as much of the ship's side as he could reach from one altar course he would have to move up or down to another altar course to continue his work. I think the question I have to answer in considering the master's liability at common law is whether or not it was negligent to put the plaintiff to paint this ship from the altar courses I either without taking precautions, such as providing him with a safety net or safety belt, or at all.

Counsel for the defendants contended that it was not dangerous for experienced ships' painters to work from the altar courses. Mr. Miller, the board's foreman, said he had never heard of a painter falling from an altar course; Mr. Arrowsmith, a foreman painter of forty years' experience, had heard of only one similar accident. On the other hand, the plaintiff called another ships' painter, a Mr. Lithgoe, who had fallen from an altar course, taking another man with him; and a Mr. Potts, an official of the trade union concerned, said that his union

office in Liverpool had records of five similar accidents, including three in this same dock. A

There seem to have been fewer accidents than I should have expected, and this evidence in my opinion tends to support the contention of counsel for the defendants, but it may after all mean no more than that the men in general take a high degree of care. I cannot, however, doubt that the plaintiff's situation was dangerous. The slope of the dock side was so steep that if the plaintiff once slipped from one of the altar courses there was no likelihood of his checking his fall before reaching the dock bottom, and therefore, while standing on an altar course, he was for practical purposes in as much danger as if the wall below him had been vertical. B

I appreciate the danger of argument by analogy, but it does seem to me that the plaintiff's position as he stood on one of these narrow ledges was not unlike that of a window cleaner on an eight or nine inch wide window sill, or a quarryman working on a narrow ledge of a quarry, and I think it is clearly established at common law that the master of a window cleaner or the master of a quarryman has to provide for his servant in such a situation a safety belt or safety rope. C

My view that it is dangerous to work on these altar courses seems to me to be supported by the decision of the Court of Appeal in *Bath v. British Transport Commission* (1), and it is fortified, I think, by the witnesses for the defence. Sergeant Roberts of the Birkenhead Police allowed his young and eager constable to climb down the dock side; he thought it quite unsafe to go down himself. Mr. Miller, the board's foreman, said these courses do not provide a safe foothold, and he thought it unsafe to go up and down them carrying a bucket of paint and a striker. Mr. Arrowsmith, a most experienced foreman painter employed by Messrs. Harland & Wolff, said that work on altar courses should be done only by young and active men, and that he would not expect older men to do it; but I point out in passing that the plaintiff at the time of his accident was in his forty-seventh year. D E

My view that the work was dangerous does not dispose of the matter. A great deal of work which has to be done is dangerous, and if it is not reasonably practicable for the master to eliminate or diminish the danger, then the risk is a necessary incident of this employment and a risk which the servant is paid to take. Ships must be painted, and they cannot be painted below the water line save in a dry dock, for the days of careening are past. There was no room for a staging to be erected between the ship and the side of the dock, for the dock between the vertical walls was no more than sixty feet wide and the beam of the *Arthemisia* was fifty-seven feet. Assuming staging could have been erected or suspended from the ship's side between the shores and above the lower altar courses, then so much of the side of the ship below the staging as could not be reached from the bottom of the dock could not have been painted at all save from the altar course below the staging, and it is almost certain that if staging had been provided the men would have gone down the altar courses to get to it rather than go aboard the ship by a gangway and go down on to the staging by a ladder over the ship's side. F G H

All witnesses agreed this work had always been done in the same way and was universally done in this way today. The plaintiff himself said that there was no other way of doing it. I think I ought to find that the sub-contractors were not negligent in setting the plaintiff to work on the altar courses. That leaves open the question whether or not some form of safety device such as a safety belt and line or a safety net between the side of the ship and the altar courses could not and should not have been provided. The use of a safety belt and line might involve extra expense and might create difficulty, and I hesitate very much to find that the universal practice of the trade is negligent, yet the risk seems to me so clear that I feel bound to find that some precaution such as the provision of a safety belt and line should have been taken, and I think it was for the I

A employer to satisfy me it would not be practicable to do so, and this he has not done.

I am conscious that this decision is in conflict with the universal practice of a great industry, and I should have felt happier if I had had the advantage of hearing the evidence of a witness or witnesses who had experience in managing the business of ship repairing in dry docks, who might have given me adequate reasons why it is not practicable to adopt such precautions. The main objection put forward in cross-examination and argument was no more than that the provision of a safety line would involve extra expense, in that if the suggestion of Mr. Martin, an engineer, were adopted, an additional man or additional men would have to stand at the top of the dock and make fast or let go the safety lines as might be required.

C Mr. Martin had no special experience of dock work, and I am not sure that I ought to attach much importance one way or another to his suggestion that a banksman or extra hand at the top of the dock would be needed. I should, however, have listened with the most careful attention to any evidence called for the defence tending to show that the provision of safety lines or other precautions was impracticable either because the extra cost was out of proportion to the risk or for any other reason, and in the absence of such evidence I think it my plain duty to find that the sub-contractors failed to take reasonable care for the plaintiff's safety and that the plaintiff is entitled to recover compensation for his injury.

E I have now to consider whether the plaintiff has proved a breach of the Shipbuilding Regulations, 1931.* The only provision of which a breach is alleged is reg. 1. Before I consider whether that regulation is broken I must first decide whether or not the regulations apply at all. The regulations apply to the repairing of ships in shipbuilding yards, and they clearly apply to a ship in a public dry dock (which this was) undergoing repair. There is no evidence that any work was being done on this ship except re-painting the bottom of the ship with anti-fouling composition, and the question is "Is this painting work of repair?"

F In *London & North Eastern Ry. Co. v. Berriman* (2), the House of Lords held that a railway signal fitter's labourer engaged in the routing oiling of the apparatus connecting signal boxes with signals and points was not engaged in relaying or repairing the permanent way within the meaning of the Railway Employment (Prevention of Accidents) Act, 1900. Counsel for the defendants said that the object of oiling the moving parts of signal mechanism was both to improve the function and prevent corrosion, and the object of putting anti-fouling paint on a ship's bottom was precisely the same, that is to say, to protect the hull from corrosion, and by keeping the hull free of marine growth to improve, or at least to maintain, the vessel's speed by diminishing the friction between the hull and the water.

H I am unable to accede to this argument. Whether or not a given piece of work amounts to a repair is a question of fact depending on the circumstances of a particular case, and I certainly do not myself take the view that, because the House of Lords by a majority of three to two decided that oiling the points and signal apparatus on a railway line was not repairing the permanent way within the meaning of a particular Act of Parliament, I am constrained to decide that to put a ship in dry dock for the purpose of restoring or renewing the anti-fouling composition below the water line is not repair. The distinction between maintenance and repair is a fine one, and indeed I should have thought myself that the two were not mutually exclusive.

I In *Taylor v. Ellerman's Wilson Lines, Ltd.* (3), a case tried at Leeds Assizes, ORMEROD, J., decided that certain painting work being done in a ship's hold—work which could have been done in wet dock, or I suppose, even at sea if the

* S.R. & O. 1931 No. 133; 8 HALSBURY'S STATUTORY INSTRUMENTS 141.

hold were empty—was not repair within the meaning of the Shipbuilding Regulations, 1931, although the work was being done in a dry dock. A

In *Day v. Harland & Wolff, Ltd.* (4), PEARSON, J., decided that the painting of a ship in dry dock with anti-fouling composition constituted repair of a ship within the meaning of the Shipbuilding Regulations, 1931. I do not think that the two decisions are inconsistent, and having considered the cases cited to ORMEROD, J. and PEARSON, J., I find myself in agreement with the reasoning of PEARSON, J., in *Day's* case (4), and in my opinion the work on which the plaintiff was engaged in *Day's* case (4) was the repair of a ship. B

The regulations provide that when a ship is being repaired in a public dry dock the person who contracts with the owner of a ship to execute the work of repair shall be deemed to be the occupier for the purposes of certain parts of the regulations, including, in particular, Part I which includes reg. 1, the regulation that is in question in this case. The contractor becomes what has been called the notional occupier of the dock and assumes the duty to comply with the regulation. C

It is plain that the sub-contractors had not contracted with the shipowner. The sub-contractors are not the notional occupier, for the shipowner's contract was with the contractors, and there is no evidence that the contractors were acting as the owner's agent. Counsel for the defendants submits there is no evidence justifying the inference that the contractors had so contracted, or, if they had, that they were the sole contractors. He referred to the judgment of DEVLIN, J. in *Donovan v. Cammell Laird & Co.* (5). He contended the burden was on the plaintiff to prove affirmatively that there was no other repairer who had made a contract with the owner in respect of work to be done on this ship on the same occasion. D E

I venture to express my agreement with DEVLIN, J., that the draftsman of the regulations appears to have assumed that whenever there is a ship being repaired in a dry dock there will always be a single repairer who can be identified as the notional occupier (see [1949] 2 All E.R. at p. 87, letter F), but in the present case there is no evidence that any work was being done on the ship other than that being done by the sub-contractors. I find that the contractors had contracted with the owner of the ship to get this work done, had arranged with the board for the vessel to be taken into dry dock and had contracted with the sub-contractors to do the work. Accordingly I hold that the contractors were the notional occupier. F

It follows that the contractors were under a duty to comply with reg. 1 of the regulations, which reads as follows: G

“ Safe means of access shall be provided to all parts of the ship to which persons employed may be required to proceed in the course of their employment.”

Counsel for the defendants argued that this regulation did not apply in that the plaintiff was required to proceed not to a part of the ship but to a part of the dry dock, namely, the altar course on which he would stand while doing his work. I do not agree with that argument, and I am of opinion that the plaintiff was required in the course of his employment to proceed to that part of the hull of the ship which he was to paint, and the fact that his route lay over a part of the dock and not over any part of the ship itself does not deprive him of his right of safe means of access under the regulations, nor does the fact that in using his brush to reach that part of the ship he would stand on the altar course, which was a part of the dock. H I

This conclusion appears to me to be in accord with the decisions of TUCKER, J., in *Rippon v. Port of London Authority & Russell & Co.* (6), and of PRITCHARD, J., in *Daniels v. F. Leyland & Co., Ltd.* (7).

Next, counsel for the defendants submitted that the means of access provided, namely, by going down the altar courses, was safe within the meaning of the

A regulations since, he argued, the word "safe" must be construed in its context, that in relation to the parts of a dry dock over which experienced ship repairers must go in order to do their work the word "safe" must be a relative term, and that to experienced ships' painters or repairers the altar courses did provide a safe means of access, notwithstanding risk of an occasional fall.

I think that the findings of fact at which I have already arrived answer these
 B contentions. I cannot find, while considering the employers' liability at common law, that the altar courses were a dangerous work place or means of access without arriving at the same finding of fact when considering the notional occupier's duty under the Shipbuilding Regulations, 1931, and I am driven to find that the contractors were in breach of their statutory duty to provide a safe means of access for the plaintiff. What else the contractors could have done I
 C do not know. It was not in their power to require the painters, over whom they had not a master's control, to wear safety belts, and I have already found that it is not practicable to paint the side below the water line of a ship in dry dock except from altar courses. The duty imposed by reg. 1 of the regulations is absolute, for the words "so far as is reasonably practicable" (which qualify the duty imposed by s. 26 (1) of the Factories Act, 1937) do not appear in reg. 1
 D of the regulations.

There remains the question whether or not the plaintiff was guilty of contributory negligence. Counsel for the defendants argued that he could have let himself down by holding one of the chains fitted at intervals along the side of the dock. There is evidence that men occasionally do this, but the practice of going
 E down the altar courses without using the chains is almost universal, and no one in authority over the plaintiff had ever suggested to him that it was wrong for him to go down without holding on to one of the chains, and I cannot find him guilty of contributory negligence on this ground. I am, however, of the opinion that he could and should have taken more care not to put his foot on the outside edge of the altar course on which he slipped, and I attribute one-quarter of the liability for the accident to him on this account.

F As to damages, his special damage is extinguished by the allowance which must be made for payments received by him as sickness or industrial injury or disablement benefit or gratuity. I have only to assess his general damages. He was fortunate to escape as lightly as he did, and the agreed medical report says that such loss of faculty as remains should not disable him from doing his work as a ships' painter. I assess his damages at £500, and I give judgment for that sum
 G less twenty-five per cent. against both defendants.

Judgment for the plaintiff against both defendants.

Solicitors: *Riley, Sutcliffe & Co.*, Blackburn (for the plaintiff); *Laces & Co.*, Liverpool (for both defendants).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

H LANDOM TRUST, LTD. v. HURRELL AND ANOTHER.

[QUEEN'S BENCH DIVISION (Denning, L.J., sitting as a judge of the Division), March 7, 16, 1955.]

Contract—Penalty—Hire-purchase agreement—Three-quarters of purchase price payable as depreciation if agreement determined under certain conditions.

I *Hire-Purchase—Penalty—Three-quarters of purchase price payable as depreciation if agreement determined under certain conditions.*

The first defendant entered into a hire-purchase agreement with the plaintiffs, who were a hire-purchase finance company, for the acquisition of a second-hand car. The second defendant was guarantor of the first defendant's payments under that agreement. The total price payable was £558 8s., of which £525 was the price of the car and £33 8s. was a finance charge. Clause 6 of the agreement provided that, if the first defendant should

return the car or if the plaintiffs should re-take it under the conditions provided for in the agreement, the first defendant should pay to the plaintiffs a sum sufficient together with the sums already paid or then payable to amount to £425, as compensation for the depreciation of the car. The figure of £425 was approximately three-quarters of the total purchase price. The first defendant paid £175 in cash at the time of the agreement and subsequently paid the first four of the twelve monthly instalments of £31 19s., making a total payment of £302 16s. The first defendant having failed to pay the fifth instalment, the plaintiffs re-took the car in accordance with the agreement and re-sold it for £270, thus making a total sum received by them of £572 16s. The plaintiffs sued the defendants under cl. 6 of the agreement for a further £122 4s., being the difference between £425 and the first defendant's payments amounting to £302 16s.

Held: the sum agreed to be paid under cl. 6 of the agreement was not a genuine pre-estimate of damage, but was a penalty, and the plaintiffs' claim failed.

Cooden Engineering Co., Ltd. v. Stanford ([1952] 2 All E.R. 915) followed.

Per CURIAM: *Elsey & Co., Ltd. v. Hyde* (JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 107) and *Re Apex Supply Co., Ltd.* ([1941] 3 All E.R. 473) cannot be regarded as establishing that a sum for depreciation equivalent to three-quarters of the purchase price is reasonable for all goods at all times (see p. 842, letter D, post).

[As to Liquidated Damages or Penalty, see 10 HALSBURY'S LAWS (2nd Edn.) 141-145, paras. 183-185; and for cases on the subject, see 17 DIGEST (Repl.) 148-166, 487-621.]

Cases referred to:

- (1) *Cooden Engineering Co., Ltd. v. Stanford*, [1952] 2 All E.R. 915; [1953] 1 Q.B. 86; 3rd Digest Supp.
- (2) *Elsey & Co., Ltd. v. Hyde*, (1926), JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 107.
- (3) *Re Apex Supply Co., Ltd.*, [1941] 3 All E.R. 473; [1942] Ch. 108; 111 L.J.Ch. 89; 166 L.T. 264; 2nd Digest Supp.
- (4) *Roadways Transport Development, Ltd. v. Browne & Gray*, (1927), JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 118.
- (5) *Chester & Cole, Ltd. v. Wright*, (1930), JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 124.

Action.

The plaintiffs, who were a hire-purchase finance company, bought a second-hand Armstrong-Siddeley car for £525 and agreed to let it to the first defendant on hire-purchase terms. The first defendant was the hirer and the second defendant was the guarantor under the agreement. The agreement was in writing, was dated Aug. 28, 1953, and provided for an initial payment of £175 followed by twelve monthly instalments of £31 19s. The total purchase price, including a finance charge of £33 8s., was £558 8s. There were clauses in the agreement enabling the owners to re-take the car if the hirer defaulted in payment of the instalments. Clause 6 provided that the hirer was—

“To pay, should he return the motor under cl. 15 (a) hereof or should the owner give notice terminating the hire of the motor and/or re-take the motor under cl. 8 hereof before the expiration of nine months from the date hereof, such further sum (in addition to any sum payable under cl. 8 hereof) as, with the total amount previously paid under cl. 1 and cl. 2 hereof, will equal the sum of £425, by way of depreciation of the said motor.”

The first defendant paid £175 in cash at the time of the agreement and paid the first four instalments (making in all £302 16s.) but defaulted on the fifth instalment. The plaintiffs, having given notice on Feb. 10, 1954, terminating the

- A hiring in accordance with the agreement, re-took the car and sold it for £270. They thus received under the agreement a total of £572 16s., being £14 8s. more than the total purchase price. Under cl. 6 of the agreement a sum of £122 4s. (viz., £425 less £302 16s.) became due as compensation for depreciation. The figure of £425, stipulated in cl. 6 of the agreement, was approximately three-quarters of the total purchase price. The defendants contended that the £122 4s.
- B was a penalty and irrecoverable.

- The agreement included provisions to the following effect: (cl. 3) the hirer agreed to keep the motor in good repair and condition, that repairs should be carried out by persons selected or provided by the owners, that the owners might require the motor to be delivered to them for repair and that the hirer would pay the cost of the repair; (cl. 8) if any payment should be in arrear or the hirer
- C should commit a breach of the agreement it should be lawful for the owners to terminate the agreement and to re-take possession of the motor without prejudice to their right to recover rent or other moneys payable; and (cl. 15) (a) the hirer might terminate the agreement by returning the motor, but would remain liable for rent up to the date of the return, for any damages for breach of the agreement and for any compensation under cl. 6.

- D *B. Finlay* for the plaintiffs.
The first defendant appeared in person.
The second defendant was not represented.

Cur. adv. vult.

- Mar. 16. DENNING, L.J., read the following judgment in which, after
- E stating the facts, he continued: The plaintiffs claim that they are entitled to £122 4s. by reason of cl. 6 of the hire-purchase agreement, which provides that, if the owners terminate the hiring or re-take the motor car, the hirer will pay a sum sufficient to bring his total payments up to £425 by way of compensation for depreciation. Now, the hirer had already paid £175 plus £127 16s., making £302 16s. That left £122 4s. to make up the £425 which they claim. In effect,
- F they have got the car back and also claim £425 in cash.

- I was told by the secretary of the plaintiffs that it is the usual practice of hire-purchase finance companies to stipulate for compensation for depreciation at the rate of seventy-five per cent. of the price. This means, therefore, that, if the hirer should fail to pay the first instalment or any later instalment, the owners not only can re-take the car and re-sell it for their own benefit, but also can compel
- G the hirer to pay three-quarters of the price. This seems to me to be altogether exorbitant. The facts of this case show how unfair it is; and, as Mr. Hurrell was not represented, I asked counsel for the finance company to justify the clause if he could.

- At one time it was thought that the courts of this country were powerless to interfere with clauses such as this, but I am glad to say that in *Cooden Engineering Co., Ltd. v. Stanford* (1), the Court of Appeal held that if the clause imposes a penalty (as opposed to liquidated damages) it is invalid and unenforceable. The sole question for me is, therefore, whether this clause is a penalty clause. I reserved my decision on this question because of the large number of cases which will be affected by it. In considering this question, I take into account these circumstances: (i) The £425 is three-quarters of the total price. It is inserted
- H by the hire-purchase companies by rule of thumb without regard to the make of car, its age, the market conditions or anything of the kind. It is the same for all.
- I (ii) The £425 payment for compensation for depreciation is payable on the footing that the car, when it is re-taken, is in good order, repair and condition. If it is in bad condition, the owners can recover damages for breach of agreement under cl. 3, cl. 8 and cl. 15 (a), and these damages are payable in addition to the £425. (iii) Assume that the car is kept in good condition, and at the end of the first month the hirer makes default and the owners re-take the car. Can anyone suppose that in that time the value of it will have dropped by three-quarters so

that it will be worth only one-quarter of what it was worth a month before? It is an altogether extravagant thing to imagine. (iv) Next, assume that the car is kept in good condition and at the end of six months the hirer makes default and the owners re-take the car. One can understand that it might have dropped to one-half its value, but not as much as three-quarters. Indeed, when the matter was put to the test, the drop was only one-half. (v) Lastly, suppose that the car was let on a simple hiring (without a purchase clause) and the hiring was for one month, or even for six months. The hiring charge would be nowhere near £425, and yet it would have to cover depreciation. A

In these circumstances, I cannot regard the figure of three-quarters as a genuine pre-estimate of damage. If the parties had genuinely tried to estimate the depreciation of this particular car at this particular time, the figure would have been much less. B

I was referred to two previous cases in the courts where owners have recovered three-quarters for depreciation. In 1926, in *Elsey & Co., Ltd. v. Hyde* (2), a new tricycle was let on hire-purchase for £30 4s. The owners re-took the machine and also recovered £25 as compensation for depreciation (see JONES AND PROUD-FOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 107). In 1941 (in *Re Apex Supply Co., Ltd.* (3)), second-hand factory machinery was let on hire-purchase for £1,360 16s. The owners re-took the goods and also recovered £1,020 12s. as compensation for depreciation. Each of those cases was decided, however, on the ground that no question of penalty arose, which has since been held to be wrong. The judges also expressed the view that the sum for depreciation was a genuine pre-estimate of damage; but, if this was so, it must have been because of the absence of any market at that time for goods of that type. The cases cannot be regarded as establishing that three-quarters is reasonable for all goods at all times. C

I was also referred to *Roadways Transport Development, Ltd. v. Browne & Gray* (4), a case decided in 1927 in the Court of Appeal, where a sum of £100 payable for depreciation on a motor car was held to be a genuine pre-estimate of damage, but it is not very helpful, because no details are given. I do notice, however, that ATKIN, L.J., said that in that particular case the car did depreciate by more than £100; so that the sum was shown ex post facto to be reasonable. That is not the case here. The case of *Chester & Cole, Ltd. v. Wright* (5) is also unhelpful, because not sufficient details are given. D

In the present year 1955 I must, I think, approach the matter afresh in the light of the different circumstances which now exist from those existing when those earlier decisions were given. Looking at this agreement and the conditions under which it was made, I am of opinion that the sum of £425 was not a genuine pre-estimate of damage but was an extravagant and extortionate sum held in terrorem over the head of the hirer. It is a penalty and, as such, it is not recoverable in these courts. There will be judgment, therefore, for the defendants. E

Judgment for the defendants. F

Solicitors: *Darling & Taylor* (for the plaintiffs).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.] G

H

A **WALTER & SULLIVAN, LTD. v. J. MURPHY & SONS, LTD.**
SAME v. SAME.

[COURT OF APPEAL (Hodson and Parker, L.JJ.), March 4, 7, 16, 1955.]

Chose in Action—Equitable assignment—Assignment of part of a debt—Assignor's action against debtor for whole debt—Whether joinder of assignee necessary.

B In or about 1952 the plaintiffs carried out certain works as sub-contractors of the defendants. Disputes arose as to the amount due from the defendants and in July, 1953, the plaintiffs issued a writ claiming that the defendants were indebted to them in the sum of £1,808. On Sept. 1, 1953, the plaintiffs having become indebted to H. & Co. in the sum of £1,558 17s. 8d. gave the defendants a written authority and request "to pay to [H. & Co.] . . . the sum of £1,558 17s. 8d. from moneys owing by you to us . . . The receipt of [H. & Co.] shall be good and sufficient discharge to you in respect of payment made hereunder". This authority was declared to be for valuable consideration to secure payment of a debt and to be irrevocable without the written consent of H. & Co. By a second document dated Sept. 1, 1953, H. & Co. undertook with the plaintiffs in consideration of the irrevocable authority given by them to the defendants, "that we will . . . pay over to you any moneys which are paid to us by [the defendants] . . . after your debt to us . . . has been fully repaid . . ." By their defence the defendants pleaded that the plaintiffs' authority dated Sept. 1, 1953, amounted to an assignment of part of the alleged debt, namely, £1,558 17s. 8d. and that as to that sum and any excess the plaintiffs were not competent to proceed with their claim without joining H. & Co. as a party.

E **Held:** (i) the arrangement made between the plaintiffs and H. & Co., amounted to an equitable assignment to H. & Co. by way of charge of part of the debt alleged to be due from the defendants, and the plaintiffs could not proceed with their claim unless H. & Co. were joined as parties (dictum of MATHEW, L.J., in *Hughes v. Pump House Hotel Co.* ([1902] 2 K.B. at p. 193) explained); and

F (ii) as the assignment was an assignment of part only of the debt, the plaintiffs could not recover even the excess over the part assigned without joining H. & Co. as parties (*Re Steel Wing Co., Ltd.* ([1921] 1 Ch. 349) applied).
 Appeal dismissed.

G **[Editorial Note.** In *Re Steel Wing Co., Ltd.* ([1921] 1 Ch. 349) one M. had assigned for value a half part of a debt. LAWRENCE, J., said (*ibid.*, at p. 357) "the main reason why an assignee of a part of a debt is required to join all parties interested in the debt in an action to recover the part assigned to him is in my opinion because the court cannot adjudicate completely and finally without having such parties before it". In the present case the plaintiffs were the assignors of part of the debt and it seems that the principle indicated by LAWRENCE, J., is extended to circumstances where the assignor and legal owner of the whole debt, as distinct from the assignee, sues the debtor; or at any rate is so extended where the equitable assignment of part of the debt is by way of charge.

H As to Equitable Assignments by way of Charge, see 4 HALSBURY'S LAWS (3rd Edn.) 492, para. 1017; and for cases on the subject, see 8 DIGEST (Repl.) 578, 268 et seq.]

I Cases referred to:

- (1) *Re Kent & Sussex Sawmills, Ltd.*, [1946] 2 All E.R. 638; [1947] Ch. 177; [1947] L.J.R. 534; 176 L.T. 167; 2nd Digest Supp.
- (2) *Hughes v. Pump House Hotel Co.*, [1902] 2 K.B. 190; 71 L.J.K.B. 630; 86 L.T. 794; 8 Digest (Repl.) 571, 220.
- (3) *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349; 124 L.T. 664; sub nom. *Re Steel Ring Co., Lord's Petition*, 90 L.J.Ch. 116; 10 Digest 821, 5346.

Appeal and cross-appeal.

On July 8, 1953, the plaintiffs sued the defendants for damages for breach of a contract whereby the plaintiffs were to execute plasterwork to certain buildings and to be paid therefor. In substance the net claim was for £1,808 2s. 4d. for work done by the plaintiffs under the contract. The defendants alleged, among other defences, that by a document dated Sept. 1, 1953, and registered under the Companies Act, 1948, the plaintiffs had, after action brought, authorised and requested the defendants to pay Hall & Co., Ltd. the sum of £1,558 17s. 8d. from moneys owing by the defendants to the plaintiffs in respect of work done under the contract, that this authority had been given for value and that accordingly there was nothing due to the plaintiffs up to the amount of £1,558 17s. 8d. On Mar. 18, 1954, the issue raised by this plea was referred by consent to be tried as a preliminary issue by an official referee. On Jan. 21, 1955, His Honour BRETT CLOUTMAN, Q.C., Official Referee, ordered that all further proceedings in the action should be stayed pending the addition of Hall & Co., Ltd. to the proceedings by the plaintiffs. The plaintiffs appealed.

The defendants cross-appealed for an order that the plaintiffs' claim be dismissed unless the plaintiffs joined Hall & Co., Ltd. as parties to the proceedings within a fixed period.

J. Perrett for the plaintiffs.

R. D. Stewart-Brown for the defendants.

Cur. adv. vult.

Mar. 16. PARKER, L.J., read the following judgment of the court: The plaintiffs, who are plaster-work contractors, in 1952 carried out certain work as sub-contractors of the defendants, who are builders. Disputes arose as to the amount due from the defendants, and in July, 1953, the present proceedings were brought by the plaintiffs alleging that the defendants were indebted to them in the sum of £1,808. Meanwhile the plaintiffs had become indebted to their suppliers, Hall & Co., Ltd., in the sum of £1,558, and desired to get further materials from them for current work. Accordingly, an arrangement was made whereby the plaintiffs were to give the defendants an irrevocable authority to pay Hall & Co. £1,558 out of the £1,808 alleged to be due from the defendants, and Hall & Co. were to continue to supply material to the plaintiffs. The arrangement was carried through by means of two documents dated Sept. 1, 1953.

The first document signed by Hall & Co. was as follows:

"In consideration of your today giving an irrevocable authority to J. Murphy & Sons, Ltd. of 43, Charteris Road, Finsbury Park, N.4 to pay to us the sum of £1,558 17s. 8d. (one thousand five hundred and fifty-eight pounds, seventeen shillings and eightpence) from moneys owing by them to you, as therein more particularly mentioned we hereby undertake with you that we will forthwith pay over to you any moneys which are paid to us by J. Murphy & Sons, Ltd. pursuant to such irrevocable authority after your debt to us of £1,558 17s. 8d. or such part thereof as may from time to time be owing, has been fully repaid either by you or out of the moneys which we receive from time to time from the said J. Murphy & Sons, Ltd. or their assigns."

The second, addressed by the plaintiffs to the defendants, was in this form:

"We hereby authorise and request you to pay to Hall & Co., Ltd. of Victoria Wharf, Croydon, Surrey, the sum of £1,558 17s. 8d. from moneys owing by you to us in respect of work done on your behalf under the above mentioned contract. The receipt of Hall & Co., Ltd. shall be a good and sufficient discharge to you in respect of the payment made hereunder. This authority is given for valuable consideration to secure payment of a debt and is irrevocable by us unless Hall & Co., Ltd. shall consent in writing to the revocation thereof."

- A On Oct. 21, 1953, the defendants delivered their defence and pleaded, *inter alia*, that this arrangement of which they had notice amounted to an assignment of £1,558, part of the alleged debt, and that both as regards the £1,558 and any excess no claim lay without the joinder of Hall & Co. The matter was tried as a preliminary issue by the official referee, who upheld the defendants' plea, and stayed the proceedings. Against this order the plaintiffs now appeal.
- B It is, we think, clear that the arrangement between the plaintiffs and Hall & Co. amounted to an equitable assignment by way of charge of part of the debt alleged to be due from the defendants. It was in a form similar to the documents in question in *Re Kent & Sussex Sawmills, Ltd.* (1), and, no doubt, as a result of that decision the charge was duly registered under s. 95 of the Companies Act, 1948. Normally, of course, it is the assignee who, if necessary, seeks to recover the debt, and in a case where, as here, s. 136 of the Law of Property Act, 1925, does not apply, he would, if the right assigned were equitable, have to join the assignor in order to bind him at law, or if the right were a legal right he could compel the assignor to allow his name to be used. In the present case, however, it is the assignor who is seeking to recover, and in his own right, and it is strongly urged that he is entitled to do so without joining the assignee. We think that that is an impossible contention. The whole object of the notice to the debtor is to protect the assignee. After receipt of that notice the debtor pays the assignor at his peril. Reliance was, however, placed on certain words of MATHEW, L.J., in *Hughes v. Pump House Hotel Co.* (2) ([1902] 2 K.B. at p. 193). In that case the plaintiff, Mr. Hughes, a builder, had assigned to his bankers all moneys due from the defendants, the building owners. The question was whether the assignment was an absolute assignment within s. 25 (6) of the Judicature Act, 1873, in which case the action should have been in the assignee's name or whether it was an assignment by way of charge only, in which case, as MATHEW, L.J., said (*ibid.*), "... the action must be in the name of the assignor . . ." In our opinion, however, he was not saying that the assignor, the plaintiff, was entitled to sue for his own benefit. The question was merely whether the action should have been brought by the assignee in his own name or by the assignee in the name of the assignor.
- F

- It was further said that once the plaintiffs in the present proceedings recovered judgment the debt would merge in the judgment debt, and that accordingly the defendants could not thereafter be sued by Hall & Co. The court, however, will not give judgment for the plaintiffs when there is an admitted interest outstanding in Hall & Co., and unless and until the authority to pay Hall & Co. is withdrawn, or Hall & Co. are joined in the proceedings, judgment cannot be given. Further, in the present case, the assignment is only of part of a debt, and that being so, the plaintiffs cannot recover even the excess, if any, over the part assigned without bringing Hall & Co. before the court (see *Re Steel Wing Co., Ltd.* (3)). We are of opinion, therefore, that the appeal should be dismissed.
- H It remains only to consider the defendants' cross-appeal, which is an appeal from the official referee's order merely staying the proceedings. In our opinion the defendants are entitled to an order dismissing the claim, unless within a fixed period the claim is put in proper form. This could take the form of the plaintiffs' joining Hall & Co. as plaintiffs, should they be willing to join, or as defendants, should they not be willing. Alternatively, the plaintiffs might be able to induce Hall & Co. to consent to the authority to pay being withdrawn, substituting some letter of trust under which the plaintiffs undertook to hold any sum recovered in the proceedings in trust for Hall & Co.
- I

Appeal dismissed.

Solicitors: *Hicks, Arnold & Co.* (for the plaintiffs); *Masons* (for the defendants).
[Reported by PHILIPPA PRICE, Barrister-at-Law.]

ATTORNEY-GENERAL FOR NEW SOUTH WALES v.
PERPETUAL TRUSTEE CO. (LTD.) AND OTHERS.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Cohen and Lord Somervell of Harrow), January 24, 25, 26, 27, 31, February 1, 2, March 14, 1955.]

Master and Servant—Loss of servant—Police constable injured through negligence of third person and subsequently discharged—Claim by Crown to recover amount of his salary and pension for period of disablement—Relationship of master and servant.

Privy Council—Australia—New South Wales—Master and servant—Action per quod servitium amisit—Police constable injured through negligence of third person and subsequently discharged—Claim by Crown to recover amount of salary and pension for period of disablement.

Police—Constable—Nature of office—Whether servant of Crown—Loss of services of police officer due to negligence of third person—Whether action per quod servitium amisit lay at suit of Crown.

A police constable, a member of the New South Wales Police Force, was injured while travelling in a tramcar with which a motor vehicle, negligently driven, collided. The constable was disabled by these injuries from carrying out his duties as a member of the police force, and, later, he was discharged. During the period of his disability the Crown, although deprived of his services as a member of the New South Wales Police Force, paid him the salary and allowances appropriate to his office and, on and after his discharge, he was paid a pension in accordance with the provisions of the New South Wales Police Regulation (Superannuation) Acts, 1906 to 1944. But for his disablement he would not have received such a pension for a long time. The Crown, in an action per quod servitium amisit, claimed to recover the salary and allowances already paid, and to be reimbursed in respect of the pension already paid and which would thereafter be paid to the constable.

Held: the cause of action of a master for personal injuries to his servant per quod servitium amisit, being a survival from a time when service was a status, should not be extended to the loss by the Crown of the services of a constable or member of a police force, because the status on which the cause of action was founded lay in the realm of domestic relations, not in that of public relations, and a constable or member of a police force was the holder of an office which had for centuries been regarded as a public office.

Commonwealth v. Quince (1944) (68 C.L.R. 227) considered; *Bradford Corp'n. v. Webster* ([1920] 2 K.B. 135), and *A.-G. v. Valle-Jones* ([1935] 2 K.B. 209) criticised as being unreliable; *A.-G. & Minister for Justice v. Dublin United Tramways Co. (1896), Ltd.* ([1939] I.R. 590) not followed.

Per CURIAM: (i) their Lordships share the opinion, entertained by all the judges of the High Court of Australia, that the service relationship of a constable to the Crown is not, in principle, distinguishable from that of a soldier (see p. 857, letter I, post).

(ii) although cases concerned with the enticing of servants from their service, or harbouring them after they have left it, have developed out of the original cause of action per quod servitium amisit, yet they differ essentially from it in that the injury has not been done to the servant whereby the master lost his service, but has been done solely to the master whose servant has been enticed away or harboured (see p. 855, letter E, post).

Distinction drawn by CROMPTON, J., in *Lumley v. Gye* (1853) (2 E. & B. at p. 228) approved.

Appeal dismissed.

[As to the Rights of a Master for Loss of Service of a Servant from Personal Injury, see 22 HALSBURY'S LAWS (2nd Edn.) 251, 252, para. 437; and for cases on the subject, see 34 DIGEST 180, 181, 1451-1470.]

- A As to the Office of Constable, see 25 HALSBURY'S LAWS (2nd Edn.) 288, 289, para. 473; and as regards the status of a member of the police force, see *ibid.*, p. 322, para. 530.

As to the position in law of Crown Servants, see 7 HALSBURY'S LAWS (3rd Edn.) 254, para. 548.]

Cases referred to:

- B (1) *Commonwealth v. Quince*, (1944), 68 C.L.R. 227; [1944] A.L.R. 50; 17 A.L.J. 370; 2nd Digest Supp.
- (2) *Enever v. R.*, (1906), 3 C.L.R. 969; 11 Digest (Repl.) 598, 267.
- (3) *Stanbury v. Exeter Corpn.*, [1905] 2 K.B. 838; 75 L.J.K.B. 28; 93 L.T. 795; 70 J.P. 11; 34 Digest 39, 156.
- C (4) *Fisher v. Oldham Corpn.*, [1930] 2 K.B. 364; 99 L.J.K.B. 569; 143 L.T. 281; 94 J.P. 132; Digest Supp.
- (5) *Bradford Corpn. v. Webster*, [1920] 2 K.B. 135; 89 L.J.K.B. 455; 123 L.T. 62; 84 J.P. 137; 34 Digest 183, 1490.
- (6) *Mackalley's Case*, (1611), 9 Co. Rep. 61 b, 65 a; 77 E.R. 824; 41 Digest 88, 252.
- D (7) *Coomber v. Berks JJ.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 28 Digest 14, 69.
- (8) *Lumley v. Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 34 Digest 168, 1307.
- (9) *Société Anonyme de Remorquage à Hélice v. Bennetts*, [1911] 1 K.B. 243; 80 L.J.K.B. 228; 41 Digest 803, 6636.
- E (10) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38; sub nom. *Admiralty Comrs. v. The Amerika (Owners)*, *The Amerika*, 86 L.J.P. 58; 116 L.T. 34; 34 Digest 183, 1489.
- (11) *Taylor v. Neri*, (1795), 1 Esp. 385; 170 E.R. 393; 34 Digest 180, 1453.
- (12) *Fores v. Wilson*, (1791), Peake, 77; 170 E.R. 85; 34 Digest 174, 1369.
- (13) *Blake v. Lanyon*, (1795), 6 Term Rep. 221; 101 E.R. 521; 34 Digest 170, 1331.
- F (14) *Sykes v. Dixon*, (1839), 9 Ad. & El. 693; 8 L.J.Q.B. 102; 112 E.R. 1374; 34 Digest 170, 1326.
- (15) *Pilkington v. Scott*, (1846), 15 M. & W. 657; 15 L.J.Ex. 329; 7 L.T.O.S. 340; 153 E.R. 1014; 34 Digest 170, 1324.
- (16) *Hartley v. Cummings*, (1847), 5 C.B. 247; 17 L.J.C.P. 84; 10 L.T.O.S. 247; 136 E.R. 871; 34 Digest 50, 247.
- G (17) *Martinez v. Gerber*, (1841), 3 Man. & G. 88; 10 L.J.C.P. 341; 133 E.R. 1069; 34 Digest 180, 1456.
- (18) *A.-G. v. Valle-Jones*, [1935] 2 K.B. 209; 104 L.J.K.B. 358; 152 L.T. 513; Digest Supp.
- (19) *Raphael (Owners) v. Brandy*, [1911] A.C. 413; 80 L.J.K.B. 1067; 105 L.T. 116; 4 B.W.C.C. 307; 34 Digest 427, 3470.
- H (20) *R. v. Richardson*, [1948] S.C.R. 57; 2nd Digest Supp.
- (21) *McArthur v. R.*, [1943] 3 D.L.R. 225; Ex. C.R. 77; 2nd Digest Supp.
- (22) *United States v. Standard Oil Co. of California*, (1947), 332 U.S. 301; 67 S.Ct. 1604.
- (23) *A.-G. & Minister for Justice v. Dublin United Tramways Co. (1896), Ltd.*, [1939] I.R. 590.

I

Appeal.

Appeal by special leave by the Attorney-General for New South Wales from an order of the High Court of Australia, dated Mar. 5, 1952, dismissing an appeal from an order of the Supreme Court of New South Wales, dated Mar. 9, 1951. The first and second respondents, the Perpetual Trustee Co. (Ltd.), and Matilda Jane Bruce Johnson, were executors of the will of Frederick James Johnson, deceased, and, as such, were the owners of the motor vehicle which, at the time of its collision with the tramcar in which the police constable injured was

travelling, was being driven by the fourth respondent, Arthur Douglas Dunn, as agent of the third respondent, William Frederick Johnson. The facts appear in the judgment. A

F. Gahan, Q.C., and J. G. Le Quesne for the appellant.

Viscount Hailsham, Q.C., and Dingle Foot, Q.C., for the respondents.

VISCOUNT SIMONDS: This appeal, which is brought from a judgment of the High Court of Australia affirming a judgment of the Supreme Court of New South Wales, raises a question of first rate importance. B

The suit out of which the appeal arises was commenced by the appellant by information dated June 30, 1950, filed in the Supreme Court of New South Wales. In this information, it was alleged on behalf of the Crown that the first and second respondents were executors of the will of Frederick James Johnson deceased and, as such, the owners of a certain motor vehicle, that the vehicle was being driven on a public highway by the fourth respondent as agent of the third respondent, and that one Bertrand Leslie Hayden, a member of the police force of New South Wales, was passing along the highway in a tramcar when the motor vehicle was negligently driven against the tramcar whereby Mr. Hayden received bodily injury disabling him from the performance of his duties as a member of the police force. The information further alleged that, during his period of disability and whilst he continued as a member of the police force, Mr. Hayden was paid the salary and allowances appropriate to his office although the Crown was, during the same period, deprived of his services as a member of such police force, and that, on his discharge, Mr. Hayden was paid, and had since been and would continue to be paid, a pension in accordance with the provisions of the New South Wales Police Regulation (Superannuation) Acts, 1906 to 1944, whereas, but for such disablement, he would not have commenced to receive a pension in accordance with the provisions of the said Acts for a long time. The appellant claimed on behalf of the Crown to recover the salary and allowances paid as aforesaid, and to be reimbursed in respect of the moneys already paid and which would thereafter be paid to Mr. Hayden pursuant to the said Acts. The amount of the appellant's claim was expressed to be £5,050 3s. 9d. C
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On Sept. 13, 1950, the respondents delivered a defence pleading the general issue and denying the allegations contained in the information. In addition, the respondents demurred to the information in the following terms:

"And the [respondents] and each of them further say that the declaration herein is bad in substance. On the argument of this demurrer it will be contended that the said declaration is bad in substance on the following amongst other grounds: (i) That it discloses no cause of action. (ii) That the action per quod servitium amisit does not lie at the suit of the Crown for the loss of the services of a member of the police force." G

On Sept. 25, 1950, the appellant filed a joinder in demurrer and a replication joining issue on the respondents' pleas. The case was set down and argued on the respondents' demurrer on Feb. 13, 1951. H

On Mar. 9, 1951, the Supreme Court of New South Wales gave judgment on the demurrer in favour of the respondents. STREET, C.J., held that the case was completely covered by the decision of the High Court of Australia in *Commonwealth v. Quince* (1), in which case it was decided that an action would not lie at the suit of the Crown in respect of the loss of the services of a member of the Royal Air Force as a result of injuries sustained by him owing to the negligent driving of the respondent. The other learned judges of the Supreme Court concurred and gave further reasons for holding that the action would not lie. I

On appeal to the High Court, the learned judges of that court dismissed the appeal by a majority (DIXON, McTIERNAN, WEBB, FULLAGAR and KITTO, JJ., dissentiente WILLIAMS, J.), but DIXON, J., said that he felt constrained to

- A follow the decision in *Quince's* case (1) and that, had the matter been *res integra*, he would have held that the action was maintainable. The questions that appear to arise are what are the nature and limits of the action per quod *servitium amisit* and whether a constable appointed under the Police Regulation Act, 1899-1947, of New South Wales, stands in such a relation to the Crown that the action lies at the suit of the Crown for the loss of his services by reason of the
- B tortious act of a wrongdoer.

It will be convenient first to set out some of the relevant provisions of this Act, since reliance has been placed on them by both parties. Reference may be made to the following sections:

- C “ 4.—(1) The governor may from time to time appoint a commissioner of police who shall, subject to the direction of the Minister, be charged with the superintendence of the police force of New South Wales . . . (4) The commissioner may be suspended or removed from his office for misbehaviour or incompetence as follows:—(a) The commissioner may be suspended from his office by the governor for misbehaviour or incompetence, but shall not be removed from office except as hereinafter provided. The Minister shall cause
- D to be laid before Parliament a full statement of the grounds of suspension within seven sitting days after such suspension if Parliament is in session, and if not, then within seven sitting days after the commencement of the next session; (b) The commissioner suspended under this section shall be restored to office unless each House of Parliament within twenty-one days from the time when such statement has been laid before it, declares by
- E resolution that the commissioner ought to be removed from office, and if each House of Parliament within the said time does so declare, the commissioner shall be removed by the governor accordingly . . .

“ 4A.—(1) The governor may from time to time appoint a deputy commissioner of police who shall assist the commissioner generally in the superintendence of the police force of New South Wales . . .

- F “ 5.—(1) The governor may appoint such number of superintendents and inspectors of police as may be found necessary . . .

- “ 6.—(1) The commissioner may, subject to disallowance by the governor, appoint so many sergeants and constables of police of different grades as he deems necessary for the preservation of the peace throughout New South Wales. (2) Such constables shall, unless and until their appointments
- G respectively are disallowed by the governor, have all such powers, privileges, and advantages and be liable to all such duties and responsibility as any constable duly appointed now has or hereafter may have either by the common law or by virtue of any statute or Act of Council now or hereafter in force in New South Wales.

- H “ 9. No person appointed to be a member of the police force shall be capable of holding such office or of acting in any way therein until he has taken and subscribed the following oath:—I, A.B., do swear that I will well and truly serve our Sovereign Lady the Queen in the office of commissioner, superintendent, inspector, sergeant, or constable of police (as the case may be), without favour or affection, malice or ill-will, for the period of . . .
- I from this date, and until I am legally discharged, that I will see and cause Her Majesty's peace to be kept and preserved, and that I will prevent to the best of my power all offences against the same, and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties therefore faithfully according to law. So help me God.

“ Such oath shall be administered by a justice, and shall in all cases be subscribed by the person taking the same, and when so taken and subscribed shall be forwarded to the commissioner by the justice before whom the same was taken.

" 10. Every person taking and subscribing such oath shall be deemed to have thereby entered into a written agreement with and shall be thereby bound to serve Her Majesty as a member of the police force and in the capacity in which he has taken such oath, at the current rate of pay for such member, and from the day on which such oath has been taken and subscribed until legally discharged: Provided that—(a) no such agreement shall be set aside, cancelled, or annulled for want of reciprocity; (b) such agreement may be cancelled at any time by the lawful discharge, dismissal, or other removal from office of any such person, or by the resignation of any such person accepted by the commissioner or other person acting in his stead.

" 12. The governor may make rules for the general government and discipline of the members of the police force and to give effect to this Act or any amendment thereof . . .

" 18.—(1) No member of the police force shall be at liberty to resign his office or to withdraw from the duties thereof unless expressly authorised in writing so to do by the commissioner or other member of the police force under whom he is placed, or unless he gives to such member of the police force three months' notice of his intention so to resign or withdraw. (2) Any member of the police force who so resigns or withdraws without such previous permission or notice shall, on conviction before two justices, be liable to a penalty not exceeding £20.

" 19.—(1) When any member of the police force is dismissed from or ceases to hold his office, all powers and authorities vested in him shall immediately cease . . .

" 27. Nothing in this Act contained shall be deemed to diminish the duties or restrict or affect the liabilities of constables at common law, or under any Act now in force or hereafter to be passed."

References in the Act to the "office" of a constable and to his powers and duties at common law make it desirable to say something about this ancient office, and this is the more important because, unless the action per quod servitium amisit is held to extend to every case in which what is, in any context, called service is rendered by one who is called a servant, it is essential to define with what precision is possible the nature of the service rendered and the relation in which he who renders it stands to him to whom it is rendered. It must be said at once that it does not appear to their Lordships that the matter is concluded by recalling that, under the Act a constable taking the statutory oath is deemed to be bound to "serve Her Majesty as a member of the police force", or that he may be referred to as a servant of the Crown.

The position of a constable has been the subject of decision in recent times, both in Australia and in England, and it will not be necessary to traverse the whole field which their Lordships, in the course of the hearing, were able to survey. In *Enever v. R.* (2) the question was as to the liability of the Government of Tasmania for the wrongful arrest of the plaintiff by a constable in the intended performance of his duties as an officer of the peace, and a passage from the judgment of GRIFFITH, C.J., in the High Court of Australia, illuminates the position (3 C.L.R. at p. 975):

" At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown. The appointment to the office was made in various ways, and often by election. In later times the mode of appointment came to be regulated for the most part by statute, and the power of appointment was vested in specified authorities, such as municipal authorities or justices. But it never seems to have been thought that a change in the mode of appointment made any difference in the nature or duties of the office, except so far as might be enacted by the particular statute."

A The learned Chief Justice then cites with approval an observation of LORD ALVERSTONE, C.J., in *Stanbury v. Exeter Corpn.* (3) ([1905] 2 K.B. at p. 841):

“This case . . . is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts.”

B In the same case, BARTON, J., points out that it is not enough merely to describe as a servant the person for whom it is sought to make the executive government responsible. He says (3 C.L.R. at p. 983):

C “As I have pointed out, the person must be not only the servant of the superior, but must be under the control of the superior before the latter can be held liable. I am of opinion that that is not the case where a constable is obeying a statute, because when an act is done under a statute, an order not to do it is one which has no weight or validity, while the order of the executive government to do the duty imposed by the statute gives no added force to the command of the statute.”

D The passages cited from the judgments in *Enever's* case (2) referred to the relation of the constable to the government in a case where the doctrine of respondeat superior was under review, and their Lordships do not suggest that the areas of the applicability of that doctrine and of the action per quod servitium amisit are necessarily coterminous. On this point they concur in the view expressed by LATHAM, C.J., in *Quince's* case (1) (68 C.L.R. at p. 235). But

E in both classes of case the same question arises as to the position of a constable, and the cited passages appear to be strictly apposite. So, also, in *Fisher v. Oldham Corpn.* (4), where it was held that the police appointed by the watch committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as the servants or agents of the corporation so as to render that body liable to an action for false imprisonment, it was necessary to consider the same question, and McCARDIE, J., after a review of the authorities, ancient and modern, in the course of which he referred with approval to *Enever's* case (2), and with something less than approval to *Bradford Corpn. v. Webster* (5), presently to be mentioned, made this observation, which appears to their Lordships to be well worth citing ([1930] 2 K.B. at p. 372):

G “Suppose that a police officer arrested a man for a serious felony? Suppose, too, that the watch committee of the borough at once passed a resolution directing that the felon should be released? Of what value would such a resolution be? Not only would it be the plain duty of the police officer to disregard the resolution, but it would also be the duty of the chief constable to consider whether an information should not at once be laid against the members of the watch committee for a conspiracy to obstruct the course of criminal justice.”

H The value of this vivid illustration is that it indicates how inappropriate it would be, in the view of the learned judge, to describe the relation of watch committee and police officer as that of master and servant. This view is reinforced by his observations on the *Bradford Corpn.* case (5) which, he said, he could not regard as in any way a decision that the normal relation of master and servant or principal and agent exists between a police officer and the municipal corporation within whose area he acts. He said (*ibid.*, at p. 375):

“So to hold would be contrary, in my view, to established decision and to sound public policy.”

Fisher's case (4) demands further consideration. For in it there are not only the passages already cited and other passages which appear to their Lordships, consistently with *Enever's* case (2), to state the law correctly as to the relation of a constable to the watch committee or other appointing body, but also observations

on which counsel for the appellant relied, as showing that a constable is at least the servant of somebody and that with somebody the relation of master and servant exists. The learned judge, for instance, says of a police constable that (*ibid.*, at p. 371) A

“ he is a servant of the state, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation ”, B
and somewhat earlier he says (*ibid.*, at p. 369):

“ It is clear from *Mackalley's Case* (6) that a constable, watchman or the like person was regarded as a servant or minister of the King.”

And he is to be regarded as a servant or minister of the King because, as LORD BLACKBURN said in *Coomber v. Berks JJ.* (7) (9 App. Cas. at p. 67), the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are amongst the most important functions of government and, by the constitution of this country, these functions do, of common right, belong to the Crown. A constable, then, may be said in a certain context, and sometimes with the appendage “ or minister ”, to be a “ servant of the Crown ”. It remains to be considered whether, between him and the Crown, or, in the present case, the Government of New South Wales, the relation of servant and master exists so as to found the action *per quod servitium amisit*. But before doing so their Lordships will refer to some of the points made in the course of the argument on the position of a constable. C
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For the appellant, great stress was laid on the change that had taken place in the organisation of the police force in England since the first Metropolitan Police Act of 1829 was passed. No doubt, great changes have been made which are reflected in the organisation of the police force in New South Wales today, but the substantial change was made long before *Enever's case* (2) was decided in Australia or *Fisher's case* (4) in England, and those cases show convincingly that neither changes in organisation, nor the imposition of ever-increasing statutory duties, have altered the fundamental character of the constable's office. Today, as in the past, he is, in common parlance, described in terms which aptly define his legal position as “ a police officer ”, “ an officer of justice ”, “ an officer of the peace ”. If ever he is called a servant, it is in the same sense in which any holder of a public office may be called a servant of the Crown or of the state. And here their Lordships must observe that, if a constable is, by reason of his terms of service, to be regarded as the servant of a master, the Government of New South Wales, so, also, are his superiors in the same service up to and including the commissioners who take the same oath and are subject to the same provisions of the Police Regulation Act. The appellant did not shrink from this conclusion, but it appears to their Lordships to emphasise in a convincing manner the danger of reasoning which would admit the entertainment of an action *per quod servitium amisit*, wherever it can be said, in however general a sense, that there is a contract of service, or that a man is a servant of the Crown. E
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Next, their Lordships would refer briefly to the oath which appears from early times to have been required of the constable, as it was in varying forms required of other persons holding public office. In such an oath, the word “ serve ” will commonly be found, just as in the case under appeal the constable Hayden swore that he would well and truly serve his Sovereign in the office of constable. It appears to their Lordships that, in such a context, the use of the word “ serve ” is of negligible significance. It is the traditional word in the context of subject and Sovereign and does not, by itself, import the relation of master and servant in the ordinary sense of those words. A single illustration will suffice. A special constable appointed under the Special Constables Act, 1831, is required to swear (unless, instead, he affirms) that he will well and truly serve his Sovereign in the I

A office of special constable, and so on. It may, on the other hand, be of some significance that an oath should be required to be taken at all. It is not the usual concomitant of the master and servant relationship.

Finally, before examining the history and scope of the action to which this appeal relates, it is proper to refer to BLACKSTONE'S COMMENTARIES. In the early part of the seventeenth century, LAMBARD writing on the "duties of constables" had referred to them as "constables and such other law ministers of the peace". BLACKSTONE, following LAMBARD a century and a half later, deals with the subject in a manner to which (in agreement with KITTO, J.) their Lordships attach much importance. Reference is made to the 20th Edn., 1841. In Book I, ch. IX, the author deals with the rights and duties of the principal subordinate magistrates, and he treats in turn of, first, the sheriff and his officers, second, the coroner, third, the justices of the peace, fourth, the constable, fifth, the surveyor of highways, and, last, the overseers of the poor. Later writers have pointed out some errors in his treatment of the constable but none that is relevant to the present purpose. A later chapter, ch. XIV, opens with these significant words (p. 456):

D "Having thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* economical relations."

He then states that there are three great relations in private life, of which the first is that of master and servant

E "which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him."

It is in this connection that he discourses on the relation of master and servant and, amongst other things, on the actions which a master may maintain in respect of his servant, including the form of action now under review. It is in the same connection that the matter is treated in modern text-books on the law of torts, of which a single example will suffice. In SALMOND ON TORTS (11th Edn.), p. 406, under the heading "Master and Servant: Loss of Service", the learned editor, after referring to the action, says:

G "In truth, the doctrine is a historical relic of the days when a master had a proprietary interest in his servant and seems anomalous in modern industrial conditions."

This citation is more strictly relevant to the later part of this judgment, but its present importance lies in the broad distinction which BLACKSTONE had previously made between public officers and domestic relations. There appears to their Lordships to be ample justification for saying, as was said in the High Court, that the service of a constable is "different in nature" or "on a different plane" from the domestic relation, that it is "different both in its nature and its incidents", and that, even if some of the incidents which the law implies in the ordinary contract of service are present also in the relation of the constable to the Crown, there is a fundamental difference which makes it necessary to approach with caution the question whether a form of action available in the one case is available in the other also.

I It is now time to consider the action per quod servitium amisit, its origin and development. There is no doubt that, from early days, a master could maintain an action against a wrongdoer for the loss of the services of his servant and that this right (to quote SIR WILLIAM HOLDSWORTH*)

"rested at bottom on the idea that the master had a quasi-proprietary interest in his servant's services: and that idea is connected with ideas as

* HISTORY OF ENGLISH LAW (2nd Edn.) (1937), Vol. III, p. 429.

to the status of a servant, which originated in the rules of law applicable to A
villein status."

It is clear, too, from the cases cited from the Year Books and elsewhere in the learned judgment of DIXON, J., that the action did not depend on any contract of service between master and servant, but on the single fact of service. Thus, an action lay by the father for the seduction or debauching of his daughter, if he could prove that she had rendered him service, however slight, and that he B
had been thereby deprived of that service. The law could, indeed, hardly have been otherwise, as the form of action in trespass was established before the concept of contract had been developed in our jurisprudence.

But, though the contractual relation had no part in the historical origin of the action, it was inevitable that, as the relation of master and servant came to be less and less a matter of status and to depend more and more on a contract C
between the parties, that relation should become more prominent in the cases in which this form of action was used. In particular, where the relation of master and servant lay in contract, it was an easy development to found an action per quod servitium amisit on the fact that the defendant had induced the servant to break his contract and enticed him from his master's service. And this development led, in turn, to the establishment of a right of action for malicious procurement of a breach of contract for personal service even where the employer and employed did not stand in the strict relation of master and servant. This was the point at issue in the celebrated case of *Lumley v. Gye* (8), and, in the course of the hearing before their Lordships' Board, the judgments of the majority of the judges (CROMPTON, ERLE and WIGHTMAN, JJ.) and of COLERIDGE, J., who D
dissented, were extensively canvassed. E

It does not appear to their Lordships that *Lumley v. Gye* (8) throws much light on the problem to be solved in the present case. If the law had developed in all respects logically, that case would be an authority for saying that, if Miss Wagner had not been maliciously enticed from the service of the plaintiff but had been, by battery or otherwise, wrongfully prevented from serving him, the plaintiff would have had a good cause of action against the wrongdoer. But it has never been suggested that that is the law. On the contrary, it is fundamental (as RICH, J., pointed out in *Quince's* case (1), 68 C.L.R. at p. 240) that the mere fact that an injury to A prevents a third party from getting from A a benefit which he would otherwise have obtained does not invest the third party with a right of action against the wrongdoer: see *Société Anonyme de Remorquage à Hélice v. Bennetts* (9). Nor, strictly, is *Lumley v. Gye* (8) an exception to this rule, for it was not by reason of any injury to Miss Wagner that the plaintiff suffered damage. It is the better course, then, ignoring the way in which the law has developed where the wrongdoer has procured the breach of a contract of service, to examine solely the case where the master has lost the services of a servant by reason of injury to the servant. For that is the historical origin of the action, and those are alleged to be the facts of the case under appeal. It appears H
to their Lordships to be permissible, in approaching this question, to bear in mind what LORD SUMNER said in *Admiralty Comrs. v. S.S. Amerika* (10) ([1917] A.C. at p. 60):

"Indeed, what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status." I

The question, then, may once more be stated. Is the relation of the Government of New South Wales to a constable engaged under the provisions of the Police Regulation Act, 1899 to 1947, such that this action lies? Of the two aspects of this question, viz., first, what is the relation of a constable to the government and, secondly, what is the scope of the action, enough has been said on the first to indicate their Lordships' view that the relation is not that of

- A master and servant in the sense in which those terms are ordinarily used. But the appellant says that, whatever those terms strictly mean, and whatever may have been the historical origin of the action, today an action lies in such a case as this. For, he says, even if (to quote again from LATHAM, C.J., in *Quince's* case (1) (68 C.L.R. at p. 238)) a member of the forces (and equally a constable) is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties, yet by analogy and on a consideration of the history of the form of action the action lies. This was, perhaps, the determining factor with WILLIAMS, J., who said (85 C.L.R. at p. 266) that the decision in *Quince's* case (1) was manifestly wrong because it proceeded on the view that the relationship of the Crown and a member of the armed forces was not analogous to that of a master and servant under a contract of service. And this consideration probably influenced DIXON, J., to say (85 C.L.R. at p. 248):

"There is no reason to suppose that the action per quod servitium amisit would lie only for the loss of the services of persons of low degree. In the historical development of the actions per quod servitium amisit there has not been any limitation upon the class of services for the loss of which a private employer may sue."

- D With much of this their Lordships respectfully agree, but it appears to them more pertinent to consider when, in its historical development, and on what consideration, this form of action was first used at the suit of the Crown for the loss of the service of persons of high or low degree whose service lay in the public field. It will be seen that in England, at least, it was first so used at a very recent date and on little or no consideration.

- E Their Lordships have been referred to a large number of relevant cases. The great majority have been concerned with enticing servants from their service or harbouring them after they had left it. As already pointed out, this class of case, though it may have developed out of the original form of action, yet differs essentially from it, in that injury has not been done to the servant whereby the master has lost his service, but has been done solely to the master whose servant has been enticed or harboured. If this distinction is recognised, it is easy to reconcile subsequent cases. Thus, in *Taylor v. Neri* (11), it was held that the action per quod servitium amisit would not lie for the manager of a place of public entertainment against a person for beating one of the performers who was thereby prevented from performing, EYRE, C.J., saying (1 Esp. at p. 385) that

- G "he did not think that the court had ever gone further than the case of a menial servant."

It is not clear to what range of service the term "menial" extended in the judgment of the Chief Justice, but it is difficult to suppose that he was unaware of the limits of the action, or that he did not know how far it had gone in cases of enticement and harbouring. It is more reasonable to infer that he recognised

- H the distinction to which CROMPTON, J., referred in *Lumley v. Gye* (8) (2 E. & B. at p. 228). That learned judge, after commenting on the decision in *Taylor v. Neri* (11), said (*ibid.*):

"Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants per quod servitium amisit, and which differ from actions of the present nature for the wrongful enticing or harbouring with notice, as pointed out by LORD KENYON in *Fores v. Wilson* (12), it is clear from *Blake v. Lanyon* (13), and other subsequent cases, *Sykes v. Dixon* (14), *Pilkington v. Scott* (15) and *Hartley v. Cummings* (16), that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor v. Neri* (11)."

The distinction thus recognised is of great importance in considering the present scope of the action, for it affirms the view that the development of the

law in relation to enticing and harbouring and maliciously procuring a breach of contract may properly be disregarded where the cause of action lies in injury to a servant, whereby the master has lost his services. The scope of the inquiry is, accordingly, narrowed down to those cases in which such injury has been done and damage suffered. It must, at once, be said that the relevant cases are few. Up to the end of the nineteenth century, the widest extension of the master and servant relationship appears to be in *Martinez v. Gerber* (17). In that case, the injured person, whose service was lost to the plaintiffs by reason of the reckless driving of the defendant's gig, was described as the plaintiffs' "servant and traveller". The terms of his service are not stated, but the substantial question in the case was the somewhat technical one, whether the master could maintain the action, inasmuch as the servant could not have maintained an action in trespass but must have sued in case. The decision must, however, be regarded as establishing that, at this date, a person described as a servant and traveller stood in such a relation to his master as to support the action, and this probably represents some advance from the limit suggested by *Eyre, C.J.* The nineteenth century closed without, so far as their Lordships are aware, any further advance and, in particular, without any decision that the holder of any such office as that of a constable was a "servant" for the purpose of the rule. But, in 1920, in *Bradford Corp'n. v. Webster* (5), it was held that the plaintiff corporation was entitled to recover damages for the loss of service of a constable in their service who had been injured by the negligent driving of the defendant's steam wagon. The importance, however, of this decision is greatly reduced by the fact that the question whether the action lay was allowed to go by default. The question, and the only question, was what was the measure of damages which the plaintiff corporation was entitled to recover. None of the cogent considerations, which prevailed with the High Court of Australia in *Quince's* case (1) and in the present case, were brought to the notice of the court. It does not appear to their Lordships that *Webster's* case (5) can be relied on. The same observations apply to the case of *A.-G. v. Valle-Jones* (18). In that case, two aircraftsmen of the Royal Air Force were injured as a result of a collision with a motor lorry whereby the Crown lost their services, but, again, the only question was as to the measure of damage. The reported argument of counsel opens with the admission that the action was available to the Crown as an employer, as well as to a subject. Some weight, no doubt, may be attached to the fact that judge and counsel alike in these cases assumed without question that the action lay, but their Lordships cannot regard it as a predominant consideration.

Reference should also be made to *Raphael (Owners) v. Brandy* (19), because reliance was placed on it by the appellant and by *WILLIAMS, J.*, in the High Court of Australia. In that case, a stoker in the mercantile service, who was also a stoker in the Royal Naval Reserve and, as such, entitled to a retainer of £6 a year, met with an accident while employed on a merchant ship. The question was whether, for the purpose of assessing his compensation under the Workmen's Compensation Act, 1906, he was serving under concurrent contracts of service within the meaning of the Act, and this depended on whether he had a contract of service with the Crown under which he earned his retainer. It was held that he had, *LORD LOREBURN, L.C.*, saying that he agreed with *FLETCHER MOULTON, L.J.*, that it was almost a typical case of concurrent contracts because the workman was being paid wages for his service on board a merchant ship and, at the same time, was earning his £6 a year by virtue of his engagement with the Crown, and he was giving his equivalent for that because he was keeping himself fit and doing the work which he stipulated to do. But this case is relevant only if it is assumed that, where there is any contract of service, the relation of servant and master necessarily arises, and their Lordships agree with *KIRTO, J.*, in thinking that *Brandy's* case (19) does not justify the view that the House of Lords, if it had occasion to consider the matter, would have held that the contract there under review created that relation.

A The case last cited is, however, useful as again illustrating how easily the words "serve", "service", and "servant", may be used to describe one side of a relation which is not that of master and servant. For it may be repeated that a soldier or sailor may be called a servant of the Crown; yet, as LATHAM, C.J., said in *Quince's case* (1) (68 C.L.R. at p. 238):

B "It is, I think, true that a member of the forces is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relations of the parties."

Their Lordships' attention has been properly called (as was that of the High Court) to relevant cases which were decided in Canada, Eire, and the United States of America, and something must be said about them. In the Canadian case, *R. v. Richardson* (20), the question turned on the meaning and effect of a Canadian statute of 1943 [the Exchequer Court Act (7 Geo. 6 c. 25)], which (inter alia) provided [by s. 50A] that

D "For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since June 24, 1938, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown",

E and it was held that, under this statute, an action lay at the suit of the Crown for damages arising out of the loss of service of a member of the forces owing to the tortious act of the defendant. It is not for their Lordships to determine whether this case was correctly decided; its persuasive value is undoubtedly diminished by the powerful dissenting judgment of KELLOCK, J. It is, perhaps, sufficient to say that the statute appears to have been enacted shortly after the decision in *McArthur v. R.* (21), that the Crown was not liable under the maxim "respondeat superior" for the negligent act of a member of its forces, and it was not difficult to come to the conclusion that the master-servant relation, having been thus established for one purpose, should prevail for another also.

F In the American case, *United States v. Standard Oil Co. of California* (22), the actual decision, as FULLAGAR, J., said, went on the grounds that no state law could apply to the Federal "government-soldier relation", and that there was no Federal law which gave to the United States the right claimed. Their Lordships agree, too, with him in thinking that the majority of the judges of the Supreme Court were disposed to the view that the "government-soldier relation" differed materially from the ordinary master and servant relation.

G In the Irish case, *A.-G. & Minister for Justice v. Dublin United Tramways Co. (1896), Ltd.* (23), it appears that a different view was taken, for there it was held that the relationship of master and servant existed between the People of Eire and the Civil Guard, and that the Attorney-General, representing the People, could sue for, and recover damages for, loss of the service of a member of the Guard. Their Lordships find themselves unable to agree with this decision which, in their respectful view, gives too little weight to the considerations which have influenced them.

H Their Lordships have made many references to *Quince's case* (1), which was in the High Court regarded as indistinguishable in principle from the present case, and have freely borrowed from the judgments of RICH, STARKE and McTIERNAN, J.J., in that case. In their view, its facts, at least as clearly as those of the present case, support the view that the master and servant relation, on which the action per quod servitium amisit rests, is wholly different in kind from the relation of the Crown to a member of the armed forces, whether field marshal or private soldier, and that a rule of law which applies to one should not be applied to the other unless there is compelling authority to do so. The review of the case law on the subject has shown that is far from being the fact. Their Lordships share the opinion entertained by all the judges of the High Court that the case of the

constable is not, in principle, distinguishable from that of the soldier. Certain differentiating features, such as the right given to the police under the Industrial Arbitration Act, 1940-1943, cannot affect the position. A

Their Lordships can now express their final opinion on the case. They repeat that, in their view, there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the state which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognised in the fact that his relationship to the government is not, in ordinary parlance, described as that of servant and master. Nor, as would appear from quotations that have been made, and others that might have been made, from the dissentient judgments in *Quince's* case (1) and the present case, would a different view be taken on this point by learned judges who have come ultimately to a different conclusion. It is rather on what has been called the second aspect of the question that the difference arises. Their Lordships, differing with great respect on this part of the case from the judgment of LATHAM, C.J., in *Quince's* case (1) and from DIXON and WILLIAMS, JJ., in the present case, think that this form of action should not be extended beyond the limits to which it has been carried by binding authority or, at least, by authority long recognised as stating the law. Their review of the relevant case law shows that, where in recent times it has been extended to cases of persons in the public service who (to repeat the now familiar words) are not servants of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties, the extension has been made without argument or deliberation. The form of action appears, as LORD SUMNER said ([1917] A.C. at p. 60), to be a survival from the time when service was a status. That status lay in the realm of domestic relations. It would not, in their Lordships' view, be in accord with modern notions, or with the realities of human relationships today, to extend the action to the loss of service of one who, if he can be called a servant at all, is the holder of an office which has for centuries been regarded as a public office. B C D E F

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondents' cost of this appeal as between solicitor and client in accordance with the condition on which special leave to appeal was given.

Appeal dismissed. G

Solicitors: *Light & Fulton* (for the appellant); *Bell, Brodrick & Gray* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

R. v. CHARLSON.

[CHESTER ASSIZES (Barry, J.), February 10, 11, 1955.]

Criminal Law—Grievous bodily harm—Whether act must be conscious act—Insanity not pleaded—Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 20.

B

Automatism—Defence to criminal charge—Act done unconsciously.

A father invited his ten-year-old son to look out of a window at a rat in the river below and, when the boy did so, struck him on the head with a mallet and threw him out of the window, causing him grievous bodily harm. There was no evidence of provocation or motive. The father stated that he did not know why he hit the boy but remembered hitting him, and that the next thing he remembered was being in his car. There was a history of ill health in the father's family and, according to medical evidence, he possibly had a cerebral tumour. A man suffering from cerebral tumour is liable to an outburst of impulsive violence over which he has no control. The father was charged (i) with causing grievous bodily harm to the boy with intent to murder him, (ii) with causing him grievous bodily harm with intent to cause such harm, or (iii) with unlawfully and maliciously causing him grievous bodily harm but without any allegation of specific intent. The accused did not raise a plea of insanity, but contended that his act was not his conscious act or one over which he had control.

D

The jury were directed: although on the third count no specific intent need be proved by the prosecution, yet the prosecution must prove that the act causing grievous bodily harm was committed unlawfully and maliciously, and accordingly, unless the jury were satisfied that when the accused struck his son the accused was acting consciously, knowing what he was doing, the jury should return a verdict of not guilty.

E

F

[Editorial Note. The present case may be compared, as regards the defence of automatism, with *R. v. Harrison-Owen* ([1951] 2 All E.R. 726) where a brief reference to the defence having been raised will be found (*ibid.*, at pp. 727, 728).

For the Offences against the Person Act, 1861, s. 20, see 5 HALSBURY'S STATUTES (2nd Edn.) 795.]

Trial on indictment.

The accused, Stanley Charlson, was charged on indictment on three counts:

G

(i) causing grievous bodily harm to his son, Peter Stanley Charlson, with intent to murder him, contrary to the Offences against the Person Act, 1861, s. 11; (ii) causing grievous bodily harm to his said son with intent to cause grievous bodily harm, contrary to the Offences against the Person Act, 1861, s. 18; and (iii) unlawfully and maliciously inflicting grievous bodily harm on his son, contrary to the Offences against the Person Act, 1861, s. 20.

H

The facts appear from the summing-up.

H. E. Hooson for the Crown.

D. E. P. Evans, Q.C., and *P. L. W. Owen* for the accused.

I

BARRY, J., summed up to the jury as follows: On any view you may think this is a very pathetic case. You have heard from the police officers, from other witnesses and from the accused's own wife, what type of man he is. It is not disputed by the prosecution that he has been a very devoted husband and father throughout his married life, and there is nothing to suggest that he and this little boy had any serious differences at all. Indeed there is everything to suggest the contrary. You may think that he was a very devoted and indulgent father, and that he and his little son got on very well. These are matters for you. It is such a man who faces these very serious charges.

The charges are three in number. The first and most serious one is the charge of causing grievous bodily harm to this little boy—Peter Stanley Charlson—

with intent to murder him. The second alternative charge, which is somewhat less serious than the first, is a charge of causing grievous bodily harm to this little boy with the intention of causing him some grievous bodily harm. The third and least serious of the three charges is the charge of inflicting grievous bodily harm on this boy without any specific allegation as to his intention. A

No plea of insanity is raised in this case. If the facts warrant it, it is always open to an accused person to say: "I was guilty of the offence with which I am charged, but at the time when I committed the offence I was insane, and therefore I should not be punished for what I did". That is a defence which has to be raised by the accused, and in this case it has not been raised. Indeed, you have heard from the medical officer at Her Majesty's prison in Manchester that this man is sane and is not suffering from a disease of the mind. B

That, however, does not conclude the matter. The prosecution have to prove the case against him. What have the prosecution to prove in relation to each of the three alternative charges? With regard to all of them they have to prove that the accused caused some grievous bodily harm to his son. There has been no dispute about the facts. The defence accept the story, which was told to you by this little boy, about what happened on the evening of Jan. 13, 1955. You may have no doubt that the accused did in fact cause grievous bodily harm to the boy; and you need not trouble about that aspect of the case when considering any of the three alternative charges against the accused. C D

However, the prosecution must prove more than that. In relation to the first two charges it is necessary for the prosecution to prove the intention alleged in the indictment; that is to say, in relation to the first charge, the prosecution must satisfy you not only that the accused man did cause grievous bodily harm to his son but also that, at the time when he did it, he intended to murder this boy. Nothing short of that will suffice. Both the act of causing grievous bodily harm and the intention to murder must be established to your complete satisfaction. E

The onus rests on the prosecution, and the prosecution must satisfy you, as regards each alternative offence, of all the essential elements of that offence. It is not for the accused to prove his innocence. If you are in any doubt about the matter, he is entitled to be acquitted. Similar considerations apply to the second charge, which is the charge of causing grievous bodily harm with the intention of causing that grievous bodily harm. F

There again, the prosecution has to prove not only that the accused did inflict those injuries on his son, about which there is no real question, but also that, when the accused inflicted the injuries, he intended to do some serious injury to the boy. Unless you are satisfied that that intention was present in the accused's mind at the time when he committed those acts then the second alternative charge is not established. G

Lastly, there is the third charge of inflicting grievous bodily harm. In relation to that charge the prosecution need not prove a definite intent. They do have to prove, however, that the grievous bodily harm was caused by the accused unlawfully and maliciously. This means that there must be a conscious act on the part of the accused. Malice does not necessarily involve the existence of some hostility to the person injured. It does, however, mean that the act must be done consciously. In order to commit an unlawful and malicious act, the accused must know what he is doing and must realise that he has no lawful justification for his act. H I

These are charges of criminal offences, and the first two are charges of criminal offences of the utmost gravity. In order to commit them an accused must have a guilty mind. For example, an act which otherwise might be an assault would not be an assault if it was done purely accidentally. You or I in a public street might suddenly put our hands up to stop our hat being blown off, and might hit a passer-by on the nose without knowing he was there. If we had consciously

A put out our hands, whatever the motive, and hit the passer-by on the nose, it would be an assault, for it would have been a conscious act. If it is purely accidental, no assault is committed; for the element of consciousness is not present.

Similarly in the case of certain diseases, a person suffering from the disease may be deprived of the control of his actions. A man in the throes of an epileptic fit does not know what he is doing. If a friend bends over to assist him, and in the midst of his fit the epileptic grips that friend by the throat, not knowing what he is doing, and in so doing throttles the friend and causes his death, no offence has been committed against the criminal law; because the actions of an epileptic are automatic and unconscious, and his will or consciousness is not applied to what he is doing. He is not in conscious control of his actions, and I do not propose to worry you, or take up your time, by reminding you of the details of the evidence. I may, however, have to say a few words as to the evidence of the police officers who interviewed the accused after these events had occurred.

[HIS LORDSHIP referred to the evidence of the accused's son being accepted and fresh in the minds of the jury, and continued:] You must consider the whole of the evidence and apply your minds to each of these charges in turn. When you consider the first count you must ask yourself whether there is anything in this case which could possibly justify you in reaching the view that this man really intended to murder his son, remembering that that intention to murder must be brought home to the accused with certainty. You must all be certain that the accused intended to murder this boy, and unless you are so satisfied, the first charge has not been proved, and you should return a verdict of not guilty on that charge. If you think that that has been proved, then it would be your duty to return a verdict of guilty. If you think that it has not been proved, you will proceed to the second alternative charge and consider that with equal care.

Again, you will look at the whole picture, you will consider the sort of man that the accused was and all the events leading up to the very tragic incidents which resulted in those serious injuries to the boy. A man, in a state of nervous tension, may suddenly lose his temper with a child who has been irritating and annoying, and do some injury to it; but here there is no suggestion that anything this little boy did could have annoyed his father.

He was invited by his father to go and look at this rat which his father had seen below the window which was just above the river, and he did so. He did nothing which could have annoyed any parent, and the little boy does not suggest that his father showed any signs of annoyance with him before he struck him in this way. You have to ask yourselves in those circumstances whether you ought to infer that the accused did have a real intention of causing serious injury to his son.

The intention of the accused can of course only be inferred from all the circumstances which have been proved before you. Neither you nor I can ever look into the mind of an accused person and say, with positive certainty, what his intention was at any particular time. A jury is entitled to infer a man's intentions from his acts. As you were rightly told by the learned counsel for the prosecution when this case was opened, in normal circumstances a man is presumed to intend the normal and usual consequence of his acts. If a man consciously and deliberately strikes another man or woman with a mallet of this kind, in ordinary circumstances any jury would feel entitled to say that that must have been intended to do some serious injury. You cannot hit people on the head with a mallet, or strike them in the chest with a knife, without the extreme probability that serious injury will occur; and therefore, other circumstances being equal, the jury is perfectly entitled to infer the intention from the mere act itself.

However, that is not an inference which must always be drawn, and before it can be drawn you should look at all the surrounding circumstances and ask

yourselves whether that inference should be drawn in this particular case which we are considering today. It is open to you to think that, although some ordinary person in ordinary circumstances must inevitably have intended to do injury by using a mallet of this kind on the head of a little boy, none the less you are not satisfied that this particular man had that intention, owing to the state of his health as we now know it, and having regard to his relationship with the boy, and also to the lack of any provocation on the part of the boy or any motive of any kind for crime. A B

It is for you to look at the whole of the circumstances and, having done so, to make up your minds whether it has been established to your satisfaction that the accused, when he inflicted those injuries, intended to do grievous bodily harm to his son. If you are not satisfied that that intention is there, then there must also be a verdict of not guilty on the second of those alternative charges, and you would have to consider the third. C

No specific intention need be proved by the prosecution before the accused can be found guilty of the third charge of inflicting grievous bodily harm. You must, however, be satisfied that he was acting consciously, and that he knew what he was doing when he inflicted those blows. If he did, however much his mind was disturbed, and whatever mitigating circumstances there may be, he would be guilty of this offence. If the accused knew that he was striking his son, and if the accused realised that he had no legal excuse for striking him, as clearly he had not, and realised that he was in fact striking his son and did that act consciously and of the accused's own volition, then he would be guilty of inflicting grievous bodily harm. Therefore, in considering this third charge you have to ask yourself "was the accused knowingly striking his son, or was he acting as an automaton without any control or knowledge of the act which he was committing?" If you think that he was in a condition similar to that of a person in an epileptic fit, who does not know what he is doing at all, then the elements of malice and unlawfulness would not have been established. If you are left in doubt about the matter, and you think he might well have been acting as an automaton without any real knowledge of what he was doing, then the proper verdict would be not guilty, even on the third and least serious of these alternatives. D E F

What is the evidence in reference to this one vital issue, namely, the accused's consciousness, and the existence of any intention on his part, at the time that these acts were committed? There is the boy's evidence, and there is nothing in that evidence or the evidence of any other witness which suggests any sort of provocation, or any sort of motive, for these acts. There is the evidence of the accused. There is his wife's evidence, and, reading between the lines from that, it appears that he was almost too lenient with his son, and on occasions it was she who had to do the correcting when the boy had done wrong. There is nothing strange about the accused's actions or words before these acts were committed. The little boy does not suggest that there was anything untoward in any of his acts before this attack. G H

What happened afterwards? We have got his statement, which you will be able to take with you when you retire to consider your verdict. The accused describes how they got into this back room, and that the rat had gone. He says that then: I

"I kicked something on the floor and I saw that it was the big joiners' mallet that's usually kept in the drawer. I picked it up to put it back in the drawer. I remember hitting Peter on the head with the mallet. I do not know why I hit him, but I do remember hitting him."

"The next thing I remember is being in Openshaw in my car. I had my windjammer and my woollen pullover on. My raincoat and scarf were on the seat beside me. I stopped, and I knew something dreadful had happened. I backed into a little side street to think. I knew there was something about

- A Peter and that I should not be there. I put my raincoat and scarf on as I felt shivery. I knew I should go back. I drove back to Stalybridge, and when I got back I saw a Morris 8 outside my door. I knew it was the police car and then I knew that something was wrong. I had remembered when I was driving home that I had hit Peter on the head with the mallet. I drove round for a while, then I drove the car into Revell's yard."
- B Sergeant Stewart found him and has given the conversation that he had with him. The conversation largely bears out what the accused said in his statement. When the sergeant arrived he found the accused seated in the driving seat of the car, his head bent forward on the steering wheel. The sergeant opened the off-side door and put his light into the car and shone it on to the accused's face. The accused then said very quietly: "My God, tell me what I have done".
- C Then there was a pause, and the accused went on: "It is something dreadful, isn't it; it's Peter isn't it?" The police sergeant said: "I don't know what you have done; what have you done?", and the accused did not reply. By then it was just under half past nine. He was dazed and bewildered and was trembling violently. A little later, he was seen by a detective-sergeant, who said to the accused: "I believe you are Mr. Charlson?" The accused said "Yes".
- D The detective-sergeant asked: "What has happened?" The accused said: "I have done something dreadful to Peter". He was cautioned and told he would be taken to the police station. Again, according to the detective-sergeant, the accused appeared to be very distressed and was trembling violently. He was given a drink of water at his request when he arrived at the police station, and the detective-sergeant said that that seemed to revive him. The accused said:
- E "Why did I do it; I have done wrong; I will have to be punished". The detective-sergeant told him that the little boy was in the district infirmary. He said to the accused: "He is injured, and he says you threw him into the water". The accused replied: "Why did I do it?"
- The detective-sergeant said to him: "Can you tell me what did happen?" the accused answered:
- F "We were in the back room looking for a big rat which I have seen on a stone under the window. I remember hitting Peter, but I don't know why I did it; I will tell you what I remember."

It was at that period that he wrote the statement that has been read to you more than once, and the material portions of which I have just again brought to your attention. That is the evidence apart from the medical evidence.

- G The medical evidence shows that there has been a history of ill health in the accused's family, and particularly ill health of a certain kind, the existence of which in the accused is at least suspected by the medical officer of the prison. The accused's mother died of a cerebral haemorrhage; his mother's sister (his aunt) died of a cerebral tumour; his own sister died of meningitis; and his brother, who is still alive, has had an operation for a mastoid.

- H You have that family history, and you have the history of certain complaints which the accused has mentioned to the prison doctor. The accused has told the prison doctor that six or seven years ago he had some trouble with his legs which was then diagnosed as neuritis. No one suggests that what he says is untrue; the prison doctor appears to have accepted it, and there was no reason why he should not accept it. He said that after that he had increasing weakness in his legs, and difficulty in co-ordinating their movements. He said that he could walk slowly satisfactorily, but he found difficulty in controlling the movements of his legs if he tried to run. Also he complained of persistent headaches which are sometimes of great severity, so severe as to be quite incapacitating. He was examined by the prison doctor, who said that on clinical examination he found signs of organic disorder of the nervous system which clearly indicated the need for further investigation. Without further investigation the doctor was not going to commit himself to say that this man had got a cerebral tumour. On

the other hand, he said that clinical examination, and the history of the case, pointed at least to the possibility. It may well be that such a tumour exists. A

If a man or a woman is suffering from a cerebral tumour, says the doctor, he or she is liable to an outburst of impulsive violence, quite motiveless, and over which the patient has no control at all. The doctor does not state positively that that is the case here, but he says that it may be, and if a tumour does in fact exist, then the conduct of the accused would be wholly consistent with that of someone suffering from such a disease. B

Looking at the whole of these matters, are you satisfied that the accused intended to murder the boy when he caused these injuries to him? If you are so satisfied, beyond any real doubt, then the verdict would be "guilty" on the first count. A verdict of guilty on the first count means that the remainder of the three counts need not be further considered. On the other hand, if you are not satisfied that he intended to kill his son, you have to consider the second alternative charge. There the question is whether you are satisfied beyond any real doubt that, when the accused inflicted those injuries, he intended to inflict serious physical injuries to his son? If you are satisfied, the verdict is "guilty"; if you do not think that intention is proved, then the proper verdict is "not guilty". If you find the accused "guilty" on the second charge, you have no need to proceed to the third count. If you find him "not guilty" on the first two charges, the third charge of inflicting grievous bodily harm must receive consideration. C D

On the third charge you have not to consider these questions of intention. There the question is whether the accused knew what he was doing when he struck the blows. If he struck his son with the mallet, knowing what he was doing, and by those blows caused injuries, then he is guilty of the third charge. E If he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit and no responsibility rests on him at all, then the proper verdict is "not guilty" of all the three charges.

Will you be good enough now to retire, and let me know in due course whether you find the accused "guilty" or "not guilty" of each of the three offences with which he is charged. I will arrange for you to have a copy of the statement before you. Perhaps I ought to remind you what the accused said when he was formally charged by the police with the first offence. He said: "I did not mean to kill him; I don't know why I hit him". When the accused was before the magistrates he was asked if he wished to say anything, and he said: "I can only plead not guilty to the charge; I would never want to hurt Peter; I desire to reserve my defence". F G

Verdict: "Not Guilty" on all three charges.

Solicitors: Clerk to Cheshire County Council (for the Crown); Davis, Hope & Furniss, Glossop (for the accused).

[Reported by SEYS LLEWELLYN, ESQ., Barrister-at-Law.]

A Re MARTIN (*deceased*). MIDLAND BANK EXECUTOR & TRUSTEE CO. LTD. v. MARFLEET AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), March 10, 1955.]

Administration of Estates—Fund for payment of legacies and testamentary expenses—Solvent estate—Debts, funeral and testamentary expenses charged on personal estate—Real estate undisposed of—Administration of Estates Act, 1925 (15 & 16 Geo. 5 c. 23), s. 33 (1) (2), s. 34 (3), Sch. 1, Part 2, para. 1.

A testator made his will in 1938 whereby, after bequeathing legacies, he devised all his real estate to his daughter absolutely. By cl. 2 (3) of his will he bequeathed all the residue of his personal estate to his trustees on trust for sale and conversion into money and directed them with and out of the moneys so to arise and out of his ready money to pay his just debts, funeral and testamentary expenses and to stand possessed of the residue on trust for named persons. By a codicil the testator revoked the devise of real estate contained in his will. He made no other disposition of his realty and died on Feb. 25, 1953, intestate as to his real estate. His estate was solvent. On the question out of what properties the executors ought primarily to pay the debts, funeral and testamentary expenses and legacies,

Held: (i) the testator's just debts, funeral and testamentary expenses were primarily payable out of his residuary personal estate by reason of cl. 2 (3) of his will which varied the order of administration of assets prescribed by s. 34 (3) of and Part 2 of Sch. 1 to the Administration of Estates Act, 1925.

Re Atkinson ([1930] 1 Ch. 47) followed.

(ii) the legacies were payable primarily out of the testator's realty by virtue of s. 34 (3) of and para. 1 of Part 2 of Sch. 1 to the Act of 1925.

Re Thompson ([1936] 2 All E.R. 141) considered.

F [As to Order of Application of Assets of solvent Estates, see 14 HALSBURY'S LAWS (2nd Edn.) 375, para. 704; and for cases on the subject, see 23 DIGEST 473-477, 496-498, 5425-5461, 5621-5640.

As to Liability of Real Estate for Payment of Legacies, see 14 HALSBURY'S LAWS (2nd Edn.) 384, para. 713; and for cases on the subject, see 23 DIGEST 506, 507, 5717-5728.

G For the Administration of Estates Act, 1925, s. 33 (2), s. 34 (3) and Sch. 1, Part 2, para. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 734, 737, 767.]

Cases referred to:

(1) *Re Atkinson*, [1930] 1 Ch. 47; 99 L.J.Ch. 35; 142 L.T. 129; Digest Supp.

(2) *Re Thompson*, [1936] 2 All E.R. 141; [1936] Ch. 676; 105 L.J.Ch. 289; 155 L.T. 474; Digest Supp.

(3) *Re Boards*, [1895] 1 Ch. 499; 64 L.J.Ch. 305; 72 L.T. 220; 23 Digest 510, 5758.

(4) *Re Beaumont's Will Trusts*, [1950] 1 All E.R. 802; [1950] Ch. 462; 2nd Digest Supp.

Adjourned Summons.

I The plaintiff, as executor of the testator, George Thomas Barnes Martin, deceased, applied to the court by originating summons for the determination of the question whether, on the true construction of the will and codicils of the testator, all or any and if so which of (a) the said testator's debts and funeral and testamentary expenses, and (b) the pecuniary legacies bequeathed by his will and codicil should be paid or satisfied out of (i) the property of the testator undisposed of by his will and codicil, or (ii) his personal estate comprised in the residuary gift of personalty contained in his will, or how otherwise the expenses and legacies respectively should be paid and satisfied.

Robert S. Lazarus for the plaintiff.

J. A. Wolfe for the first defendant, interested under the testator's intestacy.

J. A. Armstrong for the second and third defendants, beneficiaries under the will.

DANCKWERTS, J.: This case raises a point of some interest, but, as far as I can see, despite the fact that there are numerous cases on the subject, there is no decision which covers the point.

The testator in this case made his will on Dec. 13, 1938. He made a codicil dated Mar. 17, 1944, and another dated Mar. 26, 1947, and he died on Feb. 25, 1953. The material provisions of his will, as his wife predeceased him, are in cl. 2. He gave and bequeathed by cl. 2 (1) two legacies, and by cl. 2 (2) he devised all his real estate of whatsoever kind and wheresoever situate to his daughter Kathleen Hulett absolutely. By cl. 2 (3) he bequeathed all the rest, residue and remainder of his personal estate to the trustees on trust to sell, call in and convert into money the same or such part thereof as should not consist of money at such time and in such manner as they should think fit, and he directed his trustees with and out of the moneys to arise from such sale, calling in and conversion and with and out of his ready money to pay his just debts, funeral and testamentary expenses, and to stand possessed of the residue of the proceeds of such sale, calling in and conversion (thereinafter called his "residuary estate") on trust in equal shares for beneficiaries.

By the first codicil the testator revoked cl. 2 (2) of his will, i.e., he revoked the devise of all real estate of whatsoever kind and wheresoever situate to his daughter Kathleen Hulett absolutely. There is in this will or in the codicils no other disposition of the real estate, and, accordingly, the real estate is undisposed of, and there is an intestacy as regards that property. It, therefore, becomes necessary to look at the Administration of Estates Act, 1925, to see what is to happen in that case.

Section 33 (1) of the Act provides:

"On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—(a) as to the real estate upon trust to sell the same; and (b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money . . ."

and there is a power to postpone sale. By s. 33 (2) it is provided:

"Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased."

Pausing there for a moment, counsel for the second and third defendants has called to my attention the fact that the provisions of sub-s. (1) and sub-s. (2) of s. 33 apply to any real or personal estate in respect of which the deceased is intestate. *Prima facie*, therefore, any parts of the estate, whatever their particular nature may be, in respect of which there is no effective disposition by the deceased, are subject to the provisions of these two sub-sections. In other words, it is true to say that the undisposed of real estate is subject to the provisions of sub-s. (1) and sub-s. (2) of s. 33 of the Act:

The only other sub-section of s. 33 with which I think I need deal is sub-s. (7), which provides:

"Where the deceased leaves a will, this section has effect subject to the provisions contained in the will."

A It is also necessary to refer to s. 34 which provides:

“(1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part 1 of Sch. 1 to this Act . . . (3) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part 2 of Sch. 1 to this Act.”

B It is to be observed that whereas in s. 33 (2) there is a reference to the setting aside of a fund for pecuniary legacies, s. 34 (3) only refers to the discharge of the funeral, testamentary and administration expenses, debts and liabilities, and does not refer to legacies at all.

C I now turn to Sch. 1 to the Act, and as the estate is solvent the relevant Part is Part 2, which sets out the order of the application of the assets of the estate. Paragraph 1 is: “Property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.” I must refer also to para. 2, though it does not apply in the present circumstances:

“Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.”

E “As aforesaid” I take to be a reference to the preceding para. 1.

One thing is plain, and that is that the provision in cl. 2 (3) of this will is a direction varying the provisions of the Administration of Estates Act, 1925, in so far as it applies. It is only a bequest of the personal estate, and it casts on the personal estate the just debts, funeral and testamentary expenses. To that extent, therefore, the will, by this direction, has made the personal estate the primary fund to meet those obligations. In support of that view I must refer to *Re Atkinson* (1). The circumstances in that case were similar to those in the present case except that, in that case, the question of the fund for the payment of legacies was not raised. The question remains whether the legacies are to be paid primarily out of the undisposed of real estate or whether, as, indeed, was the old law in operation before the Administration of Estates Act, 1925, came into force, the legacies are charged primarily on the personal estate.

G I have been referred to a large number of cases very properly by counsel in this case, to whose arguments I am very much indebted, but there is no case, except *Re Atkinson* (1), so far as it goes, which really applies, in my opinion, to the present case. This is a case which I have to consider to some extent without much guidance. I do not propose to go through all the cases, though I have considered them carefully in the course of counsel's argument, but they are all distinguishable in some respect or other (except as I shall mention presently).

H *Re Thompson* (2), a decision of CLAUSON, J., was not quite the same as the present, because in that case the testator, after bequeathing an annuity and certain legacies, devised and bequeathed all his real and personal estate not otherwise devised or bequeathed to certain persons, and he left personal estate, and real estate of considerably greater value. In that case there was no question of intestacy, but there was merely a common fund comprised of the real and personal estate; and the question was, as there was no direction in the will how the legacies were to be borne, whether the Administration of Estates Act, 1925, threw the burden of the legacies rateably on the real property and the personal property, or whether the old law applied, which made the personal estate the primary fund to meet the legacies. CLAUSON, J., held that the law in force before the

Administration of Estates Act, 1925, as regards the primary fund for payment of legacies as between the personal and real estate, had not been altered by s. 34 (3) and para. 2 and para. 8 (b) of Part 2 of Sch. 1 to that Act, that the personal estate must be treated as primarily liable, and that recourse would not be made to the real estate until the personal estate had been exhausted. He followed *Re Boards* (3), which was decided before the Act came into force. I will refer to the judgment of CLAUSON, J., in *Re Thompson* (2) to see what view he took of para. 2 of Part 2 of Sch. 1 to the Act. He read para. 2 and went on to say ([1936] 2 All E.R. at p. 145; [1936] Ch. at p. 682):

"That means so far as not provided for by part of the estate in respect of which the testator died intestate. It is suggested that the effect of that provision is to alter the law and to provide that the fund which is to be retained out of the residuary realty and personalty in order to meet pecuniary legacies is to be retained in this way, that a proportionate part is to be retained out of realty and personalty pro rata the amount of the realty and personalty respectively. The provision does not say that. And the provision is not concerned with any such matter. The provision is concerned with the way in which funeral, testamentary and administration expenses, debts and liabilities are to be met. There is no indication there that there is any intention to alter the law in regard to the rights of legatees as against those interested in the residuary personalty and residuary real estate, or in respect of the rights inter se of those interested in the residuary realty and personalty respectively, as regards bearing the charge of legacies, and I can see no foundation for the suggestion that that provision has in any way altered the law as laid down in *Re Boards* (3)."

There CLAUSON, J., was dealing with para. 2, which directed the retention of funds for legacies out of a mixed fund, and he decided that there was nothing in the paragraph which made the personalty or realty primarily bear the burden in respect of that obligation, and therefore the old law applied, and he applied it accordingly. That paragraph is not one which applies in the present case; it is para. 1 which applies.

I will mention in passing that I followed that case in *Re Beaumont's Will Trusts* (4), which was very different from the present case, because there was in that case a trust for sale, and there was not, as there is in the present case, an intestacy as regards a particular asset of the testator's estate, but merely an intestacy as regards a share of the fund given in the will. Therefore, as it seems to me, *Re Beaumont* (4) has no application to the case which I have to decide now. There are no other cases which give me any real assistance at all.

What is the result, therefore, of the provision contained in para. 1 of Part 2 of Sch. 1 to the Administration of Estates Act, 1925? That paragraph, just as in the case of s. 33 (2), directs that the undisposed of property of the deceased is to be the fund for the debts, and so on, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies. It has been argued that that merely requires the setting aside of a fund, and contains no provision for the payment of the legacies out of that fund. *Re Thompson* (2) was called in aid to that extent to show that a mere direction to set aside did not settle the matter of payment, but I am unable to see what is the object of setting aside a fund unless that fund is to be used for the payment of the legacies for which it is to provide. Under para. 2 the fund has to be set aside, and, indeed, there was no real dispute in *Re Thompson* (2) that that fund was the fund which was to meet the legacies. The point in *Re Thompson* (2) was whether the fund for that purpose had to be taken wholly out of the personal estate, or had to be taken rateably out of the real and personal estate of the deceased.

It seems to me that here I am dealing simply with one asset, the undisposed of real estate, and out of that undisposed of real estate a fund is to be raised to provide for the pecuniary legacies, and if the fund is not to be raised for the

A payment of the pecuniary legacies, it is difficult to see what reason there is for setting aside the fund. Therefore, I am necessarily driven to the conclusion that according to the provisions contained in para. 1 of Part 2 to Sch. 1 to the Act, the proper fund to meet the legacies in the present case is the undisposed of property.

Order accordingly.

B Solicitors: *Gardiner & Co.*, agents for *D'Angibau & Malim*, Bournemouth (for the plaintiff); *Edwin Coe & Calder Woods*, agents for *Other, Manning & Co.*, Bournemouth (for the first defendant); *Alfred Blundell* (for the second and third defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

C

NOTE.

D PARISH AND OTHERS *v.* BEACH BROS. (DOVER), LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), March 15, 1955.]

Court of Appeal—Notice of appeal—Form of notice—Discretion of Chief Registrar—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5

E *c.* 49), s. 68 (2)—*R.S.C., Ord. 58, r. 3, r. 8.*

Case referred to:

(1) *Walton v. Rikof*, [1937] W.N. 360; 81 Sol. Jo. 941; Digest Supp.

Interlocutory Appeal.

In this case WYNN-PARRY, J., having granted an injunction until judgment

F in the action, the defendants appealed to the Court of Appeal. On the setting down of the appeal a question arose as to the proper length of notice to be given under R.S.C., Ord. 58, r. 3. At the hearing of the appeal no point was taken as to this, but, after referring to s. 68 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925*, and to R.S.C., Ord. 58, r. 8, which requires "the proper officer of the Court of Appeal" to set down appeals in "the proper list of appeals",

G **SIR RAYMOND EVERSLED, M.R.**, said: In the hope that it will be useful to practitioners, I take this opportunity of repeating what was, in effect, said by my predecessor, **SIR WILFRID GREENE, M.R.**, in *Walton v. Rikof* (1). There is no form specified by statute or in the rules for giving notice of appeal to this court. For the convenience of the court and also of litigants it has long been the practice, and is the practice, of the court to give the Chief Registrar

H a wide measure of discretion as regards form in accepting notices of appeal as proper or sufficient. Where it appears that points of substance arise, the Chief Registrar will always consult the president of the appropriate division of the court. The purpose of these arrangements is to avoid unnecessary costs by way of applications to the court itself.

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

I

* The Supreme Court of Judicature (Consolidation) Act, 1925, s. 68 (2), provides: "Any doubt which may arise as to what orders or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal"; see 18 HALSBURY'S STATUTES (2nd Edn.) 500.

JOHN SUMMERS & SONS, LTD. v. FROST.

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Keith of Avonholm), February 10, 14, 15, 16, March 24, 1955.]

Factory—Dangerous machinery—Duty to fence—Grindstone—Grindstone fenced by “hood”—Part of grindstone exposed—Whether “securely fenced”—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1).

The respondent, a maintenance fitter, was employed by the appellants in a steel works. While at work grinding the end of a bar of metal known as a “key” on a power-driven grinding machine, his thumb came into contact with the revolving grindstone and he was injured. The machine consisted of a horizontal shaft, mounted at a convenient height from the ground, driven by an electric motor which could be switched on when required, and carrying at each end of the shaft a circular grindstone or grinding wheel. When grinding a piece of metal the workman stood facing the edge of the grindstone which was moving downwards and he held the metal against the grindstone, resting it on a substantial rest which was about level with the shaft and adjusted so that there was a gap of about three-eighths of an inch between it and the revolving grindstone. The back and top of the grindstone were fenced by a guard in the shape of a hood, so that the only part of the revolving grindstone which was exposed was an arc about seven inches long between the hood and the rest. In an action for damages for breach of statutory duty under s. 14 (1) of the Factories Act, 1937,

Held: (i) as the grinding wheel was a dangerous part of machinery within s. 14 (1) of the Factories Act, 1937, there was an absolute obligation under that sub-section that the grinding wheel should be securely fenced; a dangerous part of machinery is securely fenced only if the presence of the fence makes it no longer dangerous in the sense that there is no longer a reasonably foreseeable risk of injury to the workman using the machine, even though he is careless or inattentive; on the facts the grinding wheel was not so fenced, and accordingly the appellants were in breach of statutory duty to the respondent, notwithstanding that the consequence of securely fencing the machine in accordance with the statutory obligation would be to render it commercially unusable.

Davies v. Thomas Owen & Co. ([1919] 2 K.B. 39) approved.

(ii) (LORD OAKSEY and LORD MORTON OF HENRYTON dissenting) in all the circumstances the respondent was not guilty of contributory negligence.

Per LORD REID: in my judgment *Miller v. William Boothman & Sons, Ltd.* ([1944] 1 All E.R. 333) was rightly decided. In the recent case of *Richard Thomas & Baldwins, Ltd. v. Cummings* (ante, p. 285) I expressed the view that s. 60 of the Act of 1937 did not entitle the Minister to make a general amendment of a section: in that case, the argument was that regulations could be made, in effect, to alter the terms of s. 16 of the Act. In my view the Minister cannot alter the terms of the Act but he can, within a limited sphere, substitute other provisions for those of the Act (see p. 887, letter D, post).

Decision of the COURT OF APPEAL, sub nom. *Frost v. John Summers & Sons, Ltd.* ([1954] 1 All E.R. 901) affirmed.

[**Editorial Note.** Apart from the decision stated above, the speeches in the present case contain consideration of the question whether an absolute obligation imposed by an enactment in, e.g., Part 2 of the Act of 1937, which enacts the general safety provisions, can be modified by regulations under s. 60 of the Act. VISCOUNT SIMONDS concurred in the opinion of LORD REID, who considered that

- A regulations under s. 60 could modify such obligations. LORD MORTON OF HENRYTON took a like view (see p. 878, letter D, post). There was thus a majority of the House of Lords in support of the decision in *Miller v. William Boothman & Sons, Ltd.* ([1944] 1 All E.R. 333). LORD KEITH OF AVONHOLM, however, expressly reserved his opinion on the question whether absolute obligations imposed by sections of the Act could be modified by regulations
- B under s. 60 (see p. 889, letter E, post).

For the Factories Act, 1937, s. 14, s. 60, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009, 1046.]

Cases referred to:

- C (1) *Davies v. Owen (Thomas) & Co.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 24 Digest 909, 68.
- (2) *Barras v. Aberdeen Steam Trawling & Fishing Co., Ltd.*, [1933] A.C. 402; 102 L.J.P.C. 33; 149 L.T. 169; Digest Supp.
- (3) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.
- (4) *Mitchell v. North British Rubber Co., Ltd.*, 1945 S.C. (J.) 69; 2nd Digest Supp.
- D (5) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; sub nom. *Birtwistle v. Hindle*, 66 L.J.Q.B. 173; 24 Digest 909, 71.
- (6) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; 1948 S.C. (H.L.) 100; [1948] L.J.R. 1490; 2nd Digest Supp.
- (7) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
- E (8) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] 1 K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.
- (9) *Mackay v. Ailsa Shipbuilding Co., Ltd.*, 1945 S.C. 414; 2nd Digest Supp.
- (10) *North British Ry. Co. v. Budhill Coal & Sandstone Co.*, [1910] A.C. 116; 79 L.J.P.C. 31; 101 L.T. 609; 34 Digest 607, 43.
- F (11) *Blyth v. Birmingham Water Works Co.*, (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 156 E.R. 1047; 36 Digest (Repl.) 5, 1.
- (12) *Stimson v. Standard Telephones & Cables, Ltd.*, [1939] 4 All E.R. 225; 161 L.T. 387; sub nom. *Stimpson v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 32 B.W.C.C. 253; 2nd Digest Supp.
- G (13) *Burns v. Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987; [1951] 1 K.B. 454; 114 J.P. 613; 2nd Digest Supp.
- (14) *Richard Thomas & Baldwins, Ltd. v. Cummings*, ante, p. 285.
- (15) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; Digest Supp.
- (16) *Lyon v. Don Brothers, Buist & Co., Ltd.*, 1944 S.C. (J.) 1; 2nd Digest Supp.
- H (17) *Souter v. Steel Barrel Co., Ltd.*, (1935), 154 L.T. 85; 99 J.P. 379; Digest Supp.
- (18) *Dennistoun v. Charles E. Greenhill, Ltd.*, [1944] 2 All E.R. 434; 2nd Digest Supp.
- (19) *Lewis v. Denyé*, [1940] 3 All E.R. 299; [1940] A.C. 921; 109 L.J.K.B. 817; 163 L.T. 249; 2nd Digest Supp.

I Appeal.

Appeal by the employers, John Summers & Sons, Ltd., from an order of the Court of Appeal, dated Mar. 19, 1954, and reported sub nom. *Frost v. John Summers & Sons, Ltd.*, [1954] 1 All E.R. 901, reversing an order of JONES, J., at Chester Assizes, dated Oct. 21, 1953. The facts appear in the opinion of LORD REID (p. 881, post).

R. H. Forrest, Q.C., and *N. G. L. Richards* for the appellants.

Marven Everett, Q.C., and *R. Geraint Rees* for the respondent.

The House took time for consideration.

Mar. 24. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have had the privilege of reading the opinion which my noble and learned friend, LORD REID, will deliver, and am so fully in agreement with it that I propose to make only a few short observations myself. I have come, with reluctance, to the conclusion that this appeal must be dismissed, for I cannot fail to be impressed by the inconvenience of a decision which may, for the time being, make it impossible to work a machine which has for long been in popular use without (so far as is known) any adverse report by H.M. Inspectors of Factories or any administrative measure designed to safeguard its use. Fortunately, as I shall indicate, the matter can be remedied and, as the judgment of the Court of Appeal which is to be affirmed was delivered a year ago, it may be assumed that the necessary steps are already in contemplation.

My Lords, s. 14 of the Factories Act, 1937, and its predecessor s. 10 of the Factory and Workshop Act, 1901, have on many occasions been discussed in the courts, and I think that their true construction is not in doubt. In particular, I think it is clear that the obligation imposed by the section to fence securely every dangerous part of any machinery, except as in the section mentioned and subject to its proviso, is an absolute obligation. And by that, I mean that it is not to be qualified by such words as "so far as practicable" or

"so long as it can be fenced consistently with its being used for the purpose for which it was intended"

or similar words. I come to this conclusion for the following reasons which will be elaborated by my noble and learned friend.

First, it appears to me to be an illegitimate method of interpretation of a statute, whose dominant purpose is to protect the workman, to introduce by implication words of which the effect must be to reduce that protection. Secondly, where it has been thought desirable to introduce such qualifying words, the legislature has found no difficulty in doing so. This can be found both in other statutes, of which I need give only one out of many possible examples, viz., 60 & 61 Vict. c. 60*, which, in providing for the fencing of chaff-cutting machines, uses the words

"so far as is reasonably practicable and consistent with the due and efficient working of the machine"

and also in other sections of the statute now under consideration. For instance, in different forms, qualifying words are to be found in s. 18, s. 19, and s. 22 and, no doubt, in many other sections. Thirdly, it was decided as long ago as 1919 in *Davies v. Thomas Owen & Co.* (1), that the obligation imposed by the comparable s. 10 of the Factory and Workshop Act, 1901, was absolute and that, if the result of a machine being securely fenced was that it would not remain commercially practicable or mechanically possible, that did not affect the obligation: the statute would, in effect, prohibit its use. This had been for seventeen years the unchallenged law when the Act of 1937 was passed and that Act, by s. 14, substantially repeated the former section. It would be contrary to well established principles of construction to give a different meaning to the new section; see *Barras v. Aberdeen Steam Trawling & Fishing Co., Ltd.* (2). Fourthly, the proviso to s. 14 (1) affords a strong indication that the substantive part of it imposes an absolute obligation: for, unless its effect is absolutely to prevent the operator from coming into contact with a dangerous part of the machine, there would be little meaning in the provision of an alternative which has just that effect. Fifthly, the absolute obligation imposed by s. 14 (1) is subject to the regulation-making power of the Minister under s. 60. I do not think it necessary to decide

* The Chaff-Cutting Machines (Accidents) Act, 1897.

A whether the Act of 1901 contained a similar power. But, in my opinion, it is clear that s. 60 of the Act of 1937 enables the Minister by special regulation to modify the absolute obligation of s. 14 in regard to such classes or descriptions of factory as he thinks fit. Reading the section as a whole, I do not regard the words "subject to the provisions of this Act" as qualifying the power of modification, but rather as looking forward to s. 129. There is thus a consistency in
 B the Act—first a provision for the safety of the workman which is absolute, and secondly a recognition that such a provision may render a particular industrial process practically impossible, and, therefore, a power in the Minister, if he thinks fit, and subject always to the power of Parliament to annul the regulation, to relax the rigour of the absolute obligation.

C For these reasons, I think that the obligation to "securely fence" the machinery here in question is unambiguously absolute and will remain absolute unless and until the Minister makes appropriate regulations.

The next question is what is the test or standard of secure fencing. I agree with my learned and noble friend, LORD REID, that, since the danger to be guarded against is contact with the exposed part of the grindstone while it is in motion, fencing is secure which effectively protects the workman from that
 D danger. By workman in this context I mean not only the actual operator but also any other person employed on the premises. Your Lordships have been referred to a number of formulae and I do not wish to add to their number. It is elementary that it is necessary to consider not only the risk run by a skilled and careful man who never relaxes his vigilance. An observation of DU PARCQ, J., in *Walker v. Bletchley Flettons, Ltd.* (3) ([1937] 1 All E.R. at p. 175) to the effect
 E that a machine is dangerous

"if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur"

F has been sometimes mentioned with approval, and I think that it gives as precise a direction as can be hoped for if it is read in conjunction with what the Lord Justice-Clerk (LORD COOPER) said in *Mitchell v. North British Rubber Co., Ltd.* (4) (1945 S.C. (J.) at p. 73), viz., that a machine is dangerous if

"... in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled
 G operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part."

So long as this element of danger exists the machine is not securely fenced. But, whatever test is adopted, there will be borderline cases, and it is sufficient
 H for this case for me to say that I can think of no standard of security which would justify the employers in leaving the rotating grindstone unfenced to the degree to which it was exposed in this case.

There remains this question. The employers being guilty of a breach of statutory duty and the workman having suffered damage which was assessed by the learned judge at £261 6s., was he guilty of contributory negligence and, if so, should there be any and what apportionment of the damage? The learned
 I judge came to the conclusion

"that there really was nothing wrong with this machine; that it was a perfectly safe machine to use, guarded as it was with a guard above and the rest below, if a person used it in the proper way . . . and that the real cause of the accident was, unfortunately, the [respondent's] own negligence."

The learned judge saw the witnesses and the accident was illustrated to him and his opinion must be weighty. But in the Court of Appeal, BIRKETT, L.J.,

thought that the respondent was not doing anything wrong or stupid or forbidden in using the grindstone, and MORRIS, L.J., said that he was not acting in a deliberately foolhardy way and concluded that, while some measure of criticism could forcibly be suggested, any deficiencies or failures on the respondent's part fell far short of negligent conduct. Having carefully read all the evidence I think that the learned lords justices were well justified in drawing these inferences and I agree with them. No question, therefore, of apportionment of the damage arises.

LORD OAKSEY: My Lords, I agree with my noble and learned friend on the Woolsack that the appellants have been shown to be guilty of a breach of statutory duty and that so far this appeal fails.

On the question of the respondent's contributory negligence, however, I think the finding of the learned judge should not be disturbed. He, and he alone, saw the respondent demonstrate what he did at the time of the accident. The respondent's case was that there was an improper gap between the rest and the wheel, not that the exposed part of the wheel was, in itself, dangerous apart from the alleged gap. The learned judge found that there was no improper gap but that, in performing the grinding operation on a rest which was close to the wheel, the respondent was guilty of negligence. The trial judge was obviously in a better position to decide that question than the Court of Appeal, and I think, therefore, that the appeal should be allowed on the question of damages, which should be borne equally by the parties.

LORD MORTON OF HENRYTON: My Lords, in certain cases which have been cited to your Lordships, the court has asked itself the question—was the machine under consideration, regarding it as a whole and in its actual state at the time of the accident, a "dangerous machine"? The words "dangerous machine" are not used in the section which is now under consideration, viz., s. 14 of the Factories Act, 1937, nor are they used in any one of the group of sections which includes s. 14. If I had thought that this question arose in the present case, I should have answered it in the negative. The only dangerous part of the machine is the grinding wheel, and that part is so fenced in that only an arc about seven inches long is exposed. A substantial rest is provided, on which the piece of metal to be ground is held by the workman. The respondent himself said in evidence that he had used stones for twenty-five years and had never had an accident before, and that the machine in question was used normally by everyone for all kinds of work, heavy or light. Mr. Martin, an expert witness called on behalf of the respondent, said that the machine was a perfectly normal machine and was "guarded as far as is practicable to allow the machine to be used at all" and that it was a machine which any skilled fitter should be able to use without hesitancy if it was properly adjusted. The learned judge held that it was properly adjusted, and it has not been suggested that this finding was wrong. Moreover, the wheel is only in motion while a workman is using it, so there is no danger to any other workman.

In my opinion, the question whether this machine, regarding it as a whole, was a dangerous machine does not arise at all, but I believe I am alone in so thinking. Your Lordships are, I think, all of opinion that this question does arise and have, in effect, answered it in the affirmative. In these circumstances, I think it is only fair to the appellants to say that, if I had thought that the question arose, I should have taken a different view, in agreement with SOMERVELL, L.J., and JONES, J., who tried the action. I refrain from elaborating the point, and pass from it with this quotation from the judgment of WILLS, J., in *Hindle v. Birtwistle* (5) ([1897] 1 Q.B. at p. 195):

"No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous."

A I now turn to the questions which do arise, in my opinion, in regard to the alleged breach of statutory duty by the appellants. Section 14 (1) of the Factories Act, 1937, is as follows:

B “Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.”

C As I read the section, only two questions arise on it in the present case. They are—(i) Was the grinding wheel a “dangerous part” of the power-operated grinding machine at which the respondent was working, within the meaning of s. 14 (1) of the Act? (ii) If so, was that wheel “securely fenced”, within the meaning of the same section, at the time when the accident occurred? If the answer to the former question is “Yes” and to the latter question “No”, the appellants have been guilty of a breach of statutory duty, and it will become necessary to decide whether there was or was not contributory negligence on the part of the respondent.

E In my opinion, in order to answer the first question stated above, one must disregard for the moment such protection as has been provided, and consider only the wheel itself, which is a *part* of the machinery, operated by power which can be turned on or off by any person at will, and revolving at 1,450 revolutions a minute. So regarding it, the wheel is undoubtedly a dangerous part—and, indeed, the only dangerous part—of the machine now under consideration.

F Question (ii) turns on the meaning of the words “securely fenced” in s. 14 (1). The word “fenced” raises no difficulty, but various meanings of the word “securely” have been suggested in argument. I shall first approach this question by a consideration of the words of the section, apart from any authority. My Lords, to my mind the natural meaning of the word “securely”, used in regard to the fencing of a dangerous part of a machine, is that the part must be so fenced that no part of the person or clothing of any person working the machine or passing near it can come into contact with it. Nor can I find any context in the sub-section which should lead the reader to give to this word any meaning other than that which it would naturally bear. The words

“unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced”

H seem to me to support this meaning, and the words of the proviso seem to place the matter beyond doubt. If safety cannot be secured by means of a fixed guard, the proviso offers an alternative in the form of a device which “automatically prevents the operator from coming into contact with that part”. The proviso refers only to the operator, but the earlier part of the section makes it plain that, in cases not coming within the proviso, the protection is intended to cover every person employed or working on the premises.

I The meaning of the words “securely fenced”, in a similar context, was recently considered by this House in *Carroll v. Andrew Barclay & Sons, Ltd.* (6). That case turned on the construction of the words “Every part of the transmission machinery shall be securely fenced” in s. 13 (1) of the Factories Act, 1937, and the question was whether the words “securely fenced” imposed a duty on the employers to erect an enclosure which would prevent broken parts of a machine from flying out or injuring an employee; but the following passages

from the speeches have a direct bearing on the present question. LORD PORTER A
said ([1948] 2 All E.R. at p. 390):

"Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out."

LORD NORMAND said (*ibid.*, at p. 391):

"It is common ground that the crucial words are 'securely fenced' and that they must have the same meaning wherever they occur in the statute."

And (*ibid.*, at p. 393):

"The proviso to s. 14 (1) makes it clear that, whereas the best form of fencing for a dangerous part of a machine is a fixed guard, yet the obligation to fence will in defined cases be deemed to be complied with if a device is provided which automatically prevents the operator from coming into contact with that part. The difference between the fence prescribed by the substantive part of the sub-section and the device is not that one is a fence and the other is not, but that the device is a fence which protects only the operator and not every person employed or working on the premises. It is, therefore, necessary to say that it shall be deemed to be compliance with the requirements of the sub-section, but the kind of protection which is given to the operator by the device is the same kind of protection as that given to every person employed or working on the premises by the prescribed fence or guard, and it is protection against contact."

There are passages in my own speech to the same effect.

In *Nicholls v. Austin (Leyton), Ltd.* (7), LORD THANKERTON said ([1946] 2 All E.R. at p. 94):

"At the trial, the first point argued before the judge was whether the obligation to fence imposed by sub-s. (1) of s. 14 is an obligation not only to protect against direct injury by contact with the machine, but also against indirect injury from something that flies off from the machine."

Later (*ibid.*, at p. 95) he said:

"My Lords, on consideration of the terms of s. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by sub-s. (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion . . ."

What is contemplated, in my view, is that there shall be complete protection against contact for every person employed or working on the premises in cases not coming within the proviso, and complete protection against contact for the operator in cases coming within the proviso. In using the words "complete protection", I do not suggest that the fence must be so constructed that it cannot be climbed over, or broken down, by an employee who is determined to get at the machinery. That would be demanding the impossible from the employers, and I should not have thought the point worthy of mention if it had not arisen in the course of the argument.

I shall be referring briefly to the earlier authorities dealing with the words "securely fenced", in the course of considering an interesting argument addressed to your Lordships by counsel for the appellants. For the moment, I need only say that I can find nothing in these authorities to throw doubt on the view which I have just stated.

A Counsel for the appellants could not, of course, dispute that, if the words "securely fenced" were construed as I have just construed them, the appellants had failed securely to fence the grinding wheel and had thus committed a breach of the obligation imposed by s. 14 (1) of the Act. He pointed out, however, that, according to the uncontradicted evidence of an expert at the trial, "It [i.e., the grinding wheel] is guarded as far as is practicable in order to allow the machine

B to be used at all", and he contended that the obligation imposed by s. 14 (1) was only an obligation to fence to such an extent as will preserve the identity of the machine by permitting its use. He said:

"If you cannot use the wheel, it ceases to be a grinding wheel in any real sense and becomes merely a museum piece."

C My Lords, I have felt, and still feel, great sympathy with this argument but I feel unable to accede to it. The wording of the section places no limitation on the words "securely fenced". An absolute obligation is imposed, and I am impressed by the fact that, in a number of sections of the Act, the duties imposed are qualified by the insertion of the words "so far as is reasonably practicable" or other words to the same effect. See, for example, s. 18 (1), s. 19 (3), s. 22 (4), s. 25 (3), s. 26 (1) and (2) and s. 47. On the other hand, in the section now under consideration, and in many other sections, no such qualification is inserted. The contrast is strikingly illustrated in s. 25, for the obligation is absolute in sub-s. (1), sub-s. (2) and sub-s. (4) and qualified in sub-s. (3). Counsel is really asking your Lordships to substitute for the words "shall be securely fenced" some such words as "shall be fenced as securely as is practicable but not so as to

D prevent use of the machinery"; but that would be legislation, not interpretation of the words of the statute.

E There is another serious difficulty in the way of the appellants. In *Davies v. Thomas Owen & Co.* (1), *SALTER, J.*, had to consider the meaning of the words "securely fenced" in s. 10 (1) (c) of the Factory and Workshop Act, 1901, which was substantially to the same effect as the sub-section now under consideration. The jury's answers to certain questions amounted, as the judge held, to a finding that to fence securely the dangerous parts of a pressing and finishing machine was "commercially and mechanically impracticable". Thus, the learned judge was faced with the same problem as that which now confronts your Lordships' House. He said ([1919] 2 K.B. at p. 41):

G "... with regard to the issue of breach of statutory duty in my opinion the plaintiff succeeds. The obligation imposed by the Factory and Workshop Act, 1901, in relation to the fencing of dangerous machinery, is absolute. It is an obligation not merely to fence, but to fence securely. The statute does not say that dangerous machinery shall be securely fenced if that is commercially practicable or mechanically possible. If a machine cannot be

H securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use. The words of s. 10 (1) (c) are not that dangerous machinery is to 'be in such position or of such construction as to be equally safe . . . as it would be if it were fenced' but is to 'be in such position or of such construction as to be equally safe . . . as it would be if it were securely fenced.' The workman is entitled to have secure fencing in fact and the findings of the jury show that this machine was not securely

I fenced. The observations of the jury to the effect that secure fencing is commercially and mechanically impracticable are irrelevant, and I think that the plaintiff has proved a breach of a statutory duty and damage caused to him thereby."

The view which *SALTER, J.*, took on that occasion was approved and followed in several cases between 1919 and 1937. Yet the legislature, in framing the Factories Act, 1937, reproduced the words "securely fenced" in s. 14 (1) of that

Act, which took the place of s. 10 (1) of the Act of 1901. Again, between 1937 and 1948, the view of these words which had been taken by *SALTER, J.*, was affirmed by the Court of Appeal in *Miller v. William Boothman & Sons, Ltd.* (8), and by the Court of Session in *Mackay v. Ailsa Shipbuilding Co., Ltd.* (9). The Factories Act, 1948, was passed "to amend the Factories Act, 1937" (see the long title to the Act), but, again, the legislature did not think fit to alter the words "securely fenced" in s. 14 (1) of the Act of 1937. This is a circumstance to which this House has attached great weight. I need only refer, by way of example, to *LORD LOREBURN, L.C.*'s observation in *North British Ry. Co. v. Budhill Coal & Sandstone Co.* (10) ([1910] A.C. at p. 127):

"When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense",

and to the speech of *LORD BUCKMASTER* in *Barras v. Aberdeen Steam Trawling & Fishing Co., Ltd.* (2).

For these reasons I am of opinion that the grinding wheel was not "securely fenced" within the meaning of s. 14 (1) of the Act of 1937, and thus the appellants have failed to fulfil the duty which the statute lays on them.

I am acutely conscious of the regrettable results which may follow if your Lordships are of this opinion, but s. 60 of the Act of 1937, the successor of s. 83 of the Act of 1901, provides a means whereby the Secretary of State can modify the provisions of s. 14 if he is satisfied of certain matters. An example of such a modification, under the Act of 1901, is afforded by the Woodworking Machinery Regulations, 1922*, which were under consideration in *Miller v. William Boothman & Sons, Ltd.* (8), already cited. In giving the judgment of the Court of Appeal in that case, *GODDARD, L.J.*, said ([1944] 1 All E.R. at p. 334):

"If s. 14 stood alone, in our opinion, the obligation would be absolute. The section itself does not admit of exceptions; it does not say that a dangerous machine is to be fenced as securely as possible or only so far as will make it commercially or mechanically useful."

Thus, as I have already stated, the Court of Appeal affirmed the view taken by *SALTER, J.*, in 1919. After referring to the proviso to s. 14 (1) and to other provisions of the Acts of 1901 and 1937, *GODDARD, L.J.*, continued (*ibid.*):

"The object of the legislature in giving power to the Secretary of State to modify the provisions of the Act in respect of safety requirements would seem to be that it was recognised that there are some machines necessary for modern industry that cannot be completely fenced if they are to be used, and circular and band saws afford good illustrations. From the evidence in the present case it seems that, at any rate down to the date of the trial, no guard had been invented which would afford completely secure fencing for these saws; some part of the cutting edge must be exposed or the wood could not be cut. Accordingly, if the prohibition of s. 14 is absolute, the use of these saws in a factory inevitably renders the owners liable to penalties, and it must follow that they cannot be used at all. It is unnecessary to emphasise the seriousness of such a result. It was, in our opinion, for this very reason that, in 1922, the Secretary of State made the Woodworking Machinery Regulations. These regulations were made under the Act of 1901, ss. 79, 82 and 83 being the relevant sections. By the proviso to s. 159 (1) of the present Act, these regulations continue in force notwithstanding the repeal of the earlier Act and have effect as though made under the present Act, that is, under s. 60. They contain detailed provisions in regs. 10-16 for the guarding of circular saws, band saws and planing machines. In our

*S.R. & O. 1922 No. 1196.

A opinion, these regulations must be regarded as modifying the provisions of s. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require. It is difficult indeed to see what other object these regulations could have. They clearly contemplate the use of these saws; if saws are securely fenced as required by s. 14, they could not be dangerous to life or limb, and, indeed, could not be used at all. The use in s. 60 of the words ‘as appear to him to be reasonably practicable and to meet the necessity of the case,’ we think clearly show that it is intended to give the Secretary of State power to modify the otherwise absolute obligation so as to allow the use of the machine, provided that reasonable though not absolute provision for safety is made.”

C With these observations I entirely and respectfully agree.

It may be that the principle which the legislature had in mind when enacting s. 10 of the Act of 1901 and s. 14 of the Act of 1937 was this: that *prima facie* the protection of workmen against any possibility of contact with dangerous machinery should be absolute and unqualified, and any modification of the strict rule which might be necessary to enable any particular machine to be worked should be brought into effect by special regulations designed to meet the particular case.

D I cannot attribute any moral blame to the appellants for their breach of statutory duty, as I do not doubt that they believed themselves to be carrying out the requirements of the statute, but as they have, in my view, committed a breach of a statutory duty, which may readily be modified by suitable regulations, it becomes necessary to consider whether the respondent was guilty of contributory negligence. My Lords, on this point there are clear findings of JONES, J., who heard all the evidence, and saw the respondent demonstrate exactly how he was holding the object called a “key” against the grinding wheel when the accident occurred.

E It is most significant that the respondent, in his original statement of claim, alleged that the accident was caused by the negligence of the appellants, their servants and agents, in

“providing for use by the [respondent] and/or requiring or allowing him to use a machine which was defective”

G in certain respects which were particularised, and in failing to provide adequate artificial lighting for the use of persons working at the machine. These allegations were all disproved by evidence accepted by the learned judge at the trial. He held (i) “that there really was nothing wrong with this machine”, (ii) “that it was a perfectly safe machine to use, guarded as it was with a guard above and the rest below, if a person used it in the proper way” and (iii) “that there was adequate light for the purpose”. As I have already pointed out, the respondent himself said in evidence: “I have used stones for twenty-five years and I have never had an accident before”, while an expert witness, called on his behalf, agreed, in re-examination, that there was “no particular difficulty about this job as far as an ordinary skilled fitter was concerned.” In these circumstances, one might draw the inference that, on this particular occasion, the respondent must have been negligent, as otherwise the accident would not have happened.

H The matter does not, however, rest on inference. The learned judge went on to hold that “the real cause of the accident was, unfortunately, the [respondent’s] own negligence” and gave his reasons as follows:

“What I feel is strongly against him—though of course I am not really skilled in these matters—is the way in which he himself showed me he held that key when he was doing this work. I cannot believe that it was safe and careful on his part to hold that key right up at the top and then apply the

top of it to this wheel, revolving at a great speed, with his fingers close to the wheel. If his foot had moved or he had lost his balance, his finger would have been caught immediately by this wheel. He was obviously careless in the way in which he handled the key and it is really unnecessary to go into the question of whether he might have done this job in some other way. He agreed that he might have used a file. I think he might have used something else. He did not admit, I think, that the portable grindstone would be useful, but he certainly could have used a file. I do not know that it was necessary for him to do so; if only he had kept his fingers away from the grindstone, I do not think any harm would have been done at all in this case. Of course, he may say that he knows more about this, obviously, than I do and that he could not have done the job properly if he had held the key further down. Well, the answer to that is quite obvious. It seems to me that if he could not do it without putting his fingers into a dangerous position, as he did, he ought not to have been at this grindstone at all; he ought then to have used the other method suggested to him of putting the key in a vice and using a file, or possibly using the portable grindstone. Although, as I say, I do not want to be too severe upon him, it seems to me that he was convicted of negligence by his own demonstration in the witness-box of how he held that key when he applied it to the grindstone."

This conclusion seems to be justified on the evidence. If it was dangerous for the respondent to hold the key as he did hold it, and if he could not hold this small object to the grindstone in a safe way, then he ought not to have used the grindstone at all, but should have used a file. In effect, the judge took the view that the respondent either

"omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

(*Blyth v. Birmingham Water Works Co.* (11), 11 Exch. at p. 784, per ALDERSON, B.).

This reasoning was accepted in the Court of Appeal by SOMERVELL, L.J., who said ([1954] 1 All E.R. at p. 903):

"... on the judge's findings it seems to me clear that he [the respondent] had a lapse or did something which I do not think was, on the evidence, reasonably to be anticipated."

BIRKETT, L.J., did not deal specifically with the judge's findings on this matter. He held, rightly, as I think, that (*ibid.*, at p. 906)

"the statutory duty to fence securely was, of course, to prevent the contact altogether."

and continued (*ibid.*):

"He [the respondent] was not doing anything wrong or stupid or forbidden in using the grindstone . . ."

MORRIS, L.J., stated his conclusion thus (*ibid.*, at p. 908):

"While some measure of criticism can forcibly be suggested, I have come to the conclusion that any deficiencies or failures on the [respondent's] part fell short of negligent conduct."

My Lords, for my part I see no good reason for differing from the findings of the learned judge, who was in a much better position than an appellate court to form a conclusion on this matter, in the circumstances of the present case.

The result is that, in my view, although the machine in question was one of an ordinary type in general use,

A “guarded as far as was practicable in order to allow the machine to be used at all”,

the appellants have failed to perform a statutory duty and must be held to be partly liable for the damage suffered by the respondent—see the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1) and s. 4.

B On the other hand, I agree with the findings of JONES, J., as to the negligence of the respondent. In these circumstances, I would award the respondent one-half of the £261 6s. damages assessed by the learned judge, and would order the appellants to pay one-half of his costs in this House and in the courts below.

LORD REID: My Lords, the respondent is a fitter with twenty-five years' experience. On Nov. 27, 1951, he was working on night shift as a maintenance fitter in the appellants' steel works. He had to prepare what is called a “key” from a bar of metal which was about four inches long with a cross section about three-quarters of an inch square. One end of this bar had to be “radiused”, i.e., reduced to the shape of a semi-cylinder and, in the course of doing this, he used a power-driven grindstone and sustained injury to his thumb in respect of which the present action is brought.

D The machine at which he was working is not fully described in the evidence, but it is sufficient to say that it consisted of a horizontal shaft, mounted at a convenient height from the ground, driven by an electric motor which could be switched on when required, and carrying at each end of the shaft a circular grindstone or grinding wheel of a diameter of perhaps two feet or less. When set in motion, the wheels revolved at a speed of about 1,450 revolutions per minute. When grinding a piece of metal, the workman stands facing the edge of the grinding wheel which is moving downwards, and he holds the metal against the stone, resting it on a substantial rest which is about level with the shaft and adjusted so that there is only a gap of about $\frac{3}{8}$ ths of an inch between it and the revolving stone. The back and top of the wheel are fenced by a guard in the shape of a hood, so that the only part of the revolving stone which is exposed is an arc about seven inches long between the hood and the rest. When grinding the key, the respondent held it on the rest with the axis of the semi-cylinder horizontal, and with his two thumbs on the top of the key and not far from the part which he was grinding. To get the required shape, he had to rotate the key upwards so that each part of the semi-cylindrical “radius” came in turn against the stone. This meant that, when he was grinding towards the base of the radius, his thumbs would be fairly close to the stone.

G The precise way in which the accident happened is not explained. The respondent's view was that the gap between the rest and the stone was too wide, and that the key had in some way jammed in this gap, but it was proved that the gap was not too wide and so this jamming could not have happened. H It is, of course, necessary to hold the metal against the grindstone, and it would seem that the key must have slipped in some way while the respondent was holding it against the stone, so that his thumb came in contact with the stone. Any contact with a stone revolving at so high a speed would be sufficient to cause the severe laceration of the thumb which the respondent suffered.

I The respondent's case at the trial before JONES, J., at Chester, was based alternatively on negligence or breach of statutory duty. His case on negligence failed, and is not now in issue. JONES, J., held that there was no breach of statutory duty on the part of the appellants, but that the real cause of the accident was the respondent's own negligence. He, therefore, gave judgment for the appellants. He assessed the damages in the event of the appellants being liable at £261 6s. On appeal, the Court of Appeal (BIRKETT and MORRIS, L.JJ., SOMERVELL, L.J., dissenting) held that the appellants were in breach of statutory duty and that the respondent had not been guilty of contributory negligence, and,

accordingly, gave judgment for the respondent for £261 6s. There are now two questions before your Lordships: were the appellants in breach of their statutory duty? and, if they were, was the respondent guilty of contributory negligence?

The breach of statutory duty alleged is failure to comply with the requirements of s. 14 (1) of the Factories Act, 1937. That sub-section is as follows:

“Every dangerous part of any machinery, other than prime movers and transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.”

The question in this case is whether the grinding wheel was securely fenced. The grinding machine was so constructed that no one could come into contact with the lower part of the wheel, but, without a fence or hood, there was nothing to prevent anyone from coming into contact with the upper part of the wheel, and it was not disputed that, without the hood, the grinding wheel when in motion would have been a dangerous part of the machine. But the appellants say that, with the hood in position, the wheel was securely fenced within the meaning of the sub-section. It appears to me that the object of fencing is to remove the danger which would exist in its absence, and I would hold that a dangerous part is securely fenced if, and only if, the presence of the fence makes it no longer dangerous within the meaning of that word as it is used in this section. I shall, therefore, first consider what is the meaning of the word “dangerous” in this context, and on that matter there is a good deal of authority.

In *Hindle v. Birtwistle* (5), a weaver was injured by a shuttle flying out of a shuttle-race in a loom in a weaving shed, and this was due to his having negligently failed to adjust the machine properly. The employer was convicted of an offence in respect of failure to fence. On appeal by Case Stated, the main argument for the employer appears to have been that the shuttles were not dangerous because, in a shed of 1,400 looms, there had only been four accidents in five years, so the chances of an accident were so small that it would be unreasonable to require fencing. WILLS, J., said, in a passage in his judgment which has frequently been quoted with approval ([1897] 1 Q.B. at p. 195):

“It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree.”

Subsequent statements of the law have added little to this and I shall only quote two. DU PARCQ, J., said in *Walker v. Bletchley Flettons, Ltd.* (3) ([1937] 1 All E.R. at p. 175):

“... a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur”,

A and in *Stimson v. Standard Telephones & Cables, Ltd.* (12), DU PARCQ, L.J., explained ([1939] 4 All E.R. at p. 235) that, in saying this, he did not mean a possible cause of injury to anyone acting reasonably. The only word which I would query in this passage is "possible". If the question of degree of danger has to be considered it might perhaps be better to say "a reasonably foreseeable cause of injury".

B In *Mitchell v. North British Rubber Co., Ltd.* (4) the Lord Justice-Clerk (LORD COOPER) said (1945 S.C. (J.) at p. 73):

C "The necessary and sufficient condition for the emergence of the duty to fence imposed by s. 14 of the Factories Act is that some part of some machinery should be 'dangerous'. The question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory inspector had so reported; nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributorily negligent. The test is objective and impersonal. Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part?"

D I turn to the facts of this case to inquire whether, with the hood in position, E this grinding wheel was still dangerous. I am prepared to assume that the machine was in such a position in the factory that it was highly improbable that anyone else than the man who was operating it could come into contact with the exposed part of the revolving wheel, and that the only question is whether this exposed part was dangerous to the operator. As I have said, F there was a gap of some seven inches between the hood and the rest and, in fact, the respondent's thumb did come into contact with the revolving wheel at that point. But the mere fact that such an accident occurred is not enough; the question is whether, before the accident, it was reasonably foreseeable that an accident of this kind might happen. I think it was. Mr. Moody, who was the chargehand fitter at the time and who was called by the appellants, gave this evidence in cross-examination:

G "Q.—Just tell me this: you were the chargehand fitter; you agree, do you not, that workpieces of that kind are frequently done, or were at that time frequently done, on this machine? A.—They had been done on this machine. Q.—And were commonly done on that machine? A.—It used to be a common practice at one time, but not so much now. Q.—Because you have a notice there saying, 'hand tools only are to be ground'? H A.—Yes . . . Q.—At any rate, you, as a chargehand, seeing [the respondent] doing this work on that grinder, you would not have stopped him, would you? A.—I did not see him doing that. Q.—You would not have stopped him had you seen him? A.—I would have warned him to be careful. Q.—Did you frequently see people do work of this kind on the grindstone? I A.—I have seen them lately but I have stopped them. Q.—But prior to November, did you frequently see them use the grindstone for this work? A.—Fairly often."

So the appellants must be taken to have known that work comparable to that on which the respondent was engaged was fairly often done on this machine, and, to my mind, the fact that the chargehand thought it necessary to warn workers to be careful is sufficient evidence of danger—danger which could only arise from part of the wheel being exposed.

As I read his judgment, JONES, J., held that the exposed part of the wheel was not dangerous, founding on the evidence of the expert witness Mr. Martin. In his evidence in chief Mr. Martin said:

"Q.— . . . First of all, I just want to ask you this: what do you say as to the safety or otherwise of doing the work which the [respondent] described on that workpiece on that particular grindstone? A.—The end of the key can be 'radiused' with normal safety, reasonable safety, on this machine by hand. It is quite a normal job and one which would involve very little difficulty. Q.—You see nothing wrong in doing that work on that machine? A.—No, provided the rest is properly adjusted and provided the work is properly done. Q.—Tell me this: a saw having been used on the workpiece to cut off the rough corners, how long would a job of that kind take if a rough file were to be used? A.—That is rather difficult to estimate. It would be quite arduous work. Filing work is quite arduous and there would be quite a lot of metal removed to true it up, I suppose. Altogether, it would take perhaps twenty minutes. Q.—Normally, a fitter having to do that job, what method would he adopt? Would he use a file or a grindstone or some other implement, or what? A.—If a grindstone was available he would use a grinder to get the job done more quickly and save himself a certain amount of work."

Then, in cross-examination he said:

"Q.—Of course, even without there being any gap, accidents can happen on these things? A.—Oh, yes, the wheel is the dangerous part of the machine, in my opinion. There is no doubt that if you touch it with your hand, you will suffer injury to the hand. Q.—Of course, the smaller the component you are grinding, the nearer your hands have got to be to the stone and the more care you have got to take? A.—Yes, but of course, usually the smaller the article, the finer the work, the less pressure you have to put on it and there is not the same risk of your hand ever going on to the wheel. Q.—No, but of course you remember that it was being used on this occasion on what is known as coarse work—taking off a substantial amount? A.—Yes, there would be a substantial pressure on it, really. Q.—I do not know whether you saw [the respondent] actually demonstrate. He put the key on the rest *like that*? Q.—And then he did *that*. Of course, that would bring your thumbs right up very near the wheel, would it not? A.—Your thumb would approach the wheel; it need not necessarily go very near it. Q.—But if you took your eye off the ball, so to speak, you could overdo it? A.—If you did not look, you could push your hand on the wheel, yes, I agree. Q.—And the tendency, when you push the key up against the stone, is to force it *like that*, is it not? A.—Yes. It is not much more than a tendency if it is supported by a flat surface because the effective leverage you have is fairly high. The key is four inches long and the other arm of the lever, so to speak, is $\frac{3}{4}$ -inch long and, consequently, every downward force by the wheel, you have only perhaps an ounce of upward force at the end. Q.—But you agree that there is a tendency? A.—Yes. Q.—It may be slight? A.—Yes. Q.—Therefore, if you are holding *like that*, you have got to be careful to operate against that tendency? A.—You must always control your workpiece if you are using a grindstone. Q.—If you have it upright, without putting it on the rest, the tendency is to go *like that*? A.—Yes, it could go down then. There would be nothing to stop it. That is what the work rest is there for, of course."

The gist of Mr. Martin's evidence is that the work could be done with reasonable safety if done carefully. But that is not the test: that is not inconsistent with the exposed part of the wheel being dangerous. It is, in my judgment, clear that a part of a machine is dangerous, although it is only dangerous to a careless

A or inattentive worker. No doubt, that danger must be such that it can reasonably be anticipated, but, in this case, I think that danger to such a worker was reasonably foreseeable. So, if the meaning which I would attach to the words "securely fenced" is the correct meaning, the grinding wheel was not securely fenced at the time of this accident. But two other and different meanings were submitted in argument.

B For the respondent, it was argued that the mere fact that a person is injured by coming into contact with the dangerous part shows that it was not securely fenced because "securely fenced" means fenced against all dangers whether foreseeable or not. This matter was considered by the Court of Appeal in *Burns v. Joseph Terry & Sons, Ltd.* (13), and the respondent relied on the dissenting judgment of DENNING, L.J. I agree with the judgment of SOMERVELL, L.J.

C (as my noble and learned friend then was). Apart from other considerations, the terms of s. 14 (1) itself appear to me to require this conclusion. The subsection requires fencing unless the dangerous part is in such a position, or of such construction, as to be as safe as it would be if securely fenced. If "securely fenced" means fenced against foreseeable danger, then it is possible to say in advance that the dangerous part is in such a position that there is no foreseeable

D danger and, therefore, it is as safe as if it was fenced. But, if "securely fenced" means fenced against all danger, even if unforeseeable, and an unforeseeable accident occurs, then the event proves that the unfenced part was not as safe as if it had been fenced. As one cannot foresee the unforeseeable, I do not see how, on this view, one could ever say in advance that any dangerous part left unfenced was as safe as it would be if securely fenced, because there would always

E be the chance of some unforeseeable accident happening, and proving that that part had not, in fact, been as safe as it would have been if fenced.

For the appellants, it was argued that securely fenced means fenced as securely as is possible without making the machine unusable. It was said, and I shall assume truly said, that neither this nor any other grinding machine is usable

F at all unless part of the grinding surface is left exposed, and that any fence which would avoid all foreseeable danger of contact with the grinding wheel would also prevent any grinding work from being done. There might be a point in the present case that the gap of seven inches could have been narrower, but it seems clear that, even if it had been somewhat narrower, that would not have prevented the accident. Any gap which permitted the metal bar to be held against the wheel would have been large enough to admit the respondent's thumb. It

G follows that, if "securely fenced" means fenced against all foreseeable danger, s. 14 (1) makes the use of all grinding machines illegal. The appellants say that Parliament cannot have intended such a result and, therefore, "securely fenced" must be given a meaning sufficiently restricted to allow such machines to be operated without breaking the law.

H My Lords, we are not entitled to ascertain the intention of Parliament from any other source than the terms of the Act. Before such a meaning could be attached to this section, it would be necessary to hold that it is reasonably capable of being construed in this way; but, for a number of reasons which I shall explain, it is not, in my judgment, capable of bearing that construction. So to interpret the section would not be construing the words of the section, but adding to the section a qualification or proviso which is not there. If the appellants

I were right, the question of whether a fence was secure would, in cases like the present case, depend not on the nature of the danger or the character or sufficiency of the fence but on the practicability of working the machine in a safe condition. There might be obvious and, indeed, acute danger in working a machine in a partially fenced condition, but yet on the appellants' argument the machine must be held to be securely fenced if more effective fencing would make it unusable. It is, perhaps, not surprising that Parliament refrained from adding a qualification to the section which could lead to such a result. But, as will

appear when I come to deal with s. 60 of the Act, I do not think that this difficulty was wholly unforeseen or neglected. A

In other sections of this Act where Parliament intended to qualify an obligation to provide for safety, an express qualification is inserted. For example, s. 25 (3) provides:

"All openings in floors shall be securely fenced, except in so far as the nature of the work renders such fencing impracticable"; B

s. 22 (4) provides for alternatives where it is not reasonably practicable to fit the required devices; and s. 26 (1) requires the provision of safe means of access so far as is reasonably practicable. But I need not even go to other sections of the Act, because the proviso to s. 14 (1) is, itself, inconsistent with the meaning which the appellants seek to attach to "securely fenced". It deals with cases where safety cannot be secured by means of a fixed guard by reason of the nature of the operation, and then enacts that the requirements of the sub-section shall be deemed to have been complied with if certain other measures are taken. It follows that if these other measures are not taken, or owing to the nature of the machine cannot be taken, then the requirements of the sub-section have not been complied with. But the appellants' argument is that, if by reason of the nature of the operation the safety of a dangerous part cannot be secured by any kind of guard, the requirements of the sub-section have been complied with. C

There is authority of long standing against the appellants. In *Davies v. Thomas Owen & Co.* (1), a jury had found that it was commercially impracticable to fence a calender pressing machine, but *SALTER, J.*, gave judgment for the plaintiff. He said ([1919] 2 K.B. at p. 41): D

"The obligation imposed by the Factory and Workshop Act, 1901, in relation to the fencing of dangerous machinery, is absolute. It is an obligation not merely to fence, but to fence securely. The statute does not say that dangerous machinery shall be securely fenced if that is commercially practicable or mechanically possible. If a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use." E

That decision was followed in a number of other cases shortly after its date and, when the new Factories Act was passed in 1937, Parliament must be supposed to have been aware of the construction which had been put on s. 10 (1) of the Act of 1901. Nevertheless, the terms of that section were repeated, substantially unchanged, in s. 14 (1) of the Act of 1937. In those circumstances, there is, at least, a very strong presumption that the qualification for which the appellants contend was deliberately omitted. F

But that does not mean that Parliament failed to provide any means by which the use of grinding machines could, at least in certain cases, be made lawful. On this matter, I think it desirable to note the history of the legislation. Section 6 of the Factory and Workshop Act, 1878, provided procedure whereby a dangerous part of a machine could be required to be securely fenced, but that was not to apply if it was decided that it was impossible to fence the machinery. Under the Act of 1901, there was no preliminary procedure and all dangerous parts were required to be securely fenced or to be in such position or of such construction as to be equally safe as if securely fenced. The provision with regard to impossibility of fencing dropped out. But a somewhat obscure section, s. 79, enabled the Secretary of State to make regulations. After the decision in *Davies v. Thomas Owen & Co.* (1), it was apparently realised that the reasoning of *SALTER, J.*, would make the use of circular saws illegal, and the power to make regulations was used to enact the Woodworking Machinery Regulations, 1922, by which a modified form of fencing for saws was provided. This matter was dealt with in *Miller v. William Boothman & Sons, Ltd.* (8). By that time s. 60 of the Act G

A of 1937 had replaced the old power to make regulations and, by s. 159 of the Act of 1937, the old regulations were now deemed to have been made under s. 60. In *Miller's* case (8), the fencing complied with the regulations but did not comply with s. 14 (1) of the Act, and the Court of Appeal held that there had been no breach of statutory obligation, because s. 60 authorised the Secretary of State to modify the requirements of the Act and he had done so.

B The appellants argued that *Miller's* case (8) was wrongly decided. In my judgment, it was rightly decided. Section 60 empowers the Minister to make special regulations which may, inter alia (sub-s. (2) (c));

C “modify or extend with respect to any class or description of factory any provisions of Part 1, Part 2 or this Part of this Act, being provisions imposing requirements as to health or safety.”

D The words “modify or extend . . . any provisions” are not very happily chosen, but I think that the reasonable and correct meaning is that, as regards any particular class or description of factory, the Minister has power to increase or diminish the stringency of the statutory requirements, and may substitute other provisions for those of the Act. In the recent case of *Richard Thomas & Baldwins, Ltd. v. Cummings* (14), I expressed the view (ante, at p. 290) that s. 60 did not entitle the Minister to make a general amendment of a section: in that case, the argument was that regulations could be made, in effect, to alter the terms of s. 16 of the Act. In my view, the Minister cannot alter the terms of the Act but he can, within a limited sphere, substitute other provisions for those of the Act.

E It remains to consider whether the respondent was guilty of contributory negligence. The appellants sought at the trial to prove that the respondent ought not to have used this machine at all for the work which he was doing, but ought to have used a file or a portable grindstone. The evidence which I have already quoted is, I think, sufficient to show that the respondent was well entitled to use this machine, so the only question is whether he used it negligently.

F Mr. Martin, the expert, said that he disagreed with the respondent's method of using the machine only in one respect: he would have done the work with the axis of the semicylinder vertical instead of horizontal, so that the bar to be ground would always lie flat on the rest and the man's hands would swing it sideways and not up and down. Mr. Martin did not say that the respondent's method was foolhardy, or that no careful fitter would have used it, and Mr. Martin's method

G was not put to the respondent. The line of cross-examination of the respondent was that he ought not to have used the grinding machine at all and, as I have said, that line of attack failed. I think that the respondent was guilty of an error of judgment in using the method he did, but I can find no evidence to the effect that no careful fitter would have used this method. JONES, J., said that reasonable precautions would have required that he should have kept his fingers

H further away from the grindstone, but I can find no evidence to the effect that, if he had kept his fingers further away, he would have had sufficient control of the work, and I do not think that it is self-evident that, if he had kept his fingers a little further away—it could only be a little further—the chance of an accident would have been much less. JONES, J., said that he thought that, if the respondent had exercised just a little more care, the accident never would have happened. I would agree, but the question is whether failure to exercise just a little more care amounts to negligence.

I In *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (15), LAWRENCE, J., said ([1934] 2 K.B. at p. 140):

“I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in

his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.” A

That statement of the law has been approved in this House on several occasions and, applying it to the present case, although I think that the case is a narrow one, I have come to the conclusion that the respondent ought not to be held guilty of contributory negligence. If I had taken the other view I would have thought that he ought only to bear a small share of the responsibility. I am of opinion that this appeal should be dismissed. B

LORD KEITH OF AVONHOLM: My Lords, the grindstone in this case was a fixed grindstone moved by electric power at 1,450 revolutions per minute. In an entirely unfenced condition it would, while moving, clearly cause injury to anyone in the factory coming into contact with it. The risk would generally be to the operator using the machine, because it was a machine turned on and off as required, but there could be risk to anyone standing or passing by while the operator was using it, and it might, of course, be put in motion by someone who was quite inexperienced and not entitled to use it. It could hardly be said that the risk of someone in the factory making contact with the face of the grindstone in an entirely unfenced condition, while it was moving, either through inadvertence, or inexperience, in using it, or through slipping, or in some other way, accidentally coming up against it, was not a thing reasonably foreseeable. D
The risk was, no doubt, reduced by the fact that it was fitted with a hood at the back and with a rest at the front, but there was still left a space of some seven inches in which the revolving face of the grindstone was unprotected and, in that condition and to that extent, it still presented precisely the same kind of foreseeable risk of harm, as it would have done if entirely unfenced, diminished only in degree. Accordingly, under the conditions in which the grindstone was being used at the time of the accident, it was a dangerous machine, or dangerous part of a machine, according to the test of reasonable foreseeability of accident, repeatedly and, in my opinion, correctly laid down in various cases in which this question has been considered, as, for example, in *Hindle v. Birtwistle* (5) F (per WILLS, J.), *Walker v. Blechley Flettons, Ltd.* (3) (per DU PARCQ, J.), *Lyon v. Don Brothers, Buist & Co., Ltd.* (16) (per the Lord Justice-General (LORD NORMAND)), *Mitchell v. North British Rubber Co., Ltd.* (4) (per the Lord Justice-Clerk (LORD COOPER)), *Burns v. Joseph Terry & Sons, Ltd.* (13) (per SOMERVELL, L.J.). If direct evidence of a witness is wanted it is to be found in an answer given by the respondent's expert witness in cross-examination: G

“Oh, yes, the wheel is the dangerous part of the machine, in my opinion. There is no doubt that if you touch it with your hand, you will suffer injury to the hand.”

The learned trial judge says:

“I have no doubt that the machinery should be regarded as dangerous: in other words, that this was a dangerous part of the machine” H

by which I take him to be referring to the revolving grindstone. But he goes on to hold

“that it was properly guarded by the guard at the top and by the rest at the bottom.”

If so, it would seem to follow that it, or any part of it, had ceased to be dangerous. I

There may be cases in which a trial judge is entitled to find conclusively as a matter of fact that a machine is not dangerous in its fenced condition but, in my opinion, this is not one of them. It must, at least, be fenced against the dangers that are reasonably foreseeable and, for the reasons I have stated, these same dangers still remained, though in a reduced degree, when the machine here was being worked in its fenced condition. The grindstone, in my opinion, was not securely fenced.

A It was submitted for the appellants that fencing was required only to such an extent as would preserve the identity of the machine by permitting its use. Obviously, this grindstone could be completely fenced in such a way as to make its use impossible. Whether there are ways of securely fencing a grindstone so as to permit use of its grinding face I do not know. The ingenuity of man may not be exhausted in this matter. But, if not, the only result is that, as the law stands, the use of grindstones of a dangerous character is prohibited. This possibility has been faced before, in the case of a calendering machine (*Davies v. Thomas Owen & Co.* (1)); a power press (*Sowter v. Steel Barrel Co., Ltd.* (17)); a cutting machine (*Dennistoun v. Charles E. Greenhill, Ltd.* (18)); a drilling machine (*Mackay v. Ailsa Shipbuilding Co., Ltd.* (9)); and this would have been the position in the case of circular saws, but for regulations made by the Secretary of State, in *Miller v. William Boothman & Sons, Ltd.* (8).

C Apart from the authority of the cases just cited, the inference, from a consideration of the Factories Act, 1937, and similar earlier legislation, is that there exist, side by side, a series of absolute statutory obligations and a series of qualified statutory obligations. Where the legislature wished to qualify an obligation imposed by the Factories Act, 1937, it found no difficulty in using apt language to do so, by such words as "all practicable steps" (s. 18 (1), s. 19 (3)), "except in so far as the nature of the work renders such fencing impracticable" (s. 25 (3)), "so far as is reasonably practicable" (s. 26), "all practicable measures" and "where the nature of the process makes it practicable" (s. 47 (1)). Provision, moreover, is made, by s. 60 of the Act, giving the Secretary of State power to modify by special regulations any of the statutory provisions imposing requirements as to health or safety. I do not regard it as necessary to consider what limits, if any, there are on this power to make such regulations, because no question as to the validity of any regulations made under this section is before us. I would, however, take this opportunity of qualifying my concurrence in the opinion of my noble and learned friend, LORD REID, in *Richard Thomas & Baldwins, Ltd. v. Cummings* (14), in so far as it may be taken as committing me to the view that the Secretary of State has no power to qualify the absolute obligations imposed by the statute. On that matter I reserve my opinion. It is at least intelligible that Parliament may have desired to legislate in the most absolute terms against the exposure of dangerous machinery, or dangerous parts of machinery, leaving special cases to be dealt with by executive action as they arose, and that the words "subject to the provisions of the Act" in s. 60, in the grammatical context which they occupy in the section, refer to compliance with the provisions for making special regulations and not to the safety provisions of the Act.

H But, be that as it may, I see no escape from the view that, as matters at present stand, the destruction of the machine as a working unit if it is completely fenced, is no answer to the mandatory words of the statute. It had been so decided with reference to the earlier legislation of the Factory and Workshop Act, 1901, by the decision in *Davies v. Thomas Owen & Co.* (1); and, I think, in *Sowter v. Steel Barrel Co., Ltd.* (17), and Parliament, in enacting the relevant safety provisions in 1937, in substantially similar terms, must be assumed to have had the state of the law in mind.

I In *Lewis v. Denyé* (19), the point as to the absolute nature of the statutory obligation was reserved by this House. No reference was there made to the possibility of relaxation from the absolute prohibition by special regulations made under the statute. That qualification was recognised in the case of *Miller v. William Boothman & Sons, Ltd.* (8), and no question was raised there of the validity of the regulations. The question of the absolute character of the obligation imposed by s. 14, notwithstanding the alleged commercial impracticability of fencing, came up for consideration also in Scotland in *Mackay v. Ailsa Shipbuilding Co., Ltd.* (9), and the decision there was in line with earlier English authority. In my opinion, that was a correct decision.

It follows from what I have said, that the experience of the workman operating the machine, the infrequency of accidents, and the views of factory inspectors or other interested authority on the working of grinding machines is not here a relevant consideration. The long history of the use of grinding machines in an exposed or partially exposed condition, the presumed (but unproved) infrequency of accidents and the acquiescence of factory inspectors and the Minister concerned were strongly pressed on us as material factors. But, unless possibly in a marginal case, such matters, in my opinion, can carry no weight. In this connection I adopt the language of LORD COOPER (then Lord Justice-Clerk) in *Mitchell v. North British Rubber Co., Ltd.* (4) (1945 S.C. (J.) at p. 73):

‘ The necessary and sufficient condition for the emergence of the duty to fence imposed by s. 14 of the Factories Act is that some part of some machinery should be dangerous. The question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory inspector had so reported; nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributorily negligent. The test is objective and impersonal. Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part ? ’

There remains the question of contributory negligence. It is for the appellants to prove this against the workman. In my opinion, they have failed to do so. The type of accident that happened here is just the type of accident against which s. 14 is directed. There is no question here of disobedience to orders, or of reckless disregard by a workman of his own safety. At most, there was a mere error of judgment by the respondent as to how the work on which he was engaged could best be carried out, and possibly only a mere momentary inadvertence. I agree with MORRIS, L.J., that what the respondent did “ fell short of negligent conduct ”.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Carpenters*, agents for *Laces & Co.*, Liverpool (for the appellants); *W. H. Thompson* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. BUTTERLEY
CO., LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
February 8, 9, 10, 11, March 10, 1955.]

Profits Tax—Computation of profits—Profits of trade or business—Income received from investments or other property—Nationalisation of colliery undertaking—Interim income payments pending satisfaction of compensation—Cesser of colliery trade—Continuance of other separate trades—Finance Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 54), Sch. 4, para. 7, as amended by Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 32 (1)—Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6 c. 59), s. 22 (2), (3)—Coal Industry (No. 2) Act, 1949 (12, 13 & 14 Geo. 6 c. 79), s. 1 (2).

Statute—Construction—Assumption by later enactment not an amendment.

Under the Coal Industry Nationalisation Act, 1946, a colliery concern, carried on by a company as a separate trade among several trades, was nationalised. On Jan. 1, 1947, the assets of the concern vested in the National Coal Board, and under s. 19 (1) of the Act the company became entitled, in respect of the transferred assets, to compensation which was due on that date subject to determination of its amount. For the period between Jan. 1, 1947, and the date on which the compensation was fully satisfied the company became entitled to payments as follows: (i) interim income under s. 19 (2), comprising under s. 22 (2) (a) "a money payment of an amount equal to interest for that period on [the] amount of compensation" at prescribed rates; (ii) revenue payments under s. 22 (3) (a) for 1947 and 1948 "equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned" before nationalisation; and (iii) further revenue payments for 1949 and subsequent years under the Coal Industry (No. 2) Act, 1949, s. 1 (2). The sums due under heads (ii) and (iii) alike were payable in part in substitution for the right to the interim income provided for under head (i). The Special Commissioners held that the payments under heads (ii) and (iii) were not receipts of any trade carried on by the company in the relevant chargeable accounting periods or income received from investments or other property and should not be included in the company's profits as computed for profits tax purposes. On this appeal the Crown conceded that "income from investments or other property" included in the charge to profits tax by para. 7 (1) of Sch. 4 to the Finance Act, 1937, did not extend the scope of the tax to profits which did not form part of the profits of a trade or business.

Held: the interim income, revenue and further revenue payments received by the company ought not to be included in the profits of the company for profits tax purposes, because they were (i) neither profits arising from any trade or business of the company within s. 19 (1) of the Finance Act, 1937, as the company's colliery concern had ceased at midnight on Dec. 31, 1946/Jan. 1, 1947, (ii) nor income from investments or other property within para. 7 (1) of Sch. 4 to that Act, it having been rightly conceded by the Crown that para. 7 (1) only included income from property where the income formed part of the profits of a trade or business.

Decision of ROXBURGH, J. ([1954] 3 All E.R. 69) reversed.

Quaere: whether the interim income, revenue and further revenue payments were income either of property or of compensation, rather than income-compensation, viz., periodical payments to which an independent right was conferred by way of compensation for loss of income (see p. 899, letter F, p. 910, letter B, post).

Per JENKINS, L.J.: an assumption made by a later enactment as to the construction and effect of a given statutory provision is not to be treated as if it were an amendment of the earlier provision (see p. 909, letter B, post, and *Camille & Henry Dreyfus Foundation, Inc. v. Inland Revenue Comrs.*, [1954] 2 All E.R. at pp. 480-482; *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. at p. 544, letter H, per LORD RADCLIFFE).

[For the Finance Act, 1937, s. 19, and Sch. 4, para. 7, as substituted by the Finance Act, 1947, s. 32 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 374, 383.

For the Coal Industry Nationalisation Act, 1946, s. 19 and s. 22 (2) and (3), see 16 HALSBURY'S STATUTES (2nd Edn.) 301, 304; and for the Coal Industry (No. 2) Act, 1949, s. 1 (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 1014.]

Cases referred to:

- (1) *Scales v. Thompson (George) & Co., Ltd.*, (1927), 138 L.T. 331; 13 Tax Cas. 83; Digest Supp.
- (2) *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.*, [1923] A.C. 723; 92 L.J.K.B. 665; sub nom. *Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd.*, 129 L.T. 481; 12 Tax Cas. 503; 2nd Digest Supp.
- (3) *Tootal Broadhurst Lee Co., Ltd. v. Inland Revenue Comrs.*, [1949] 1 All E.R. 261; 29 Tax Cas. 352; 2nd Digest Supp.
- (4) *Camille & Henry Dreyfus Foundation, Inc. v. Inland Revenue Comrs.*, [1954] 2 All E.R. 466; [1954] Ch. 672.
- (5) *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 33 Tax Cas. 259; 3rd Digest Supp.

Appeal.

The taxpayer company appealed from an order of ROXBURGH, J., dated July 27, 1954, and reported [1954] 3 All E.R. 69, allowing an appeal by the Crown by way of Case Stated by the Special Commissioners of Income Tax. The company carried on several trades of which its trade of colliery proprietors constituted a separate trade from the others. Under the Coal Industry Nationalisation Act, 1946, the colliery concern was nationalised, and on Jan. 1, 1947 (the primary vesting date for the purposes of the Act), the assets of that trade vested in the National Coal Board. The company ceased to carry on any colliery trade, but it continued to carry on its other trades. The provisions of s. 31 (1) (a) of the Finance Act, 1926, applied when the colliery trade ceased. The company became entitled (i) to compensation under s. 10 to s. 17 of the Act of 1946 in respect of its assets so transferred, such compensation being declared to be due on the primary vesting date subject to determination of its amount (s. 19 (1)), and (ii) for the period between the primary vesting date and the date when compensation was fully satisfied, to a right to interim income (s. 19 (2)). This interim income was to be satisfied by money payments under s. 22 (2) (a). The company was also entitled to certain revenue payments for 1947 and 1948 under s. 22 (3) and to further revenue payments for 1949 and thereafter under the Coal Industry (No. 2) Act, 1949, s. 1 (2). The company's assessments to profits tax for chargeable accounting periods from Jan. 1, 1947, to Dec. 31, 1950, included sums received by it by virtue of s. 22 (2) and (3) of the Act of 1946, and s. 1 (2) of the Act of 1949. The company appealed against the inclusion of these sums in the assessments. The Crown contended that they were properly included as being (i) part of the profits of the trade or business carried on by the company in the chargeable accounting periods, and (ii) "income received from investments or other property". The company contended that the payments were not income of the company and in any event (i) were not part of the profits of the trades or businesses it carried on during the relevant chargeable accounting periods but arose to it from its colliery concern, which

A trade ceased on Jan. 1, 1947; and (ii) were not "income received from investments or other property". The Special Commissioners held that all the payments constituted income of the company, but that the company's trade or business consisted of separate and severable trades of which the colliery concern was one, and that the trade of the colliery concern ceased on Jan. 1, 1947, with the consequence that the revenue, further revenue and interim income payments were

B not receipts of any trade carried on by the company in the relevant chargeable accounting periods. They also held that the payments were not "income received from investments or other property" and they therefore allowed the company's appeal. On appeal by the Crown, ROXBURGH, J., held ([1954] 3 All E.R. 69) that the payments were properly included in the assessments as income of the compensation, which was "other property" within the meaning of

C para. 7 of Sch. 4 to the Finance Act, 1937, as amended by the Finance Act, 1947, s. 32 (1). The company appealed. On the appeal it was conceded by the company that the payments received by it were income and by the Crown that the income received from property was not chargeable to profits tax unless it formed part of the profits of a trade or business.

D *The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Geoffrey Cross, Q.C., and Sir Reginald Hills for the Crown.*
Charles Russell, Q.C., J. Senter, Q.C., D. C. Miller and C. P. F. Jenkin for the company.

Our. adv. vult.

Mar. 10. The following judgments were read.

E **SIR RAYMOND EVERSHED, M.R. :** As ROXBURGH, J., observed at the beginning of his judgment, this case is concerned with the claim by the Crown to profits tax in respect of sums, now admittedly income for income tax purposes, received by the taxpayer company, in the years 1947 and following, from the Minister of Fuel and Power of three kinds, viz., (i) revenue payments in respect

F of the years 1947 and 1948 under s. 22 (3) of the Coal Industry Nationalisation Act, 1946 (which I shall hereafter sometimes call the Coal Act, 1946); (ii) revenue payments in respect of the years 1949 and 1950 under s. 1 (2) of the Coal Industry (No. 2) Act, 1949 (which I shall hereafter sometimes call the Coal Act, 1949); and (iii) other sums paid under s. 22 (2) of the Coal Act, 1946, in satisfaction or

G part satisfaction of the right to interim income conferred by s. 19 (2) of the last-mentioned Act. Although the payments are of the three kinds I have indicated, all of them were in respect of the right to interim income under s. 19 (2) of the Coal Act, 1946. So far as class (iii) above is concerned, these were expressly paid towards satisfaction of that right. The revenue payments, on the other hand are expressed in the statute* to be "in substitution for" what may be called the

H primary right under the Act of 1946. The revenue payments under the Act of 1949 also differed from those under the Act of 1946 in that, if the former were found to exceed what would be payable strictly by way of interim income under s. 19 (2) of the Act of 1946 for the given year, the recipient would be liable to be made to recoup.

I Notwithstanding the above differences, it is, to my mind, clear that the Crown's claim to tax should wholly fail or wholly succeed. There is, in my judgment, no sensible distinction between any of the three types of payment for present purposes, and no suggestion to that effect was made in the course of the argument on either side.

The scheme of the Coal Act, 1946, is well known, and I shall not take time in describing its general nature. It provided for the transfer, on what was called

* See Coal Industry Nationalisation Act, 1949, s. 22 (4); 16 HALSBURY'S STATUTES (2nd Edn.) 305.

the primary vesting date, later fixed as Jan. 1, 1947*, to the National Coal Board of the business assets of the component parts then existing of the coal industry. For the assets so transferred, and for overhead expenses increases caused by severance†, compensation was provided under the Act to the components in the industry of which the taxpayer company was one. A

I can, with that introduction, turn at once to s. 19 of the Coal Act, 1946. Sub-section (1) provides: B

“Compensation in respect of a transfer of transferred interests or of an overhead expenses increase shall be due on the primary vesting date, subject to determination of the amount thereof.”

The primary vesting date was Jan. 1, 1947. I pause to state that the method of determining the amount was of a complex nature and made it clear that a considerable time would elapse before the amount was, in fact, finally determined. C

Sub-section (2) provides:

“For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of s. 22 of this Act.” D

Sub-section (3) provides:

“Provision may be made by regulations for authorising the partial satisfaction of such compensation before the determination of the amount thereof has been completed.”

The compensation is the principal compensation. Section 20 is concerned with the persons to whom the compensation should be transferred, made over or paid; and s. 21 provides for the mode of satisfaction of what I have called the principal compensation which substantially, though not exclusively, was to be by way of government stock. E

I then come to s. 22, which picks up, it will be recalled, s. 19 (2). Section 22 provides: F

“(1) The right conferred by s. 19 (2) of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance with the provisions of this section. (2) Subject to the provisions of sub-ss. (3) and (4) of this section as to the revenue payments therein mentioned,—(a) the said right conferred by s. 19 (2) of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . . (b) the provisions of s. 20 of this Act as to the legal and beneficial title to compensation shall have effect in relation to additions to compensation under this sub-section . . .” G

—there follows a substitution not material to be read. The words “legal and beneficial title to compensation” are, in effect, a reference to the persons who would be the recipients. H

* See Coal Industry Nationalisation (Primary Vesting Date) Order, 1946 (S.R. & O. 1946 No. 1986).

† See s. 17 of the Coal Industry Nationalisation Act, 1946, 16 HALSBURY'S STATUTES (2nd Edn.) 300. I

A Then sub-s. (3) introduces the revenue payments. It is, so far as is material, this:

B "The following provisions of this sub-section shall have effect as to the making to colliery concerns . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned; (b) the payments to be made under the last preceding paragraph are in this section referred to as 'revenue payments', and shall be money payments."

C Paragraph (c) provides for the determination of what is called in (a) "the comparable ascertained revenue". It is a sum which is to be derived, not from the amount of compensation, but from the previous relevant trading activities of the concern. I will pause to state what is perhaps the obvious. Since, as I have already indicated, the amount of the compensation could not in the nature of events be finally determined quoad any concern for a considerable time, it followed that the amount of interim income under s. 22 (2) was incapable of calculation before such determination. The revenue payments were, therefore, plainly devised to fill that gap.

D I need not read anything further from s. 22 (3), but sub-s. (4) is important for the language which it uses:

E "The provision made by the last preceding sub-section shall be deemed, in the case of any colliery concern . . . to be in substitution for the provisions of sub-s. (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern . . . except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern . . ."

F I shall return to that language, but, for present purposes, it is sufficient to point out that this section provided that revenue payments would go in satisfaction or towards satisfaction of interim income, but that, if it turned out that they exceeded the interim income when properly calculated, there was no obligation on the concern to make repayment.

G I go now to the Coal Act, 1949. Section I extended, in effect, the provisions for revenue payment, no doubt because, the first two years having passed without the compensation having been finally ascertained, it was thought necessary to fill the further gap which resulted. Section I reads:

H "(1) The following provisions of this section shall have effect with respect to the making to colliery concerns . . . of payments in respect of the year 1949 and subsequent years towards satisfaction of the right to interim income conferred by s. 19 (2) of the Coal Industry Nationalisation Act, 1946 . . . (2) A colliery concern . . . shall, in respect of the year 1949 and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern . . . is satisfied in full, be entitled to a payment of an amount equal to the amount by which one third of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year."

I

Then there is a provision for the rate of interest which I shall pass over. Sub-section (3) provides: A

"A payment to which a colliery concern . . . is entitled under the last foregoing sub-section in respect of any year shall be treated for the purposes of para. (a) of s. 22 (2) of the principal Act as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money payments made after the expiration of that year in satisfaction of compensation in respect of transfers of transferred interests of the concern . . ."

B

I will leave out sub-s. (4). Sub-section (5) contains the power (which I have already mentioned) whereby, if the revenue payments under this Act prove to exceed the interim income properly attributable to the same period, there is a liability to recoup; thus the regulations made by the Minister may provide C

" . . . for requiring the repayment to the Minister of any amount by which a payment made under this section in respect of any year to a colliery concern . . . may exceed the aggregate towards satisfaction of which that payment is under sub-s. (3) of this section to be treated as being made . . ."

D

There is then a proviso which has some significance and relates to certain deductions which may be made against the aggregate which I have just mentioned. The second paragraph (for it is convenient to take them in reverse order) is:

"(b) an amount which bears to the amount of the deduction the same proportion that the amount of profits tax ultimately borne by the concern . . . (as determined in accordance with rules laid down by the regulations) in respect of the aggregate (as so determined) of its profits which are attributable to the year in respect of which the excess arises bears to that aggregate."

E

The previous para. (a) relates to an amount in regard to income tax calculated by a similar method. F

The tax now known as profits tax was originally imposed in 1937 sub nomine the national defence contribution. Section 19 (1) of the Finance Act, 1937, stated:

"There shall be charged, on the profits arising in each chargeable accounting period falling within . . ."

G

—and there is named a period which was subsequently extended—

"from any trade or business . . . a tax (to be called the 'national defence contribution') of an amount equal to"

the percentage therein named.

I should state now for simplicity hereafter that for present purposes the chargeable accounting periods are from Jan. 1 to Dec. 31 in each year. H

Sub-section (2) provides:

"Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

I

No question has been raised that the business activities of this company, at all relevant times, were businesses within the scope of the sub-section which I have just read.

Section 20 (1) of the Finance Act, 1937, relating to computation, provided:

"For the purpose of the national defence contribution, the profits arising from a trade or business in each chargeable accounting period shall

A be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of Sch. 4 to this Act. For the purpose of this sub-section, the expression 'income tax principles' in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purpose of income tax under Case I of Sch. D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising",

i.e., arising from the trade or business.

I now turn to Sch. 4; para. 7 (which in a modified form subsequently became, by a later amendment, sub-para. 1 of para. 7) provided:

C "Income received from investments or other property shall be included in the profits in the cases and to the extent provided in this paragraph, and not otherwise . . ."

Then there followed (a) what should be included in the case of the business of a building society and certain other businesses, and (b) what should be included in the case of any other trade or business being a trade or business carried on by a body corporate. Putting it quite briefly, the form of the paragraph in its original shape was that the income from investments should only be included in certain limited cases and otherwise should be excluded.

Paragraph 8 provides:

E "Subject to the provisions of the last foregoing paragraph, the profits shall include all such income arising from the trade or business as is chargeable to income tax under Case I of Sch. D, or would be so chargeable if the profits of the trade or business were chargeable under that Case, except"

certain cases there mentioned. That language picks up, it will be recalled, the language which I have read from s. 20 (1).

F The tax was substantially amended and re-named "profits tax" by the Finance Act, 1947. Further, by that Act, individuals and partnerships (with certain limited exceptions) were wholly exempted from the tax.

I will read s. 31 (2) of the Act of 1947, because some emphasis was laid on certain of its language in the course of the argument. It provided:

G "The said s. 19 [of the Finance Act, 1937] shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of s. 21 of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

H The reference to the Finance Act, 1922, is a reference to the provisions in that Act which made the individual corporators of certain kinds of company in certain circumstances liable in respect of supertax for the income of the company as though it had been wholly distributed among the members.

I Paragraph 7 of Sch. 4 to the Act of 1937 was also amended by s. 32 (1) of the Finance Act, 1947, so that its first sub-paragraph now was, so to speak, reversed in its emphasis. It reads (as amended):

"Income received from investments or other property shall be included in the profits except . . ."

and there are certain exceptions. So that henceforth all such income was included save in so far as excepted. Paragraph 8 of the original Schedule remained as it had originally been enacted. Finally, whereas the tax in respect of each business of a taxpayer carrying on more than one business had been (it

will be recalled) separately computed by virtue of s. 20 (1) of the Act of 1937, A
the Act of 1947 provided, by s. 43 (1):

“ All trades or businesses to which s. 19 of the Finance Act, 1937, applies
carried on by the same person shall be treated as one trade or business for
the purposes of the enactments relating to the profits tax ”,

and by s. 47 (1):

“ Subject to the provisions of this section, the provisions of this Part of this
Act relating to the profits tax shall have effect with respect to all chargeable
accounting periods any part of which falls after the end of the year 1946
. . . ”

The provisions of the section to which sub-s. (1) is subject do not affect the
present point.

It follows from the two citations which I have just made that, in the case of a
body corporate carrying on during the year 1947 and onwards more than one
distinct business or trade, all those businesses or trades would be taken together
for the purpose of computing profits tax. It will be observed that the formula
in s. 19 (1), “ profits arising . . . from any trade or business ”, which was
essential in the case of an individual, so as not to subject to the tax profits or
income not so arising, was retained after the tax had become limited to the
profits of bodies corporate and unincorporated bodies of persons. The formula
which appears in s. 31 (2) of the Act of 1947 and which I read, “ the actual
income of the body corporate from all sources ”, was not made the basis of the
tax in the case of bodies corporate. That point was considerably emphasised
by counsel for the company during the course of the argument.

During the period before the primary vesting date, Jan. 1, 1947, the company
carried on in addition to its coalmining business, several other business activities
of a distinct nature, e.g., structural steel manufacturing, brickmaking and dairy
farming—all businesses very different the one from the other, but all, in fact,
businesses within the ambit of the tax.

The Special Commissioners held that the company was not liable for the tax
claimed in the Case. The basis of the commissioners' decision was that the
company's various business activities constituted distinct and separate busi-
nesses, and accordingly that, since the coalmining business had altogether
ceased on and by Jan. 1, 1947, the sums in question, which were exclusively
referable to the discontinued activity, did not arise from any trade or business
carried on by the company during the relevant chargeable years.

I will read para. 13 (3), (4) and (5) of the Case Stated:

“ (iii) But we found, on the evidence adduced before us, that the company's
composite trade or business consisted at the material time of a number of
separate and severable trades, of which its colliery concern was one, and that
that trade ceased entirely on Jan. 1, 1947. (iv) We further held that as a
consequence of our finding of fact as set out in sub-para. (iii) above, the
said payments under the Coal Acts, 1946 and 1949, were not receipts of any
trade carried on by the company during the relevant chargeable accounting
periods, because it had ceased to carry on its colliery trade on Jan. 1, 1947.
(v) We further held that, on a proper construction of s. 19 (2) and s. 22
of the Coal Act, 1946; s. 1 of the Coal Act, 1949, and para. 7 (1) of Sch. 4
to the Finance Act, 1937, as amended by s. 32 (1) of the Finance Act,
1947, the said payments were not ‘ income received from investments or
other property ’.”

ROXBURGH, J., based his conclusion in favour of the Crown exclusively on
the terms of the amended para. 7 (1) of Sch. 4 to the Finance Act, 1937, holding
that the sums in question were, on any view, income of property within the

A meaning of that paragraph. There was some argument before us whether the learned judge assumed that, if the sums were caught by para. 7 (1) of Sch. 4 to the Finance Act, 1937, they would also and necessarily be profits arising from the company's trade or business on the basis that the company was formed as a trading company. I do not think myself that the learned judge made any such assumption. Argument on the application to the facts of the case of

B s. 19 (1) of the Finance Act, 1937, was, so I understand, stopped by the learned judge as irrelevant having regard to the view which he took of the application of para. 7 (1) of Sch. 4. The judge, therefore, thought, in my view, that, whether or not the scope of s. 19 (1) was thereby enlarged, the sums in question were, in any case, "income received from . . . other property", viz., the principal sum of compensation or the stock representing that sum, or, perhaps, the chose

C in action being the right to get that compensation. He said ([1954] 3 All E.R. at p. 73):

"I do not think that this compensation can be properly regarded as an investment, but I cannot see any reason why it should not be 'other property'."

D And then, a few lines further on:

"In my judgment the company's right to that compensation was plainly a chose in action, and none the less so because it was the creature of statute."

And finally, lower down again:

E "True, it is a right conferred by statute, but what is it to be income from? I should have thought that the answer was as plain as anything could possibly be—from the compensation due, but of which payment was still deferred. In other words, in my view these payments arose from the chose in action, consisting of compensation due but still unpaid, and fall directly within the words 'income received from other property' and therefore, by virtue of para. 7, to be included in the profits."

F If the question on this appeal was whether the learned judge was right in the view which I have attributed to him, I should, for my part, be inclined to disagree with him. The language of s. 19 and s. 22 of the Coal Act, 1946, seems to me carefully and deliberately to avoid the result that the interim income is income from or of the compensation provided for in s. 19 (1); rather it is treated (and, as I think, deliberately treated) as a distinct right, quantified, no doubt, by reference

G to the amount of the s. 19 (1) compensation, but none the less something in addition to, rather than flowing naturally from, the s. 19 (1) compensation: a distinct compensation for the loss of earnings during the period between the primary vesting date and the payment of the s. 19 (1) compensation. The revenue payments moreover were computed without reference to the s. 19 compensation at all; they are in substitution for the right to interim income

H and under the Act of 1946 might be retained even though they were in excess of the proper amount of the interim income.

I refer again to the language of the relevant sections. Section 19 (2) speaks, it will be remembered, of a "right to interim income" to be satisfied in the manner set out in s. 22. Section 22 (2) (a) says that the right shall be satisfied by making, "in addition to" the issue of the stock, etc., a money payment of

I "an amount equal to" interest on it; and in (b) of the same sub-section the relevant words are "additions to compensation". Finally, it will be recalled that in sub-s. (4) of the same section is repeated this somewhat special and elaborate language:

"so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests . . .",

and again later:

"except as to any excess of the aggregate amount of such additions . . ."

In the course of the argument reference was made to other statutes and I will refer to one merely for the purpose of emphasising the special character of the language used in the Coal Act, 1946, as distinct from the sort of language which is used in other contexts, when what is clearly intended is neither more nor less than income on a principal sum. I refer to s. 32 (2) of the Transport Act, 1947, which provides:

“Where the compensation payable to any person in respect of a wagon is satisfied by the issue of British transport stock interest on which begins to accrue as from a date later than the date of transfer, the commission shall pay to him interest on the amount of the compensation, at such rates as the Treasury may determine”,

and so on.

I agree that, as counsel for the Crown pointed out, all this income compensation is comprised within the terms of s. 19 (2) of the Act of 1946, whether the form it took was that of revenue payments or otherwise; but I think that that fact is not enough, having regard to the language used, to make the interim income or the revenue payments in reality and substance income arising from, or income of, the s. 19 (1) compensation or arising from the right to receive that compensation conferred by the statute. In my judgment, that view is reinforced by the circumstance, having regard again to the special language used, that the compensation was stated to be due on the primary vesting date.

It is, however, not necessary for me to express a concluded view on this point for, just as in this court counsel for the company conceded that the sums in question were, in truth, income, so counsel for the Crown, in turn, conceded that the amended para. 7 (1) of Sch. 4 to the Finance Act, 1937, could not enlarge the scope of the formula in s. 19 of that Act; in other words, that, if they are to be chargeable to profits tax, the sums in question must be “profits arising from a trade or business.”

Counsel for the Crown also conceded that paras. 7 and 8 of Sch. 4, when read together, were, in their scope, of a limiting, rather than an expanding, character. The case of the Crown in this court, therefore, has been of a twofold nature. (1) Since the company is a trading company formed for the exclusive purpose of carrying on business, therefore all receipts in the nature of income must inevitably be, or be brought into account in ascertaining, “profits arising from the trade or business”. Thus the last-mentioned formula becomes synonymous with “profits arising in the course of trade” or simply with trading profits. (2) Alternatively, if a company could by appropriate separation keep the income of the kind here in question wholly distinct from its other and ordinary trade receipts (e.g., as or as part of a first stage in the repayment of capital to its shareholders), that was not done on the facts in this case.

Counsel for the Crown referred to the printed accounts for the years 1947 and following of the company. I will take one of these printed accounts as an illustration, viz., that for the year ended Dec. 31, 1950. It will be observed that the profit and loss account for the company and its subsidiaries opens with an item of

“Profits (less losses) on trading, including provisional revenue payments under the Coal Industry (No. 2) Act”.

If you look at the balance sheet of the company itself, it is divided, on the right-hand side, under the headings “Assets previously owned which vested in the National Coal Board” and “Assets not vested in the National Coal Board”. Under the first heading, which includes freehold and leasehold property less depreciation, there appears an item of deduction of proceeds of sale of Treasury bonds received on account of compensation; but under the second heading “Assets not vested in the National Coal Board” you find,

- A** brought in as a current asset, compensation for certain vested assets and provisional revenue payments receivable from the Ministry of Fuel and Power, which is clearly a reference to receipts under the Coal Industry Acts, 1946 and 1949. Those instances show that, for the purpose of making up their accounts, revenue sums received from the Ministry were brought into the profit and loss account by the company together with the rest of its income and so as to form part, **B** for accounting purposes, of the whole of the company's income.

As regards the second or alternative point, counsel for the Crown said that there was, in truth, a lacuna in the findings of the commissioners—which I have read from para. 13 of the Case Stated. For the question is as to the separate character of the company's enterprises after and not before Jan. 1, 1947. Counsel for the Crown relied also on the terms of s. 43 (1) of the Finance Act, 1947, which **C** provides that, for the purposes of profits tax, all trades or businesses should be treated, as from the date mentioned—Jan. 1, 1947—as one in the case of a company carrying on more than one trade or business.

As to this second or alternative point, I think that it is now too late for us to draw any inferences of fact from the accounts. The chairman of the company and the chief accountant gave evidence before the commissioners and they were **D** not cross-examined on the point at all. I think we must conclude that the separateness of the various trades was as great after as before Jan. 1, 1947, and that the commissioners' findings intended so to state. Such a matter is a question of fact for the determination of the commissioners—see, e.g., the judgment of ROWLATT, J., in *Scales v. George Thompson & Co., Ltd.* (1).

Further, in regard to the point made on s. 43 (1) of the Finance Act, 1947, the **E** question is of the nature of the sums when received, not what was done with them after receipt. Section 43 (1) treats all the trades of a particular company as one as from Jan. 1, 1947, for the purposes of the profits tax; but, the coal-mining business of the company having then ceased, the sums in question cannot, in my judgment thereby—that is, by a mere application of the terms of s. 43 (1)—be made profits of a trade if, in truth, they were not.

F Finally, since this was a compulsory acquisition by the state, there is no real room, in the absence of clear evidence, for any intention related to the time before the sums were received. It is not in my view in doubt that the profits of a trade for present purposes must be profits of a trade being carried on during the chargeable accounting period. I think, therefore, that the second or alternative argument of counsel for the Crown cannot be sustained on the facts as **G** found and that it would not, in the circumstances, be right for us now to refer the matter back to the Special Commissioners.

The question, therefore, comes down to the single point and turns on the first head of the argument on the part of counsel for the Crown which I have stated above. On the whole, my conclusion is against the Crown on this matter. **H** The grounds for my conclusion I can state under four heads. (1) Even in the case of a trading company the conception that not all income is business earnings appears to be accepted, for example, by the House of Lords in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (2), and later in *Tootal Broadhurst Lee Co., Ltd. v. Inland Revenue Comrs.* (3). Those cases related, in fact (in the former case), to excess profits duty, and (in the latter) to excess profits tax, and it is no doubt true that the question whether particular items or assets **I** were investments turns on the special provisions of the rules applicable to that duty or tax. Nevertheless it seems to me that the language which I am about to cite from their Lordships' speeches in the *Gas Lighting Improvement Co.'s* case (2) is of general application and relevant to the point which I have sought to make.

Thus, VISCOUNT CAVE, L.C., says ([1923] A.C. at p. 730; 12 Tax Cas. at p. 535):

“The expression [‘investments’] cannot be intended to apply to investments wholly unconnected with the business to be assessed; for investments of that character could in no case be regarded as capital of the business, and

it would be quite unnecessary to direct their exclusion. It must therefore refer to investments connected with the business, and I see no reason why it should not include an investment of part of the business capital in an outside security, though made with the object of forwarding the trading operations, for which the business was constituted."

VISCOUNT FINLAY, referring to r. 8 of the particular rules applicable to the duty, said (*ibid.*, at p. 736; at p. 539):

"The rule must, on the face of it, have been intended to deal with cases in which but for its provisions the income of these investments would have formed part of the profits of the business. The rule is meaningless if it was intended to apply only to income which formed no part of the profits of the business, as such income would be already outside the scope of the excess profits duty. I do not see how it is possible to escape from the conclusion that r. 8 includes within its operation cases in which the money from which the income was derived was employed in the business of the company assessed to excess profits duty."

LORD ATKINSON (*ibid.*, at p. 738; at p. 540) agreed entirely with what VISCOUNT FINLAY had said.

In the *Tootal Broadhurst* case (3) the question was whether certain patents ought to be regarded as an investment for the purposes of the tax, the patents being assets from which the company derived, in fact, substantial revenue. I confine myself to one passage from the judgment of LORD SIMONDS in which (as will be observed) he referred to the *Gas Lighting Improvement Co.'s* case (2). He says ([1949] 1 All E.R. at p. 264):

"It appears to me that the problem may be solved in this way. I would take a schedule of the assets of the trading company concerned and, omitting assets such as stocks and shares to which, in view of the decision in the *Gas Lighting Improvement Co.'s* case (2) the title of investments can in no circumstances be denied, would ask of each other asset: 'Is this an asset which the company has acquired and holds for the purpose of earning profits in, or otherwise for the promotion of, its particular trade or business?' There might be border-line cases in which the answer would be uncertain, but I do not doubt that in the vast majority of cases the answer would be clear cut."

I should, however, refer also to the speech of LORD MACDERMOTT in this case since it was somewhat relied on by counsel for the Crown. LORD MACDERMOTT said (*ibid.*, at p. 268):

"If, in the course of carrying on my business, I make active use of a business asset—be it my factory building, a piece of machinery, a patent or my working capital—that asset is not an investment. Whatever else a business investment may have to be, it is an asset for the time being held intentionally aloof from the active work of the business. It is none the less an asset of the business and may have great business value. For instance, it may enable me to survive bad times and take advantage of good, or it may help me to control supplies or competition. And if it produces income that is income of the business. But I do not earn that income by my business efforts. The part I play there is essentially passive'."

I cannot, for my part, regard the language of LORD MACDERMOTT as sufficient, having regard to what I have cited from the earlier case and from the speech of LORD SIMONDS, to dispose of the statement I have made that, in the case of a trading company, not all income arising from assets belonging to the company can be treated as business earnings or income arising from a trade or business.

(2) The formula, which was, as I have already stated, deliberately preserved after the amendment of the Finance Act, 1937, was "profits arising from a trade

A or business". When individuals were liable to the tax, this formula had an obvious and necessary significance: so as to exclude income or profits belonging to the individual and derived otherwise than from his business. It should not be said, in my judgment, that the 1947 amendment which (among other things) excepted the individual from the tax had the oblique effect of making the original formula necessarily synonymous with "income from all sources".

B (3) The commissioners found as a fact that the various business enterprises of the company were, immediately before Jan. 1, 1947, separate and distinct. There is, in my view, no basis for saying either (a) that after Jan. 1, 1947, there was some kind of amalgamation, or (b) that the sums here in question, which were, in fact, derived from a discontinued, separate, business, became automatically the profits of one or all of the continuing and separate businesses.

C Section 43 (1) of the Finance Act, 1947, can only operate so that the businesses in fact being carried on after Jan. 1, 1947, are treated as one for the purposes of the computation of the tax.

(4) If the disposal of the coalmining business had been a voluntary act on similar or somewhat similar terms, then I conceive that the income receipts might be treated as arising from a trade or business on the ground that the sale had been (and had been intended as) a business transaction; but here the transfer to the National Coal Board was provided by Parliament in invitum so far as the company was concerned, which could do no other than obey the law and receive the sums which Parliament ordained. Such a transaction must have been wholly outside the contemplation of the original corporators and the scope of the company's memorandum of association. No intention in regard to income

E for the future can, in my judgment—in the absence, at least, of direct evidence—be attributed to the company or its directors; to treat the income payments as arising from any trade or business being carried on by the company is, to my mind, wholly unreal and insensible.

Reference was made to the terms of s. 1 (5) of the Coal Industry (No. 2) Act, 1949, as showing that Parliament regarded the revenue payments under the

F Act of 1949 as subject to profits tax. I cannot for my part attach any significance to this matter. Assuming that Parliament did so contemplate (but the sub-section, to my mind, is by no means free from doubt in this respect), the Coal Industry (No. 2) Act, 1949, was not in pari materia with the Finance Acts. In these circumstances, and according to well-established principles (see, for instance, *Camille & Henry Dreyfus Foundation, Inc. v. Inland Revenue*

G *Comrs.* (4)) the language of the sub-section cannot influence the interpretation of the Finance Act, 1937, in its application to the facts of the present case.

On the other hand, if the question had been asked of the company, in 1947 and any of the years following: "what is your business income?" or, more correctly: "what are the profits arising from your business?", I think that a natural answer (contrary to the suggestion put before us by counsel for the

H Crown) would not have taken these income payments into account. For the reasons which I have attempted to state, I would allow the appeal.

JENKINS, L.J.: This is an appeal by the Butterley Co., Ltd. from a judgment of ROXBURGH, J., dated July 27, 1954, allowing an appeal by the Crown from a determination of the Special Commissioners in favour of the company on an appeal to them by the company against assessments to profits tax for the calendar years 1947 to 1950 inclusive.

I

Down to Dec. 31, 1946, the company carried on a number of trades or businesses including the trade or business of colliery proprietors. As from Jan. 1, 1947, the company's colliery undertaking was compulsorily acquired by and vested in the National Coal Board under the provisions of the Coal Industry Nationalisation Act, 1946, and the company became entitled to receive in respect of the assets so transferred an unascertained amount of compensation, and also to receive for the period between Jan. 1, 1947, and

the date on which the compensation was fully satisfied periodical payments designated in the Act as interim income and calculated as therein provided. The question in the case is whether the payments received by the company in respect of interim income under the compensation provisions of the Act of 1946 in each of the calendar years 1947 to 1950 are liable to profits tax. A

In approaching this question, it is material to observe that, according to the facts found by the Special Commissioners, it appears that, first, the colliery concern of the company constituted a trade separate from its other trades and ceased entirely on Jan. 1, 1947, the date on which the colliery concern was compulsorily acquired by the National Coal Board; and, secondly, thereafter the company continued to carry on its various other trades, which conversely were distinct and separate trades from the defunct colliery concern, and included iron founding, structural steel manufacturing, wagon building, wrought iron production, brick-making, civil engineering and dairy farming. B C

The profits tax was first imposed under the name of the "national defence contribution" by the Finance Act, 1937. The more material provisions of that Act are these. By s. 19 (1) the tax is:

"charged, on the profits arising in each chargeable accounting period . . . from any trade or business to which this section applies." D

I here also refer to the various other provisions of the Act of 1937 to which my Lord has already referred: I will not take up time by reading them again in extenso.

Then by the Finance Act, 1947, s. 31 (1) (a), it was provided that the charge of profits tax should not apply to any trade or business unless it was carried on by a body corporate or unincorporated society or other body. By s. 32 (1), a new para. 7 was substituted in Sch. 4 to the Act of 1937, and to that again my Lord has sufficiently referred. By s. 43 (1) of the same Act it was provided that all trades or businesses to which s. 19 of the Finance Act, 1937, applied carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the profits tax. By s. 47 (1) of the same Act it was provided, so far as material for the present purpose, that these changes in the law relating to profits tax should have effect with respect to all chargeable accounting periods any part of which fell after the end of the year 1946. E F

It is unnecessary to refer at any great length to the complicated provisions of the Coal Industry Nationalisation Act, 1946. So far as material for the present purpose, this Act provided, by s. 5, for the vesting in the National Coal Board of the assets to be transferred to it. With exceptions not here material such vesting was, by s. 5 (1), to take place automatically on such date as the Minister might by order appoint, therein referred to as the primary vesting date and in fact fixed by the Minister as Jan. 1, 1947. By s. 10 (1) compensation was to be made as thereafter provided in respect of the transfer to the board of the transferred interests. The provisions as to compensation were elaborate, involving as they did the fixing of a global sum representing the total amount of compensation payable in respect of all the assets acquired throughout the country, the apportionment of this sum amongst valuation districts, the allocation of the various transferred interests to compensation units, the valuation of those units, and the rateable apportionment amongst the units in each valuation district according to their respective values of the compensation allocated to such district. It was therefore likely to be a matter of years before the compensation payable in respect of any individual colliery concern could be fully ascertained and satisfied. By s. 21 (1) the compensation in respect of a transfer of transferred interests was with immaterial exceptions to be satisfied by the issue of government stock, and this stock was by s. 23 subjected to certain restrictions as to the disposal thereof. The provisions chiefly material for the present purpose are those contained in s. 19 and s. 22 of the Act. Again, G H I

A my Lord has just read those sections; I will not take up time by reading them again.

It will be seen that, under s. 22, the right to interim income conferred by s. 19 was, as regards the years 1947 and 1948, to be satisfied (in effect) by whichever of the following sums might be the greater, that is to say, the additions provided for by sub-s. (1) to instalments of compensation satisfied, and the
B “revenue payments” provided for by sub-s. (3), with no provision for the repayment of any excess of the latter over the former. By the Coal Industry (No. 2) Act, 1949, provision was made for the continuance in a modified form of “revenue payments” in respect of the year 1949 and subsequent years, until the compensation payable in respect of the transferred assets of any concern was fully satisfied. I here refer to the provisions of the Act of 1949 which
C my Lord has already read.

Before the Special Commissioners, the contentions advanced on behalf of the company were to the effect: first, that the “interim income” payments received by the company under the Acts of 1946 and 1949, whether in the form of additions to instalments of compensation under s. 22 (2) of the Act of 1946 or in the form of revenue payments under s. 22 (3), or in the form
D provided for under s. 1 of the Act of 1949, notwithstanding the statutory description of “interim income” assigned to them in s. 19 (2) of the Act of 1946 and elsewhere, were not income of the company, but part of the compensation payable to the company for the taking away of its colliery assets; secondly, that these interim income payments were not profits of the trades or businesses carried on by the company during the relevant chargeable accounting periods, but arose to the company from its colliery concern, which trade
E ceased entirely on Jan. 1, 1947; and, thirdly, that such payments were not “income received from investments or other property” within the meaning of para. 7 (1) of Sch. 4 to the Finance Act, 1937, as amended by s. 32 (1) of the Finance Act, 1947. For the Crown, on the other hand, it was contended: first, that such payments were income of the company; secondly, that such
F payments were part of the profits of the trade or business carried on by the company in the relevant chargeable accounting periods; and, thirdly, that such payments were income received from investments or other property within the meaning of para. 7 (1) of Sch. 4 to the Finance Act, 1937, as amended.

The Special Commissioners first stated their conclusion that the payments in question were not properly included in computing, for the purposes of the
G profits tax, the profits of the company for the relevant chargeable accounting periods; secondly they held that such payments were income of the company and rejected the company’s first contention; and then they continued the statement of their findings which my Lord has already read. I will not read them again.

ROXBURGH, J., found it unnecessary to decide whether the payments received
H by the company in respect of “interim income” were or were not profits arising from the trades or businesses carried on by the company during the relevant chargeable accounting periods, for, in his view, whether this was so or not, it was at all events plain that these payments were “income received from property” and as such fell to be included in the profits of the company for the purposes of profits tax, by virtue of the express direction in para. 7 (1) of Sch. 4
I to the Act of 1937 as amended that, with exceptions not applicable in the present case, “income received from . . . property shall be included in the profits”. This provision in his view had the effect of bringing the interim income payments into the charge to profits tax, whether they were or were not profits arising from any trade or business carried on by the company in the relevant chargeable accounting periods. Accordingly he allowed the Crown’s appeal.

In this court counsel for the company abandoned the contention that the interim income payments were not income at all, while counsel for the Crown

abandoned the contention that the claim to tax could be established merely by showing that the interim income payments were income received from property. A

It thus became common ground that the interim income payments, whether they were or were not income received from property, were only chargeable to profits tax if they were profits of a trade or business carried on by the company during the relevant chargeable accounting periods. This must, I think, be the right view. The charging section, s. 19 of the Act of 1937, charges the tax on the profits arising in each chargeable accounting period from any trade or business to which the section applies, and charges nothing other than the profits so arising. B
Paragraph 7 of Sch. 4 to the Act of 1937, as originally framed, in providing that income from investments or other property should, with the exceptions therein mentioned, be excluded from the profits, must be taken to have been referring to investments or other property the income received from which would, apart from its exclusion, have been included in the profits arising from the trade or business, and not to income from investments or other property which have nothing to do with the trade or business, the exclusion of which would have been wholly unnecessary. Compare *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (2), per LORD STERNDALÉ, M.R. (12 Tax Cas. at p. 525), VISCOUNT CAVE, L.C. (*ibid.*, at p. 535), VISCOUNT FINLAY (*ibid.*, at p. 539), and *Tootal Broadhurst Lee Co., Ltd. v. Inland Revenue Comrs.* (3), per LORD MACDERMOTT ([1949] 1 All E.R. at p. 268). Similarly I think that the substituted para. 7 (1) of Sch. 4 to the Act of 1937 introduced by s. 32 (1) of the Act of 1947, in providing that income received from investments or other property should, with the exceptions therein mentioned, be included in the profits, must be taken as referring to income received from investments or other property the income from which forms part of the profits arising from the trade or business. In other words, I think the inclusion of income received from investments or other property enacted by the new para. 7 (1) of Sch. 4 to the Act of 1937 relates to investments or other property of the same character as those to which the exclusion enacted by para. 7 of that Schedule in its original form related. I cannot construe the new para. 7 (1) as bringing into charge to tax investments or other property which have nothing to do with the trade or business. I think this view is reinforced by the circumstance that, until the amendment introduced by s. 31 (1) of the Act of 1947, the charge to tax extended to trades or businesses carried on by partnerships or individuals. The question to be answered being whether profits of a trade or business received in the form of income from investments or other property were to be included in the charge to tax, the old para. 7 gave the answer "No, with certain exceptions" and the new para. 7 (1) gives the answer "Yes, with certain exceptions". Before the amendment, the general rule was that income received from investments or other property which would otherwise have been included should be excluded, whereas after the amendment the general rule was that there should be no such exclusion. E F G

Accordingly, the argument before us was in effect directed to two questions: first, whether the interim income payments, considered simply as periodical payments in the nature of income received by the company under the provisions of the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949, were profits arising from any trade or business carried on by the company in the relevant chargeable accounting periods; and, secondly, alternatively, whether such interim income payments, considered, if they could properly be so considered, as income received from property, in the shape either of a capital sum represented by the compensation when ascertained or of an income bearing asset consisting of the right to receive interim income under the Acts, were profits arising from any such trade or business. H I

The first of these questions must, I think, clearly be answered in the negative. The commissioners found as a fact that the colliery concern of the company constituted a trade separate from its other trades and that that trade ceased entirely

- A** on Jan. 1, 1947. The separate nature of the colliery concern and its cesser are both undoubtedly questions of fact as to which the Special Commissioners' findings are binding on us. The cesser of the company's colliery concern was indeed a matter on which a finding was hardly required, as it followed as a necessary consequence of the application of the provisions of the Act of 1946 to that concern, and to be strictly accurate the exact moment of cesser would
- B** appear to have been midnight on Dec. 31, 1946/Jan. 1, 1947. On these findings the interim income payments clearly could not be profits arising from the carrying on of the company's colliery trade which had wholly ceased. It is equally clear that such payments were not in fact profits arising from any of the trades or businesses which the company continued to carry on after the cesser of its colliery trade. Such payments were received independently of, and had
- C** nothing to do with, any of those other trades or businesses. They would have been received just the same if the company had never carried on any trade or business other than its colliery concern. In view of the Special Commissioners' finding as to the separate character of the colliery concern, the interim income payments cannot be imputed to the trades or businesses which were continued by the company on the ground that the colliery concern was merely a branch or department of one entire business, which was continued as a whole with the substitution of the company's rights under the Acts of 1946 and 1949 for the defunct colliery concern. I do not think s. 43 (1) of the Finance Act, 1947, which requires all trades or businesses carried on by the same person to be treated as one for profits tax purposes, can assist the Crown here, for the separate colliery trade in this case ceased contemporaneously with the commencement of the first chargeable accounting
- E** period to which that section applied. The true nature, as I see it, of the interim income payments is that they were not profits arising from any trade or business, but were payments in the nature of income made under the Acts of 1946 and 1949 to compensate the company for the loss of income which it sustained during the period from Jan. 1, 1947, to the date of final ascertainment and satisfaction of the compensation by reason of the compulsory acquisition and consequent cesser of its colliery trade.
- F**

- As to the second question, I do not think the case for the Crown is improved by treating the interim income payments as income received from property, whether in the shape of a capital sum represented by the compensation when ascertained, or of an income bearing asset consisting of the right to receive interim income under the Acts, for it is, as I have said, common ground that
- G** income received from property, in order to be chargeable to profits tax, must be profits arising from a trade or business carried on during the relevant chargeable accounting period. I think that income received from property can only answer that description if the property from which it is received can fairly and properly be described as an asset of the trade or business so carried on. In view of the separate character possessed by the company's colliery concern down to
- H** the date of its compulsory acquisition and consequent cesser, it seems to me impossible to hold that the company's rights under the Acts, whether to the capital compensation when ascertained or to the interim income payments, can fairly or properly be described as constituting assets or income of the trades or businesses carried on by the company during the relevant chargeable accounting periods, i.e., its trades or businesses other than the separate and defunct colliery concern. These rights and their produce were just as separate and distinct from the continued trades or businesses as the colliery concern had
- I** been while it existed.

Counsel for the Crown sought to meet this difficulty in two ways. First, he said that the company had in fact dealt with the interim income payments and treated them in their accounts as if they were income of the continued trades or businesses, and had in like manner treated the payments on account of compensation as assets of the continued trades or businesses. Thus, whatever the position

might have been if the company had segregated the interim income payments and the payments on account of compensation from the continued trades or businesses, the company had in fact chosen to make them income and capital assets respectively of the continued trades or businesses, with the result that the interim income payments became part of the profits arising from the continued trades or businesses for the purposes of profits tax. Secondly, he said that the *raison d'être* of a trading company being to trade, any income received by such a company must be income of its trade or business. The latter point can, I think, be shortly disposed of. Profits tax is charged on the profits arising from any trade or business carried on during any given chargeable accounting period, and not on the income from all sources of the person carrying on any trade or business during any given chargeable accounting period. It follows that income received by a trading company is not chargeable to profits tax merely on the ground that it is income of a trading company. It must be shown further that such income represents profits arising from some trade or business carried on by that company during the relevant chargeable accounting period.

As to the former point, counsel for the company did not dispute that the interim income payments and payments on account of compensation were in fact treated by the company as and when received as if they were, respectively, income and capital assets of the continued trades or businesses. This indeed appears clearly enough from the post-1946 balance sheets and accounts of the company annexed to the Case. The interim income payments as and when received were credited to revenue account, while the payments on account of compensation as and when received were, broadly speaking, applied in writing down to the nominal figure of £1 the book values of the assets taken over by the Coal Board and discharging the company's overdraft, the surplus over such book values being in part carried to reserve and in part applied by way of distribution of capital profits. But, said counsel for the company, the quality of a given income receipt as being or not being profits of a trade or business carried on by the recipient must be judged and determined at the time of receipt, and if it is not profits arising from such a trade or business when received, it cannot be converted into profits so arising by reason of the fact that it is afterwards treated as if it had been profits so arising. Moreover, while it is no doubt true that, so far as the payments on account of compensation were, as and when received, made part of the capital assets of the continued trades or businesses, any income thereafter derived from them would fall to be brought into the computation of the profits arising from those trades or businesses for profits tax purposes, it does not follow that, pending the actual ascertainment and receipt of the compensation for the time being outstanding, the mere right to receive it when ascertained became an asset of the continued trades or businesses, so that the interim income, considered as income of the compensation, became, as income of property which was an asset of those trades or businesses, part of the profits arising from them in the shape of "income received from . . . property" within the meaning of para. 7 (1) of Sch. 4 to the Act of 1937, as amended. That conclusion would be inconsistent with the Special Commissioners' finding that the company's colliery concern was a separate trade. The right to receive the outstanding and unascertained compensation was a right conferred exclusively in respect of the compulsory acquisition and consequent cesser of that separate trade and had nothing to do with the company's other trades or businesses. The fact that the stock or cash received in or towards satisfaction of the right was, as and when received, appropriated to the purposes of the continued trades or businesses could not alter retrospectively the character of the right, any more than the appropriation to such purposes of the interim income payments as and when received could alter retrospectively the character of those receipts.

As appears from the above discussion of the arguments, the two questions into which I divided the matter in issue earlier in this judgment to some extent

A overlap, and perhaps they would be better described as two ways of approaching the same question. On both questions, or on both methods of approach, I think the argument for the company should prevail.

If the view I have formed to the effect that the interim income payments in this case are not, on the true construction of the relevant provisions of the Finance Acts, 1937 and 1947, chargeable to profits tax, is right, I find it impossible
B to hold that the references to profits tax in the proviso to s. 1 (5) of the Coal Industry (No. 2) Act, 1949, has made them so chargeable. Those references at most imply an assumption by Parliament that interim income payments under the Act of 1946 and that Act were subject to profits tax; but an assumption made in a later enactment as to the construction and effect of a given statutory provision is not to be treated as if it were an amendment of the earlier provision.
C Such legislative assumptions may sometimes be used for the purpose of resolving doubts or ambiguities, but do not alter the law. See the cases on this subject collected in *Camille & Henry Dreyfus Foundation, Inc. v. Inland Revenue Comrs.* (4) ([1954] 2 All E.R. at pp. 480-482), and particularly the succinct observation of LORD RADCLIFFE in *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (5) ([1952] 1 All E.R. at p. 544) that:

D "The belief or assumptions of those who frame Acts of Parliament cannot make the law."

Moreover, it is to be observed that, in the present case, the Act in which the assumption as to liability for profits tax is made is directly concerned, not with profits tax, but with the continuation in an amended form of the provisions of
E the Coal Industry Nationalisation Act, 1946, as to interim income. The incidental references to profits tax in the provisions as to the adjustment of payments may thus well have been made merely *ex abundanti cautela* with little or no consideration of the question whether the interim income payments were or were not liable to the tax. Finally, non constat that there may not conceivably have been cases in which the facts and circumstances were such as to attract profits
F tax on the interim income payments, and the possibility that such cases might exist would suffice to satisfy the references to the tax in the Act of 1949 without recourse to the supposition that the legislature regarded it as exigible in all cases.

The admission made by the Crown to the effect that the new para. 7 (1) of Sch. 4 to the Finance Act, 1937, as amended by the Finance Act, 1947, only includes "income received from . . . property" where such income forms part
G of the profits of the trade or business, and the view I have formed to the effect that the interim income payments in the present case, even if considered in other respects as "income received from . . . property" within the meaning of the paragraph, were not profits of any trade or business carried on by the company during the relevant chargeable accounting periods, make it unnecessary for me to decide whether these income payments were in other respects "income
H received from . . . property" within the meaning of the paragraph. This seems to me at least open to doubt. The Act of 1946 studiously avoids describing the interim income as interest on or income of the compensation, even when the interim income is to be satisfied in the way provided by s. 22 (2) (a), the formula there used being

I "the said right [to interim income] . . . shall be satisfied . . . by making in addition to the issue of the stock then issued in satisfaction of that amount of compensation . . . a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . .";

and these additional payments are referred to elsewhere in the Act as "additions" to the compensation. Under the provisions of s. 22 (3) as to revenue payments (which, in effect, were to be made for the calendar years 1947 and 1948 in lieu of the above-mentioned "additions" in all cases in which

they would be larger than such additions), these payments were to be calculated by reference to the past earnings of the concern, and bore no relation at all to the amount of the compensation. In continuing the revenue payments in a modified form, the Act of 1949 in effect made them, as regards 1949 and subsequent years, subject to adjustment by repayment to the Minister of any amount whereby they were found to exceed the interim income which would have been payable for the same period according to the method of calculation provided for by s. 22 (2) (a) of the Act of 1946, but, subject to such adjustment, the right given is still a right measured by reference to past earnings. I find it difficult to hold that the interim income payable under these Acts, defined and measured in the way it is, can properly be described as income of the compensation; and there is, I think, much to be said for the view that, albeit itself in the nature of income, it is not income of the compensation but rather "income-compensation", if I may use that expression, that is to say a series of periodical payments an independent right to which is conferred by the Act by way of compensation for the loss of income sustained in respect of the period between the primary vesting date and the ascertainment and satisfaction of the capital compensation. The suggestion of counsel for the Crown that at all events the interim income was income of an income-bearing asset in the shape of the right to receive it conferred by the Acts strikes me as highly artificial. My doubts are, I think, warranted by some observations of LORD SIMONDS and LORD MACDERMOTT in the case of *Tootal Broadhurst Lee Co., Ltd. v. Inland Revenue Comrs.* (3) on the meaning of the word "investments". LORD SIMONDS said ([1949] 1 All E.R. at p. 264):

"The problem, my Lords, is a different one—not whether these assets, being investments, are within the paragraph, but whether they are 'investments' at all, and, as I have already said, that is a word whose scope will depend on its context. It appears to me that the problem may be solved in this way. I would take a schedule of the assets of the trading company concerned and, omitting assets such as stocks and shares to which, in view of the decision in the *Gas Lighting Improvement Co.* case (2), the title of investments can in no circumstances be denied, would ask of each other asset: 'Is this an asset which the company has acquired and holds for the purpose of earning profits in, or otherwise for the promotion of, its particular trade or business?' There might be border-line cases in which the answer would be uncertain, but I do not doubt that in the vast majority of cases the answer would be clear cut."

Then, later on the same page, his Lordship said:

"Applying this test to the facts of the present appeal, I cannot believe that any business man (who may be regarded as the touchstone in such a case) would describe the patent rights here in question as investments of the taxpayers or the payments received by them under the licences or agreement as income of their investments."

LORD MACDERMOTT said (*ibid.*, at p. 268):

"My Lords, I do not think any business man would describe the income so obtained as 'income received from investments'."

Then (*ibid.*):

"It is plain, therefore, that 'investments' refers to some assets and not to others. The statute, however, does not lay down any method of segregation for its purposes and, in the absence of such provision, the proper test must, in my opinion, be related to the limited sphere of trade or business with which the Act is here dealing and founded, accordingly, on the meaning of the word for the man engaged in trade or business rather than for the man in the street."

A It is true that, as LORD MACDERMOTT pointed out, the words to be considered were "income received from investments" without the addition of the words "or other property" which are of wider import. But, if it is right to consider the probable views of the business man as to the meaning of "investments", I see no reason why the same test should not be applied in considering the meaning of the word "property". I therefore ask myself whether any business
B man would describe the interim income receivable under the Acts of 1946 and 1949 as "income received from . . . property", and find it difficult to believe that he would. It is, however, unnecessary to pursue this question further, and for the reasons I have earlier stated I would allow this appeal.

C **MORRIS, L.J.:** In considering the facts in this case it is necessary to have in mind the precise provisions pursuant to which profits tax is charged. The wording of s. 19 (1) of the Finance Act, 1937, provides that:

"There shall be charged, on the profits arising in each chargeable accounting period . . . from any trade or business to which this section applies, a tax . . ."

D The wording of sub-s. (2) so far as relevant for present purposes provides that the section applies to all trades or businesses of any description carried on in the United Kingdom. Section 20 (1) of the Act provides that

" . . . the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of Sch. 4 to this Act."

E There is the further provision that

"For the purpose of this sub-section, the expression 'income tax principles' in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purpose of income tax under Case I of Sch. D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising."

F It is to be noted that the function of Sch. 4 is to set out certain adaptations of income tax provisions as to the "computation" of profits for the purpose of the tax.

G It was not contended before us on behalf of the Crown, nor in my judgment could it validly have been contended, that any of the provisions contained in Sch. 4 could enlarge or do enlarge the words contained in the body of the Act by which a charge is imposed. The result is, therefore, that the tax is charged on the actual profits arising in a chargeable accounting period from a trade or business which is being carried on and which is not exempt. In computing
H those profits the provisions of Sch. 4 come into play: but they do not come into play so as to extend the scope of the tax. Thus para. 7 of Sch. 4, both in its original form and in the substituted form introduced by s. 32 (1) of the Finance Act, 1947, refers to "income received from investments or other property." The reference is to investments or other property of the trade or business. When by the Finance Act, 1937, the tax (then called the national
I defence contribution) was imposed, it then applied, not only to bodies corporate, but also to individuals who owned a trade or business. In either case the reference in the schedule to "investments or other property" was to such investments or other property as related to or formed part of the trade or business as opposed, particularly in the case of individuals, to those which were unrelated to the trade or business.

The taxpayer company carried on a number of trades. They included coal-mining, iron founding, structural steel manufacturing, wagon building, wrought iron production, brick-making, civil engineering and dairy farming. There is

a finding of fact that the colliery concern of the company constituted a trade separate from its other trades: there is a further finding that that trade "ceased entirely" on Jan. 1, 1947. A

The position was, therefore, that the company before Jan. 1, 1947, carried on the trade or business of coalmining (which I will call business A) and various other businesses (which I will call businesses B, C, D and E although, in fact, they were more than four in number). The commissioners found that what they called the company's "composite trade or business" consisted at the end of the year 1946 of "a number of separate and severable trades," of which the colliery concern was one. Business A ceased entirely on Jan. 1, 1947. The company then had businesses B, C, D and E, and the company owned the statutory rights to income and capital given by the Coal Industry Nationalisation Act, 1946. When interim income payable pursuant to the provisions of that Act was received, the company could use or apply that income in such way as it decided. But the question now arising is as to the nature and quality of that income at the time of its receipt. This cannot be affected or altered according as to how after receipt it was used, applied or spent. Though the interim income must be regarded as income when received by the company, the present inquiry is whether it was income arising from a trade or business carried on by the company in a chargeable accounting period. Business A was no longer being carried on, and so profits tax could not be charged in reference to it. Businesses B, C, D and E must as a result of s. 43 of the Finance Act, 1947, "be treated as one trade or business". But the interim income had no relation to businesses B, C, D and E whether treated as one or whether regarded separately and singly. I do not think that the Crown can successfully assert that these businesses ceased to be separate after the end of 1946. The Case Stated refers to the "trades" carried on after Jan. 1, 1947. The interim income did not in any way or in any sense arise from the "trade or business" which I may call "B plus C plus D plus E". In my judgment it would be contrary to the realities of the situation so to hold. It is true that the company that owned the business of "B plus C plus D plus E" also owned the rights resulting from the Coal Act, 1946, after business A, which belonged to the company, had been compulsorily acquired. But the mere ownership of the statutory rights resulting from the acquisition of business A did not on the finding in this case amount to a business in itself (and it is to be observed that no suggestion has been made that the provisions of s. 19 (4) of the Finance Act, 1937, have application in this case) or to a new business to be tacked on to businesses B, C, D and E and to be treated as one with them. The company might have placed all its receipts of interim income to a suspense account. In fact, as the accounts of the company show, the money when received was employed in the general operations of the company. As a result it might be that in later years some income which would result from the use of the interim income would be included in the income or profits attracting profits tax. But the manner in which the company employed the interim income which they received is in my judgment not relevant in an inquiry as to whether it arose from a trade or business being carried on in a chargeable accounting period. As it did not so arise, profits tax did not, in my judgment, become chargeable on it. I would allow the appeal. B C D E F G H I

Appeal allowed. Leave to appeal to the House of Lords granted. I

Solicitors: Solicitor of Inland Revenue; Thicknesse & Hull (for the company).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A CHANCERY DIVISION.

PRACTICE NOTE.

Practice—Chancery Division—Chambers—Masters' powers—R.S.C. (Chancery Provisions), 1954 (S.I. 1954 No. 1728), r. 7—R.S.C., Ord. 55, r. 15.

Chambers—Chancery Division—Masters' powers—R.S.C., Ord. 55, r. 15.

B The following is published by permission of the judges of the Chancery Division for the information of the profession.

The Rules of the Supreme Court (Chancery Provisions), 1954, introduce a number of changes and in particular substitute a new r. 15 for r. 15 and r. 15A of Ord. 55 with the result that the Masters of the Chancery Division have now all the powers of a judge in chambers except such as the judges of the division may direct, or as are prescribed by rule, to be dealt with by a judge in person.

C The judges of the division do not propose at present to give any directions under that rule limiting the powers thereby conferred on masters but issue the following memorandum for their guidance in exercising their powers.

1. Before the new rules came into force the masters were, by virtue of Ord. 55, r. 15, r. 15A and r. 35A, unable to make the following orders:—

- D**
- (a) for service of process out of the jurisdiction
 - (b) for appointment of a new trustee (except a judicial trustee)
 - (c) vesting property or appointing a person to convey land or to make or join in making a transfer of stock or a share in a ship
 - (d) for general administration (except in a creditor's action where there was evidence of insolvency) or for execution of a trust
- E**
- (e) for accounts and inquiries concerning the property of a deceased person
 - (f) to bind persons on whom service of a notice of judgment or order for accounts and inquiries has been dispensed with.

2. The power of the masters as deputies for the judge in chambers to make orders in matters other than those falling within para. 1 has long been limited by a well-settled practice: that practice is to be maintained. For example, a

F master should not sanction any compromise, arrangement or transaction.

3. In cases falling within para. 1 the masters should not make orders:—

- (a) for service out of the jurisdiction except in clear cases
 - (b) for the appointment of a trustee except (1) a judicial trustee (2) in the case of incapacity or (3) where the fund is small
 - (c) for the administration of the estate or execution of the trusts in a beneficiary's action
- G**
- (d) vesting property (save on incapacity or in consequence of an appointment of a trustee or a previous order of the court) or directing some person to assign or convey (save where the transaction has been previously approved or directed by a judge)
 - (e) for inquiries relating to the next of kin of an intestate.

H Before exercising his extended powers a master should consider in every case whether it is one in which it would be more appropriate that the judge should make the order.

4. Order 14A in its new form gives to the plaintiff an extended right to apply for summary judgment in a specific performance action. Masters should not make such orders (except by consent) unless the following conditions are satisfied:—

- I**
- (i) the agreement sued on is a formal written contract, and
 - (ii) the defendant is in default of appearance or does not appear at the hearing of the summons or there is clearly no defence.

5. Order 55, r. 2, as amended by the new rules provides that applications for payment or transfer out of court of any amount of cash or securities may be made in chambers. Masters should not make orders where the value of the fund exceeds £2,000 at the date of the issue of the summons.

M. G. WILLMOTT, Chief Master,

March 30, 1955.

Chancery Division.

MASON AND OTHERS *v.* CLARKE.

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Keith of Avonholm), February 21, 22, 23, 24, 28, March 24, 1955.]

Landlord and Tenant—Reservation—Sporting rights—Right to take rabbits reserved to landlord—Right of landlord to set snares in tenant's fields—Profit à prendre—Oral grant—Part performance—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 40.

Profit à Prendre—Oral grant—No memorandum in writing—Action of trespass by grantee—Possession and part performance by grantee—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 40.

Fraud—Dishonest motive of vendor—Innocence of purchaser—Sale of profit à prendre—Receipt for consideration showing money to have been paid for another purpose—Whether purchaser precluded from enforcing agreement.

C. was the tenant from year to year of a farm, forming part of the H. estate owned by a limited company, under an agreement for an agricultural tenancy containing a reservation to the landlord, subject to the Ground Game Act, 1880, of all game, rabbits, wildfowl and fish with liberty to the landlord and all other persons authorised by him to preserve, shoot, hunt, course, kill and carry away the same. C. covenanted in the agreement that he would not (subject to the said Act) shoot or otherwise sport on the land. In 1949 the farm was infested with rabbits, and on Oct. 11, 1950, the company orally agreed to grant to M. the rabbiting rights for one year in consideration of £100, it being intended by both parties that M. was to be entitled to kill the rabbits by lawful means and take them away. On the same day, M. paid £100 to the agents for the company and was given a receipt in the following form: "Oct. 11, 1950. Received of [M.] the sum of £100 towards bailiff's wages on [H.] estate". The receipt was signed by the company's agents, and stamped. M. was shown round the farm by the company's bailiff, and C. was informed of the agreement in M.'s favour. On Oct. 14, 1950, M. laid snares in the fields where C. grazed sheep, and on Oct. 15, 1950, returned with two paid assistants to take the rabbits. C. ordered M. off the land, but he refused to leave. Later C. kicked over snares laid by M., and at all relevant times took measures to prevent M.'s enjoyment of the rights for which he had paid the company. On Dec. 30, 1950, the company and M. entered into a memorandum under seal of the agreement made on Oct. 11, 1950, setting out the terms thereof. On Jan. 4, 1951, M. commenced proceedings against C. claiming an injunction to restrain him subject to the Ground Game Act, 1880, from interfering with M.'s profit à prendre, and for damages. The company later was joined as a plaintiff and claimed an injunction and damages against C. In his defence C. pleaded, among other things, that the agreement between M. and the company was unlawful because it was made in fraud of His Majesty's Inland Revenue in that it concealed a taxable receipt of rent, and that it was therefore ineffectual to confer on M. any enforceable rights over C.'s land.

Held: (i) on the facts, M. was innocent of fraud because, as it did not appear how the form of the receipt of Oct. 11, 1950 would lead to the revenue being defrauded of tax, participation in such a fraudulent purpose should not be imputed to M. whose evidence the trial judge had accepted; and even if the company had some dishonest motive, M., an innocent party, was not debarred by the company's fraudulent intention from enforcing the agreement, which was not itself illegal; and accordingly the defence of illegality of the agreement of Oct. 11, 1950, on the ground of defrauding the revenue failed.

A *Alexander v. Rayson* ([1936] 1 K.B. 169) and *Miller v. Karlinski* (1945) (62 T.L.R. 85) explained.

(ii) M. could maintain an action in trespass against C., because he had entered into possession of the profit à prendre by exercising his rights under the agreement of Oct. 11, 1950, and although, until Dec. 30, 1950, there was no sufficient written memorandum of that agreement within the Law of Property Act, 1925, s. 40, M.'s acts in setting snares, taking rabbits and paying assistants were part performance of the oral agreement to which they were exclusively referable.

(iii) to set rabbit snares in fields was a proper exercise of M.'s rights under the agreement, although sheep were pastured in the fields.

Peech v. Best ([1931] 1 K.B. 1) considered.

C Decision of the COURT OF APPEAL ([1954] 1 All E.R. 189) reversed.

[As to Reservation of Rights in Game, see 15 HALSBURY'S LAWS (2nd Edn.) 418, para. 787; and for cases on the subject, see 25 DIGEST 353-355, 44-63.

For the Ground Game Act, 1880, s. 1, see 10 HALSBURY'S STATUTES (2nd Edn.) 720.]

D Cases referred to:

(1) *Alexander v. Rayson*, [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.

(2) *Miller v. Karlinski*, (1945), 62 T.L.R. 85; 12 Digest (Repl.) 277, 2128.

(3) *Bristow v. Cormican*, (1878), 3 App. Cas. 641; 43 Digest 382, 80.

(4) *Peech v. Best*, [1931] 1 K.B. 1; 99 L.J.K.B. 537; 143 L.T. 266; Digest Supp.

(5) *Merest v. Harvey*, (1814), 5 Taunt. 442; 128 E.R. 761; 25 Digest 365, 135.

(6) *Loudon v. Ryder*, [1953] 1 All E.R. 741; [1953] 2 Q.B. 202; 3rd Digest Supp.

(7) *Holford v. Pritchard*, (1849), 3 Exch. 793; 18 L.J.Ex. 315; 13 L.T.O.S. 74; 154 E.R. 1065; 25 Digest 20, 174.

F (8) *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; 66 L.J.Ch. 529; 76 L.T. 584; 25 Digest 4, 4.

Appeal.

Appeal by the plaintiffs, Eric Mason and Shepton Mallet Transport, Ltd., from an order of the Court of Appeal, dated Dec. 8, 1953, and reported [1954] 1 All E.R. 189, reversing an order of CROOM-JOHNSON, J., dated May 8, 1953. CROOM-JOHNSON, J., gave judgment for the plaintiffs and awarded them damages. The facts appear in the opinion of VISCOUNT SIMONDS.

Gerald Gardiner, Q.C., and *J. G. S. Hobson* for the appellants.

H. V. Lloyd-Jones, Q.C., and *J. Perrett* for the respondent.

H The House took time for consideration.

Mar. 24. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the appellant company, Shepton Mallet Transport, Ltd., are the owners of an agricultural estate known as the Hothorpe Estate on the borders of the counties of Northampton and Leicester.

I The respondent is the tenant farmer of a farm of about 341 acres which is part of that estate. He holds this farm as tenant from year to year under a number of agreements about which it is necessary to say no more than that each of them was an ordinary agricultural tenancy and contained a reservation to the owner (subject to the provisions of the Ground Game Act, 1880) of all the game, rabbits, wildfowl and fish with liberty to himself and all other persons authorised by him to preserve, shoot, hunt, course, kill and carry away the same, and also contained an agreement by the tenant that he would not (subject to the provisions of the same Act) shoot or otherwise sport on the land. It is clear law that the

so-called reservation operates as a regrant of the rights therein described in favour of the landlord and his assigns and that a profit à prendre is thereby created. A

In 1949 the respondent's farm and the spinneys adjoining it were infested with rabbits. In that year, a vain attempt was made by a firm of estate agents, Messrs. Howkins & Sons, of Rugby, on behalf of the company to let the shooting, and in or about July, 1950, the company requested the Northamptonshire Agricultural Executive Committee to gas a spinney called Coombe Hill Spinney and this was done. But the plague of rabbits was still serious, and on Oct. 2, 1950, the committee notified the respondent that they intended to make a further survey of the farm. On Oct. 9 the committee authorised their pests officer, a Mr. Smart, to serve notices on both the respondent and a Mr. Bennett, the managing director of the company. On Oct. 10 Mr. Smart saw the respondent, told him of the authorisation and said that, if the respondent preferred the committee to deal with the rabbits for him, an order on him to destroy the rabbits would not be necessary. The respondent thereupon signed in pencil an agreement with the committee, whereby the committee agreed at a certain charge to carry out "rabbit destruction work" on the farm and the respondent agreed to make all necessary arrangements free of charge to enable the committee's servants to begin work as soon as possible. I do not now pause to examine the impact of this agreement on the Ground Game Act, 1880. B C D

At this stage the appellant Mason comes on the scene. He is an experienced rabbit catcher who still practices that trade in addition to carrying on the business of a garage proprietor. He had, shortly before Oct. 11, seen Mr. Bennett, whom I have already mentioned, about the shooting on the Hothorpe Estate and was referred by him to a Mr. Atkinson, a partner in the firm of Howkins & Sons. On Oct. 11 Mr. Mason went over the Hothorpe Estate, was shown its boundaries by the bailiff of the company named Davies, and estimated that he might catch a thousand rabbits by the end of December and possibly another five hundred to six hundred rabbits by October, 1951. He accordingly saw Mr. Atkinson and, after making an offer which was not accepted, agreed with him to pay £100 for the rabbiting rights on the estate for a year. I use the expression "rabbiting rights" because, while it is not clear what expression was used, there is no doubt whatever that both parties meant Mr. Mason to have the right to kill rabbits by any lawful method and to take them away. Subject to the question with which I must presently deal, Mr. Mason thus became entitled in equity to a profit à prendre, viz., the right to enter on the respondent's land and kill rabbits there, and the respondent had no possible right to gainsay him. E F G

I must now state the fact on which so much of this litigation has turned. After making the oral agreement with Mr. Atkinson, Mr. Mason went again to the office of Howkins & Sons, handed to a girl in the office his cheque for £100 and received a receipt which had already been initialled by Mr. Atkinson. The receipt was in the following form:

HOWKINS & SONS

Auctioneers, Valuers, Surveyors and Land Agents.
12, Albert Street, Rugby.

No. 1383.

RECEIVED of E. Mason Esq.

The sum of.....One hundred.....pounds.....shillings and..... pence.

Towards bailiff's wages on Hothorpe Estate.

£100 0 0.

Oct. 11, 1950.

HOWKINS & SONS
Auctioneers.

2d.

Valuers.

Oct. 11, 1950.

Received with thanks.
Rugby.

A This document is relied on by the respondent as affording good ground for denying that Mr. Mason had, at the relevant dates, acquired the right to enter on the land and kill and take rabbits. But before I consider that question I will pursue the narrative of facts to the end.

B On the same day, Oct. 11, Howkins & Sons wrote to the respondent informing him that the company had given Mr. Mason permission to shoot the rabbits on the Hothorpe Estate. This, though not an accurate description of the agreement, was sufficient to notify the respondent that Mr. Mason was authorised to enter on the land, and, in fact, on the following day he again visited the farm, saw the respondent and his son there and told him that he had got the "rabbiting rights" for £100 for which he held a receipt. I do not think that the respondent was under any illusion as to what "rabbiting rights" meant. According to the evidence, the respondent appeared to be pleased at this information, but on the same day, returning to Mr. Smart a copy of the contract with the committee which he had signed in ink, he wrote in these terms:

D "As I predicted months ago that Bennett's intentions was to preserve these pests until he could make a big price of them my guess has come true. Today I have seen and spoken to a man whom Bennett has sold the rabbits to for £100. This man holds a receipt for his payment. He has promised to bring it for my perusal when I shall make a copy of same and you will be able to have one also if you wish. For the Lord's sake beat him to it. He has beat you up to now."

E It may be gathered from this letter that the respondent did not intend friendly co-operation with Mr. Mason, though it is not clear why this should be so. And so it proved, for on Oct. 15, Mr. Mason being in a field on the estate with three companions looking for rabbits in the hedge, the respondent rode up on his horse, and, in the words of Mr. Mason whom the learned judge accepted as a witness of truth,

F "He behaved like a lunatic. He flew at me. He ordered me off altogether. Clarke wanted to fight. He was on us all."

G He left no doubt of his avowed intention that Mr. Mason should not get any rabbits on his land. I do not propose to occupy your Lordships' time by a detailed account of the respondent's behaviour. It is clear that by such provocative conduct as I have described, and by upsetting the snares set by Mr. Mason on his farm, he did his utmost to prevent him exercising the rights for which he had paid. Nor was he content with that measure of interference; for it was established beyond all doubt by the evidence, that on more than one occasion he killed rabbits, or caused them to be killed, to an extent which his rights under the Ground Game Act, 1880, did not warrant.

H It appears that at some time the respondent had authorised in writing one Geoffrey Mason (no relation of the appellant) to kill rabbits for reward, and this authority, though not produced, was still extant and was acted on in October, 1950. If so, no other outside person could be so authorised at the same time, and I see no justification for a contemporaneous authority being given, if, indeed, one was given, to the Agricultural Executive Committee. But, apart from this, I Geoffrey Mason was on at least one occasion accompanied by two other men, who were not, and could not have been, authorised to kill rabbits, and there was no evidence on which a court could properly come to the conclusion that they were assistants of Geoffrey Mason and needed no authority. It may appear to your Lordships, that in these circumstances, Mr. Mason acted with commendable self restraint. On Dec. 3, he cleared all his snares off the respondent's farm and did not lay any more there.

On Dec. 30, 1950, in order to perfect his legal title, and with a view, one may surmise, to the legal proceedings which Mr. Mason commenced on the following

Jan. 4, the company and Mr. Mason executed a memorandum under seal by which it was witnessed that it had been, on Oct. 11, 1950, agreed between them that the company granted to Mr. Mason (subject to the provisions of the Ground Game Act, 1880), the exclusive right for himself, his servants and licensees, of shooting, hunting, coursing and killing rabbits on the Hothorpe Estate for the period of one year from Oct. 11, 1950, and that Mr. Mason would pay for that right the sum of £100, the receipt of which was thereby acknowledged. The memorandum also referred to an agreement that any director of the company might, by arrangement, shoot rabbits on the estate. It was not accurate to say that this term had been agreed on Oct. 11, 1950: it had, in fact, been agreed a little later. But this does not affect the validity of the deed.

On Jan. 4, 1951, as I have said, Mr. Mason commenced proceedings against the respondent claiming an injunction to restrain him (subject to the provisions of the Ground Game Act, 1880) from interfering with his profit à prendre and for damages. On Apr. 4, 1951, the company was added as plaintiff, presumably because it was unlikely that this action would be tried before October, 1951, and the company's reversionary interest was threatened by the respondent's attitude. And a further injunction was claimed to restrain the respondent shooting or otherwise sporting on the land, except in accordance with the provisions of the Ground Game Act, 1880. The earlier injunction looked to the terms of the reservation, the latter to the terms of the covenant. My Lords, it must, I think, have appeared that Mr. Mason and the company had a very clear case when this action was started. Mr. Mason had an agreement with the company, which they did not challenge, for the exercise of the rabbiting rights which had been the subject of reservation and regrant. He had an agreement which was, apparently, valid, and he had forthwith gone into possession of his profit à prendre, so far as the subject-matter admitted of possession, by going round the estate with the company's bailiff, informing the occupying tenant farmer of his position and laying a large number of snares. And he had, by the conduct of the respondent, been debarred from exercising his rights.

It is necessary, then, to look at the defences, which, though they were one and all rejected by the trial judge, found favour with the Court of Appeal. The defence which the respondent put in the forefront of his case must first be examined and, as it involved a charge of fraud, it is right first to see what were the specific allegations. They were that, on or about Oct. 12, 1950, Mr. Mason saw the respondent on his farm and orally stated to him that, in compliance with a request by the company's agents (meaning thereby Howkins & Sons) that he should do so, he had agreed to the rent being described in the said receipt as bailiff's wages in order to enable them to conceal from His Majesty's Inspector of Taxes a receipt of rent. It was then pleaded that, relying on the contents of the receipt and Mr. Mason's oral statement, the respondent would say that the agreement was unlawful because it was made in fraud of His Majesty's Inland Revenue, in that it concealed a taxable receipt of rent and was, therefore, ineffectual to confer on Mr. Mason any enforceable rights over the respondent's land.

My Lords, this grave charge, which involved not only the appellants, but also the firm of Howkins & Sons, and, in particular, Mr. Atkinson, the member of the firm who dealt with the matter, begins with the allegation that, on Oct. 12, 1950, Mr. Mason saw and made an oral statement to the respondent describing the fraud that it was intended to perpetrate. Here was a pure question of fact on which the trial judge, having heard and seen the witnesses, including the respondent's son, who faithfully corroborated what his father had said, unhesitatingly accepted Mr. Mason's evidence that he had said no such thing. I can see no ground for saying that this finding of fact ought to be challenged. On the contrary, since Mr. Atkinson, whose integrity was not challenged, denied having made the alleged request, it seems inherently unlikely that Mr. Mason should have invented it. I here interpolate that, as I think quite improperly, a

A suggestion was made in the course of the trial that Mr. Mason had been requested by Mr. Bennett at their first meeting to join him in falsifying the receipt. For this, also, there was no foundation.

But, my Lords, these allegations being out of the way, what remains? There remains nothing but the receipt itself, and it is on this alone, disregarding all other evidence, that the Court of Appeal came to the conclusion that the agreement was so tainted with fraud that Mr. Mason could not rely on it and, therefore, could not be regarded as entitled in equity during the relevant period to a profit à prendre. I must state at once my emphatic dissent from this conclusion. DENNING, L.J., was satisfied that the receipt was patently false and could only infer that it was done with a dishonest motive, and did not think it necessary to inquire into the precise motive. It was, in his view, enough that the false receipt was knowingly false and done (as he inferred) with some dishonest motive, and that Mr. Mason took it without making any objection to it. ROMER, L.J., was more specific: for he held that its only purpose was to facilitate a fraud on the Inland Revenue, and that it was apparent to anyone with knowledge of the facts, who saw it, that such was the object and that, as Mr. Mason saw it and retained it in his keeping, it must have been apparent to him. So far, at least, the conclusion is that Mr. Mason could not rely on the agreement, because he was himself aware of, and, therefore, a party to, the fraud, and I will first examine that aspect of the case, though, as your Lordships will see, at a later stage, DENNING, L.J., but not ROMER, L.J., appeared to hold that, whether or not Mr. Mason was aware of it, the document was, in fact, fraudulent and, therefore, he could not rely on it; this proposition was strenuously urged at the Bar. My Lords, I should hesitate long before saying that a statement is inspired by a dishonest motive if I could not say what that motive was, nor should I say that its purpose was clearly to defraud the revenue if every attempt to show how the revenue could be defrauded by it conspicuously failed. But the question is whether it was, or perhaps ought to have been clear, to Mr. Mason from the apparently innocuous words on the receipt "towards bailiff's wages" that a fraud on the revenue was intended. In the first place, his own evidence that he did not know or suspect anything of this kind was accepted by the trial judge. But in the second place, we have the testimony of Mr. Atkinson. Counsel for the respondent properly and expressly disclaimed any attack on his bona fides or integrity, but it became somewhat difficult to reconcile this disclaimer with the persistent argument that the receipt carried on its face the aspect of dishonesty. Mr. Atkinson agreed that, when he had instructions from Mr. Bennett to have the receipt made out in this form he thought about it, and that he had thought about it since, and he said that then, and now, he saw nothing wrong. It was, he said, for his (Bennett's) domestic arrangement, and he made the receipt out accordingly. This being the attitude of a professional man who had ample time for reflection on it and whose integrity is not impugned, it is somewhat surprising that it should be said of Mr. Mason, garage proprietor and rabbit catcher, that he was, or should have been, alive to the sinister import of the document. Nor does the matter end there, for a Mr. Lumley, the secretary of the company, a Fellow of the Society of Incorporated Accountants and Auditors, made it clear that Mr. Mason's payment of £100 would be disclosed in the books of the company as a taxable receipt, which could either be assessed under Case VI of Sch. D, or as a deduction against any claim the company might have for maintenance, and that, in the long run, it would not make any difference which course was adopted. These are mysteries, my Lords, into which you may not think it necessary to penetrate. I do not, myself, think it necessary to do so in order to be satisfied that Mr. Mason did not detect, and could not be expected to detect, any dishonest motive, specific or general, in those three words.

Mr. Mason, then, a party wholly innocent of any fraud, was entitled to enforce his agreement unless two things are established, the first that the other party to

the transaction was fraudulent, and secondly that that party's fraud, by itself, A
debarred him from his rights. My Lords, I will deal with these matters very
shortly. Mr. Bennett was criticised for not having appeared as a witness and
explained why he wanted the receipt in this form. As events turned out, it
would have been better if he had. But he was at Birmingham in court when the
case was first called on. It was adjourned to be heard in London at a later date
and, when it came on again, he was engaged in some business on the Continent. B
I decline, on that account, to come to the conclusion that he was fraudulent, and
it may be said in his justification that, in his absence, the trial judge took a by
no means unfavourable view of his conduct. But, finally, supposing that he had
some dishonest motive, as I hold he had not, what follows? DENNING, L.J.,
relying, I think, on *Alexander v. Rayson* (1), concluded that Mr. Mason also was
affected, or, perhaps, I should say infected, by the taint and could not rely on his C
agreement. My Lords, I do not think that the case cited or any other case such
as *Miller v. Karlinski* (2) to which reference was made at the Bar decides
anything of the kind. In the latter case, the agreement itself, of which the
impugned term was an inseverable part, was illegal and it followed that the court
would not decree specific performance of it. In the agreement which Mr. Mason
is assumed to be seeking to enforce there is no illegality. In *Alexander v. D*
Rayson (1), it was treated as settled law—and it could not be otherwise—that a
plaintiff having intention to use the subject-matter of an agreement for an
unlawful purpose cannot sue on it, and the only relevant question was whether
a plaintiff, having a similar intention in regard to the documents evidencing
an agreement, is similarly debarred. And it was held, I do not doubt correctly,
that he was. But it was not suggested there that an innocent party is debarred E
by the other party's fraudulent intention from enforcing an agreement which is
not itself illegal.

I have devoted much time to this question but not, I hope, too much, for
charges of fraud should not be lightly made or considered. I conclude that this
plea, which, as I say, was put in the forefront of the defence, fails.

The next plea that I must examine is of a technical character and, as I have F
had the privilege of reading what my noble and learned friend, LORD MORTON OF
HENRYTON, has to say about it and agree with him, I need say little. The plea,
as I understand it, is that Mr. Mason had, before Dec. 30, 1950, neither a legal
right nor a right enforceable in equity to the profit à prendre and, therefore, could
not complain of any interference with the exercise of his rights. It is true that he G
had no legal title, but I concur with my noble friend in thinking, for the reasons
that he gives, that Mr. Mason had a clear equitable title. If and so far, therefore, as
it is necessary to buttress actual possession of a profit à prendre with a title of
ownership, that condition is, in this case, fulfilled, and this plea also fails. I
express myself with this qualification, for, as was said in *Bristow v. Cormican* (3),
possession "for however short a period" (3 App. Cas. at p. 651, per LORD H
CAIRNS) "the slightest amount of possession" (ibid., at p. 657, per LORD HATHER-
LEY) of a profit à prendre is sufficient to support an action for trespass against a
wrongdoer, and in the view which I take, and have already expressed, Mr. Mason
was in possession of the profit à prendre and the respondent was, none the less, a
trespasser on that incorporeal hereditament because he was himself the occupier
of the land and had certain rights under the Ground Game Act, 1880. I should not, I
therefore, myself have thought it necessary to consider more than the possessory I
title, but inasmuch as the matter has been put in issue I wish to express my
concurrence with the noble Lord.

The respondent next sought to justify his interference with the exercise by
Mr. Mason of his rabbiting rights by pleading that the reservation or regrant to
which I have already referred did not, on its true construction, confer any right to
lay snares in the open fields of the respondent's farm. On this plea, also, the

A Court of Appeal looked favourably. DENNING, L.J. ([1954] 1 All E.R. at p. 192) held that the respondent was not precluded from

“carrying out any reasonable and normal operations which might be deemed advisable for the purpose of dealing with the land to the best advantage as farming land”,

B see *Peech v. Best* (4) ([1931] 1 K.B. at p. 18), and he must, I think, have meant to include the removal of Mr. Mason's snares as at least a reasonable, if not a normal, operation. ROMER, L.J., held that it was not a reasonable exercise of sporting rights to lay down quantities of snares in pasture that is occupied by sheep except by arrangement with the farmer. This plea had a double edge, for it was used on the one hand to justify the respondent in his objection to the use
C by Mr. Mason of snares, and on the other to excuse the steps which he took in excess of his rights under the Ground Game Act, 1880, to destroy the rabbits himself. My Lords, I regret that, at this point also, I cannot uphold the decision of the Court of Appeal. In my opinion, the only conclusion to which, on the evidence before the court, it is proper to come is that to which the trial judge came. Mr. Atkinson, to whom I have already referred, said he had never before
D in his experience heard of any trouble about snares with sheep, and added that it was “normally done” to set snares where there are sheep, that it was a common practice in his district and that he had never heard it suggested it was an improper practice. Mr. Mason, who spoke out of a very long experience, gave evidence to the same effect. So did a Mr. Edwards, a gamekeeper of more than fifty years' experience. It is true that a veterinary surgeon spoke of having had a Labrador
E dog which had several times caught its leg in a snare, and that the respondent's daughter gave evidence that, early in December, she had found a number of sheep with wires attached to their legs (an incident which was the subject of a counter-claim by the respondent which he subsequently abandoned), but the learned trial judge, having taken these, and other matters, into consideration, concluded that it was a proper exercise of rabbiting rights to lay snares in fields where
F sheep pastured. In my opinion, he was undoubtedly right. It follows that the respondent fails in this plea also, and I want only to add a word on *Peech v. Best* (4).

In *Peech v. Best* (4), the facts were that the owner of a farm containing seven hundred acres granted to a grantee the exclusive right of shooting and sporting over the farm, and entered into a covenant with him for the quiet enjoyment of that right. He then sold twelve acres, part of the seven hundred acres, to a
G purchaser who intended to use it as a training stables for racehorses and forthwith erected thereon two houses and thirty-six loose boxes for horses. It was clear that this was detrimental to the exercise of shooting rights over the twelve acres and, perhaps, over a wider area, and the question was whether the grantee of those rights could recover damages. He had acquired a right which was a profit à prendre, an incorporeal hereditament, which he was entitled to protect
H from injury either from his grantor or any third party. Since his rights were in respect of farm land, he could complain of no act on the part of the grantor which could be considered the ordinary, natural and reasonable use of farm land. But the conversion of twelve acres into a racing stables, and the erection of numerous buildings, was not such use and he was, therefore, entitled to recover damages. For, as SCRUTTON, L.J., said ([1931] 1 K.B. at p. 14):

I “... both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by extraordinary, non-natural, or unreasonable action.”

That is the whole matter and, in my opinion, the evidence overwhelmingly supported the view that Mr. Mason did not act in an extraordinary non-natural or unreasonable manner, and that, on the other hand, those epithets would be a mild way of describing the action of the respondent.

I now come to the question of remedy. The appellants, as I have said, A
 claimed an injunction and damages. The learned judge declined to grant an
 injunction but awarded damages, to the company, £50, and to Mr. Mason, £150:
 of the latter sum £50 was special damage and £100 general damage. So far as
 concerns the £50 special damage, it was agreed by counsel at your Lordships' B
 Bar, that, though at one time during the trial the judge was minded to refer any
 question of special damage and did not permit cross-examination to that issue,
 he was at a later stage invited by counsel to make such award as he thought fit.
 In these circumstances, I think that your Lordships will not consider it right to
 disturb his award. The award of £100 under the head of general damage is,
 I think, open to criticism only on the ground that it might well have been a
 larger sum. It can by no means be regarded as so extravagant as to justify an
 appellate court in setting it aside. C

The award of damages to the company presents a more difficult problem.
 Their cause of action was not for interference with the rabbiting rights, for
 ex hypothesi Mr. Mason was in possession at the critical time: their interest was
 then reversionary. But the respondent had clearly acted in breach of his
 covenant that he would not shoot or sport on the farm, for he had authorised the
 killing and taking of rabbits by means of ferreting and dogs in excess of any rights D
 he enjoyed under the Ground Game Act, 1880. Here the company had a good
 cause of action, but the learned judge, at an early stage in his judgment, said
 that no damage had been proved and that no attempt had been made to prove
 them, and I think that he was right in saying so. In these circumstances, he
 was not, in my opinion, justified in making an award of £50 damages on the
 single ground, as I read his judgment, that the respondent had, by his defence, E
 raised a plea of fraud, which, though it did not commend itself to the learned
 judge or to your Lordships, nevertheless was sustained in the Court of Appeal.
 This is remote indeed from the principle which was applied in *Merest v. Harvey* (5),
 or, more recently in such cases as *Loudon v. Ryder* (6). On the other hand, I do
 not understand why the appropriate remedy of an injunction was not granted.
 It is no longer of any use to Mr. Mason whose rights have long since expired. F
 He will retain the damages awarded to him. But I shall invite your Lordships to
 vary the learned judge's order by excluding the award of damages to the company
 and substituting an injunction in the form claimed in para. 2 of the statement
 of claim, except that the reference to the Ground Game Act, 1880, should be
 extended by including some such words as "or any other relevant statute".

I move, therefore, that the order of the Court of Appeal be reversed, and the
 judgment of the learned judge restored with the variation that I have indicated. G
 The respondent must pay the appellants' costs here and in the Court of Appeal.

LORD OAKSEY: My Lords, I have had the advantage of reading the
 opinion which has just been delivered by my noble and learned friend on the
 Woolsack, and also the opinion of my noble and learned friend, LORD MORTON
 OF HENRYTON, and I entirely agree with them, and have nothing to add. H

LORD MORTON OF HENRYTON: My Lords, I do not know why
 Mr. Bennett instructed Mr. Atkinson to give Mr. Mason a receipt in the form
 which has already been read. I could make a guess at Mr. Bennett's reason, but
 my guess might be wrong. In my opinion, however, the rights of Mr. Mason
 and the appellant company in this action are in no way dependent on an investi- I
 gation of Mr. Bennett's reason. The company's rights against the respondent
 arise under the reservations and covenants contained in the agreements under
 which the respondent became the tenant of his farm. The terms of these
 reservations and covenants have already been read, and I shall not repeat them.
 I agree that the company is entitled to an injunction in the terms proposed by
 my noble and learned friend on the Woolsack and for the reasons which he has
 stated.

- A** I now turn to the position of Mr. Mason. It is clearly established by oral evidence that, on Oct. 11, 1950, an oral agreement was entered into between the company, acting by its duly authorised agents, and Mr. Mason, whereby it was agreed that, in consideration of £100, Mr. Mason should have the right to kill and take rabbits on the Hothorpe Estate for a year from Oct. 11, 1950. That right was, of course, a profit à prendre. The £100 was paid on the same day. It is also clearly established by oral evidence that, on Oct. 14, in exercise of his right under the agreement, Mr. Mason went on the Hothorpe Estate and set snares thereon for the purpose of catching rabbits, and returned next day with two men, employed and paid by him, to take rabbits. It is also beyond dispute that the respondent interfered with Mr. Mason's exercise of his rights under the agreement by the acts already described by my noble and learned friend on the Woolsack, and thereby caused damage to Mr. Mason.

C A profit à prendre is an interest in land, and no legal estate therein can be created or conveyed except by deed (Law of Property Act, 1925, s. 52). At the time when the respondent did the acts of which complaint is made, there had been no grant by deed of the profit à prendre to Mr. Mason, but prima facie he had the benefit of an oral agreement for the grant thereof, and he had entered into possession thereof in the only possible way, viz., by exercising his rights thereunder.

D It is said on behalf of the respondent, first, that the agreement was so tainted with fraud that it was ineffectual to confer any enforceable rights; secondly, that the agreement, on its true construction, did not confer any right to lay snares in the open fields let to the respondent, and thirdly, that, at the time when the respondent did the acts in question, Mr. Mason's agreement with the company was unenforceable by action, because there was no memorandum or note thereof in writing sufficient to satisfy s. 40 of the Law of Property Act, 1925.

E My Lords, the first two of these arguments have already been fully dealt with in the speech from the Woolsack and I desire to add nothing in regard to them. As to the third argument, I am inclined to agree that there was no sufficient memorandum until Dec. 30, 1950, but it is unnecessary to examine the relevant documents in detail, because I am quite satisfied that the acts of Mr. Mason, already described, were a part performance of the oral agreement of Oct. 11, 1950. Mr. Mason set snares, took rabbits and paid helpers, and, in my view, the work done and the expense incurred were exclusively referable to the oral agreement. Accordingly, at the relevant time Mr. Mason had a contract, specifically enforceable against the company, for the grant of a profit à prendre and had entered into possession thereof. In these circumstances, he was clearly entitled to bring an action for trespass against the respondent (see *Holford v. Pritchard* (7), *Fitzgerald v. Firbank* (8)).

G I agree with the motion proposed.

H **LORD REID :** My Lords, this case arises out of a simple transaction of no great importance. The appellant Mr. Mason is an expert rabbit catcher. In 1950, he wished to get the right to catch rabbits on an area of about 450 acres known as the Hothorpe Estate, which belonged to the appellant company. The greater part of that area consists of a farm to which the respondent, Mr. Clarke, is tenant: in his leases there was reserved to the landlord, subject to the provisions of the Ground Game Act, 1880, all the game, rabbits, wild fowl and fish, and the leases contained covenants by the tenant not to shoot or otherwise sport on the land.

I Mr. Mason approached Mr. Bennett, a director of the company, and was referred by him to Messrs. Howkins & Son who acted as land agents for the company. He saw Mr. Atkinson, a partner of the firm, who says that he had already discussed the matter with Mr. Bennett. Mr. Mason and Mr. Atkinson agreed that Mr. Mason should have the right of rabbit shooting for one year for £100. There is no doubt that it was understood that this right included the right to

take rabbits in any legitimate way. Mr. Mason made out a cheque for £100, and when he left a clerk gave him a receipt. The receipt was in this form: A

“Received of E. Mason, Esq. the sum of £100 towards bailiff’s wages on Hothorpe Estate.”

Mr. Atkinson was rightly accepted by counsel for the respondent at the trial as a credible witness. He said that he had been instructed by Mr. Bennett to make out the receipt in this form, that he thought about it at the time but could see nothing wrong, and so he carried out his instructions. It is now said that this receipt was a dishonest document, that it disclosed an intention to attempt to defraud the revenue, that this must have been apparent to Mr. Mason, and that the giving and taking of a receipt in these terms so tainted the whole transaction that the respondent cannot now be sued in respect of his having interfered with Mr. Mason’s exercising his rights under it to take rabbits on the respondent’s farm. B C

In the course of the argument before your Lordships, counsel for the respondent was asked what he submitted that Mr. Mason ought to have done on receiving this receipt, and I understood him to reply that Mr. Mason ought to have refused to go on with the transaction and that, if he had done so, he would have been entitled to get his money back: merely to get another receipt in different terms would not have saved the transaction, because perusal of the receipt had fixed Mr. Mason with knowledge of the fraudulent purpose. I shall assume, for the purpose of argument, that, if Mr. Mason had been given a document which plainly disclosed an intention to falsify the company’s accounts and if he had understood that that was the intention, he ought to have taken the course which counsel suggested, and that, if he proceeded with the transaction, he did so at his peril. But I cannot see any ground for inferring a fraudulent or dishonest intention from the terms of this receipt. It is not suggested that there was any intention to conceal the receipt of the money, or that the receipt indicates any such intention. That could not have been done without the connivance of Mr. Lumley, a Fellow of the Society of Incorporated Accountants and Auditors, who was secretary of the company, and who prepared the accounts of the company, and dealt with its tax liability. There has never been any suggestion against Mr. Lumley’s honesty or capacity, and the suggestion must be that, if Mr. Lumley had been informed that this £100 was a contribution to the bailiff’s wages, he would have prepared the accounts in a way more advantageous to the company than he would have done if informed that the £100 was a shooting rent. In fact, a charge of fraud had been made and was known to Mr. Lumley before he made up the accounts. But it is important to see how he dealt with this receipt in the accounts, because counsel was unable to suggest any other, or more advantageous, way in which he might have dealt with it if he had had no other information than that it was paid towards the bailiff’s wages. The receipt was entered in the company’s property revenue account. On the one side of this account there were entered wages, repairs, rates, and other expenditure, and on the other side rents receivable. This £100 was entered as a deduction from the item “wages”. If it had been treated as a rent it would have been entered on the other side of the account among rents receivable. But the result, so far as this account is concerned, would have been exactly the same: there would still have been the same deficiency on the whole account, £388 9s. 7d., to carry to the general profit and loss account. But counsel argued that treating the £100 as a deduction from wages paid instead of as a rent received would, or might in some way, lead to a smaller tax liability. I can claim no special knowledge of accountancy and I can only say that it is not clear to me how this could be, and I could not hold that the form of this receipt was evidence of an intention to defraud the revenue without being able to see some possible way in which showing the £100 as a deduction from wages instead of as a rent would decrease the company’s tax liability. D E F G H I

A Then it was said that, if a person puts a wrong description of this kind in a receipt or in his books, it is to be presumed that he did so with some dishonest intention, even if it cannot be made clear what that intention was, or could have been. In other words, vague suspicion is as good—or as bad—as actual evidence of fraudulent or dishonest intention. I am bound to say that this strikes me as both novel and erroneous. But, before proceeding further, I must note the course which this case has taken.

B As things have turned out, it is unfortunate that Mr. Bennett did not give evidence. But I do not think that he is to blame for that. The charge of fraud or dishonesty appears to have been made first in police court proceedings in February, 1951. We do not know in what precise form the charge was then made, but in the defence to the present action, dated May 26, 1951, the charge C is stated in para. 5 and para. 6 in these terms:

D “ 5. On or about Oct. 12, 1950, the first [appellant] saw the [respondent] on his said land and orally stated to the [respondent] that, in compliance with a request by the second [appellants'] said agents that he should do so, he had agreed to the rent being described in the said receipt as bailiff's wages in order to enable them to conceal from His Majesty's Inspector of Taxes a receipt of rent.

E “ 6. Relying upon the contents of the said receipt and the first [appellant's] oral statement as aforesaid, the [respondent] will say that the said agreement was unlawful because it was made in fraud of His Majesty's Inland Revenue in that it concealed a taxable receipt of rent and that it was therefore ineffectual to confer upon the first [appellant] any enforceable rights over the [respondent's] said land.”

F That clearly means that Mr. Mason stated that Mr. Atkinson had asked him to agree to the form of the receipt, and that Mr. Atkinson made this request, and was understood by Mr. Mason to make this request for a fraudulent purpose. Mr. Bennett was not present when Mr. Atkinson met Mr. Mason; there was no allegation against Mr. Bennett in the defence, and all that he could have said was to state the instructions which he had given to Mr. Atkinson. He may well have been content to rely on Mr. Atkinson's evidence and, in fact, Mr. Atkinson's evidence, being accepted as credible, disproved the allegation in the defence: it proved that the form of receipt was not discussed by him with Mr. Mason and that he, Mr. Atkinson, had, himself, no dishonest or fraudulent intention, and had no knowledge or belief of any such intention on the part of Mr. Bennett when he caused the receipt to be made out as it was. The reason why Mr. Bennett did not give evidence was that the case was to have been tried in Birmingham, but, after the witnesses had wasted three days waiting there, it was decided that the case should be tried in London at a later date, and when the case was tried Mr. Bennett was in Spain on other business. In these circumstances, it would, I think, be unreasonable to suggest that Mr. Bennett ought to have been present to give his evidence.

H The allegation in para. 5 of the defence is not that Mr. Mason made the alleged agreement, but that, on Oct. 12, he told the respondent that he had done so. I, therefore, turn to the evidence regarding their meeting on that occasion. I Mr. Mason's evidence was that he told the respondent that he had paid £100 and had got a receipt giving him authority to catch rabbits, but that he did not show him the receipt, or discuss what was in it, or say anything about income tax. In cross-examination, it was not put to him that he had said that he had agreed with Mr. Atkinson to accept the receipt—that had already been disproved by Mr. Atkinson. What was put to him was that he said to the respondent:

“ As a matter of fact when you see the receipt you will see it is for bailiff's wages ”,

and that, when the respondent asked why, he replied: "It is something to do with avoiding income tax." This was flatly denied by Mr. Mason. The respondent's version is that, after disclosing in the course of a conversation of some length that the receipt was for bailiff's wages, Mr. Mason said: A

"I have a good lot of business to do myself but I know that things should not be receipted in that manner", B

and that, when asked why it was worded in that manner, Mr. Mason said he thought it was to put it round the income tax people. The respondent then added: "Those are the very words he said to me". The respondent agreed in cross-examination that Mr. Mason did not say anything about having been requested by Messrs. Howkins to accept the receipt in order to avoid tax, and then, for the first time, he brought in Mr. Bennett's name. I quote the relevant question and answer: C

"Q.—Did he say anything about anyone at Messrs. Howkins having asked him to enter into the agreement in any special form? A.—He said he had made the agreement with Mr. Bennett. That is what he told me."

My Lords, perhaps I ought not to have occupied time in setting out this evidence, because CROOM-JOHNSON, J., said more than once in the course of his judgment that, where the evidence of Mr. Mason and the respondent conflicted, he accepted the evidence of Mr. Mason. But counsel for the respondent invited your Lordships to take a different view, partly because the respondent's evidence was corroborated by his son. The son gave a shorter account of the conversation, but stated that Mr. Mason had said of the receipt: "It is worded like that to go round the income tax people". Nevertheless, having read the whole of the evidence of Mr. Mason and the respondent I see no reason at all to question the finding of the learned judge on their credibility. D

Even if it were possible to accept the respondent's evidence—other than his belated statement bringing in Mr. Bennett, which is plainly an afterthought—I should have great doubt whether he could be permitted to change his ground in this way in a matter involving a charge of fraud. The charge made in the defence was that Mr. Mason had made a dishonest agreement with Mr. Atkinson, but the only case which can now be made is that Mr. Bennett had a corrupt intention in instructing Mr. Atkinson to make out the receipt in false terms, and that, although Mr. Atkinson, an experienced professional man, failed to detect that intention after giving thought to the matter, Mr. Mason was astute enough to infer the fraudulent purpose from the terms of the receipt. But I need not pursue that matter because Mr. Mason's account of the matter was accepted by CROOM-JOHNSON, J., and is straightforward and, to my mind, entirely credible. When cross-examined, he said that he was satisfied with the receipt as being in order: he had got a stamp on the receipt for £100 and that was all he was interested in, and what Mr. Bennett did with the £100 was no concern of his. He did not admit that he suspected that Mr. Bennett had any fraudulent purpose. But, even if he had had some vague suspicion, I do not know what he could have done. Was he to take the grave step of demanding his money back on the ground that the receipt showed that the company or Mr. Bennett had a fraudulent purpose in accepting it? I should have thought it plain that it would have been not only foolish but wrong of him to make such an accusation on such flimsy material. But that is the course which the respondent has to submit that he ought to have taken. In my judgment, no fraudulent or dishonest purpose has been proved against either Mr. Mason or Mr. Bennett. E F G H I

As I am differing from a unanimous judgment of the Court of Appeal in this matter, I think that I ought to state explicitly my reasons. DENNING, L.J., says that the statement in the receipt was false, that Mr. Bennett was never called to say why he wanted a receipt made out in that way, and that the court had been left completely in the dark about it. I have already explained why I think that,

- A in view of the form of the allegation in the defence, there was no compelling reason for Mr. Bennett to give up his foreign engagements to give evidence. Then the learned lord justice said that, in the absence of any explanation of this patently false receipt, he could only infer that it was done with a dishonest motive, but that he did not propose to inquire into the precise motive. If it were clear that there were several ways in which the receipt, or the method of
- B describing the money, could be used to achieve a dishonest purpose, I would agree that it would not matter which method Mr. Bennett had in mind. But, where there is no obvious method by which any dishonest purpose could be achieved, I do not think it right to say, on this evidence, that the purpose must have been dishonest. The purpose may equally well have been honest. For example, Mr. Bennett might have thought that, in view of the small income
- C from the estate, continuing to pay the bailiff's wages could not be justified unless he could get in some additional income, and that any additional income which he could collect should be earmarked to be set against that expense. I do not say that that is more than a possible explanation, but it seems to me to be about as probable as that Mr. Bennett has hit on some device to escape tax which no one has yet been able to explain. Then the learned lord justice does not say
- D that Mr. Mason knew that the purpose was dishonest, or even that he ought to have known: he says that the false receipt taints the whole of Mr. Mason's authority, and refers to *Alexander v. Rayson* (1). In that case, the lessor, who had prepared false documents with a fraudulent purpose, was held not entitled to sue on them. But if the lessee, who was innocent, had brought an action to enforce covenants in her favour, I find nothing in that case to indicate that her
- E action would have failed. I, therefore, think that that case does not support the judgment of DENNING, L.J., unless he intended to find not only that Mr. Bennett had a fraudulent purpose but also that Mr. Mason was aware of it.

As I read his judgment, ROMER, L.J., did find that Mr. Bennett's purpose was to effect a fraud on the Inland Revenue, and also that Mr. Mason was aware of that. He said that, in the absence of an alternative explanation, he could not

F avoid the conclusion that the one and only purpose of the form of the receipt and corresponding entry in the company's books was to facilitate a fraud on the Inland Revenue, but, unfortunately, he did not explain how this form would enable that to be done. Then he said that that is apparent to anyone with knowledge of the facts who sees the receipt and that, as Mr. Mason saw it, it must have been apparent to him. The learned lord justice did not deal with

G the point that, if that be so, it must also have been apparent to Mr. Atkinson, but that Mr. Atkinson said in evidence that, after thinking over the matter, it was not apparent to him, and Mr. Atkinson was accepted by counsel for the respondent as an honest witness. I can only add that, after hearing a full and careful argument by counsel for the respondent, it is still not apparent to me.

- H On the other points in the case, I agree with your Lordships and I cannot usefully add anything. I would only say in conclusion that it is extremely regrettable that heavy costs should have been incurred in a case of this kind, but that, if a party makes a charge of fraud, the case assumes an importance far beyond any sum of money involved. I agree with your Lordships that this appeal must be allowed.

- I **LORD KEITH OF AVONHOLM:** My Lords, concurring as I do in the result at which your Lordships have arrived, I would express my view only on two points which have been canvassed in the course of this appeal.

Much of your Lordships' attention has been necessarily, and properly, directed to the matter of the alleged fraud in the agreement. That some purpose lay behind the terms of the receipt given to Mr. Mason and the subsequent entries in the company's books is, I should think, clear. But that Mr. Mason was a party to that purpose is a proposition with which I can in nowise agree. The learned trial judge has acquitted Mr. Mason of any participation in or knowledge of any

fraud. The receipt which Mr. Mason received was a plain acknowledgment of the payment of £100 by him to the appellant company and was duly stamped, and the words "Towards bailiff's wages on Hothorpe Estate" were not, in my opinion of themselves such as would suggest to Mr. Mason an intention on the part of the company to perpetrate a fraud on the revenue or anyone else. It is fundamental that fraud, or participation in fraud, must be proved by clear and cogent evidence. So far as Mr. Mason is concerned, that attempt entirely fails. If so, fraud disappears as a defence in the action. The company's rights depend on the reservation and the tenant's covenant in the matter of sporting rights. But, in any event, I could not hold that the terms of the receipt and the subsequent entries in the company's books evidenced any fraudulent intention on the part of the company or raised any presumption of fraud against it. There is no evidence that the receipt was ever used, or attempted to be used, for any fraudulent purpose.

Fraud being out of the way, Mr. Mason's title to sue the action is, in my opinion, unimpeachable. I base my view on the fact of possession following on an agreement with the person (the company) in right to grant the profit à prendre. I should have hesitated to hold that mere purported enjoyment of the subject-matter of such a right, unattached to any title, was sufficient to establish possession that would warrant an action of trespass. But it is not necessary here to support Mr. Mason's title to sue on bare possession and, accordingly, it is not necessary to go further into this question.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Farrer & Co.*, agents for *Phipps & Troup*, Northampton (for the appellants); *Ellis & Fairbairn* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

[END OF VOLUME ONE.]



